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RAWLINS et al. v. STATE.

TURNER v. SAME.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. JURY—OMISSIONS FROM JURY LIST.

The board of jury commissioners may, in the exercise of their discretion, omit from the jury list of the county all persons who are exempted by law from jury service, as well as those whose business or avocation is such that it is reasonably probable that an excuse from jury service would be granted by the judge.

2. CRIMINAL LAW—VENUE—CHARGE—DISCRETION OF JUDGE.

In the determination of whether the venue of a criminal case shall be changed for the reason that the condition of the public mind is such that the accused cannot obtain a fair trial by an impartial jury, the law imposes upon a trial judge the responsibility of making an examination and informing himself of the truth of the averments upon which the application is made, and the Supreme Court has no power to control his discretion in such a matter unless it has been plainly and manifestly abused. The record does not disclose any such abuse of discretion in the present case.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 8044.]

8. INDICTMENT—JOINDER OF PARTIES.

Principals and accessories before the fact may be charged in the same indictment and in one count.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 333.]

4. SAME—ACCESSORY BEFORE THE FACT.

An indictment which charges that one, being absent at the time when the crime was committed, did "procure, counsel, and command" the person alleged as principal in the crime to commit the same, contains a sufficient charge against one indicted as an accessory before the fact.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 228.]

5. HOMICIDE—INDICTMENT.

The indictment was not subject to any of the objections set forth in any of the demurrers.

6. CRIMINAL LAW—CONTINUANCE.

When a motion for a continuance is made upon the ground of the absence of witnesses, and the court postpones the case until the following day, and notifies counsel that officers will be furnished to bring into court the absent witnesses, and such officers are furnished, and all the witnesses desired are brought into court, and there is no further motion for a continuance, a ground of a motion for a new trial complaining of the refusal to continue on the day the case was first called is without merit.

52 S.E.—1

7. SAME—TRIAL—DISORDER IN COURT.

The failure of the court to interpose of its own motion, in case of disorder by the spectators at the trial, will not generally be a sufficient reason to reverse the judgment, when no ruling in reference to the disorder was invoked from the court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1460.]

8. SAME—ARRAIGNMENT.

That the accused, who was jointly indicted with others, was jointly arraigned with the others, after he had elected to sever upon the trial, furnishes no reason for granting a new trial, after a separate trial has been accorded to him.

9. SAME—CONDUCT OF SHERIFF.

The action of the sheriff in making the statement to the judge, in the presence of the jury, that the mother of the accused had requested her satchel to be brought into court, and that the satchel contained a pistol, was reprehensible as to the manner in which the fact was communicated to the judge. As it appeared from a statement of counsel for the accused that the pistol was in the satchel solely for the reason that the mother of the accused and her two daughters had been traveling through the country, and that it was carried for protection only, and was not in the satchel nor brought into court for any improper purpose, and as evidence was introduced to the same effect, and the truth of the statement and the evidence was admitted by the Solicitor General, and the jury were instructed not to allow the incident to have any effect upon their minds in determining upon their verdict, a refusal to declare a mistrial on account of the conduct of the sheriff was properly overruled.

10. SAME—CONFESSION.

The fact that a confession is brought about by improper and unlawful methods from one alleged to be concerned in the commission of the crime is no reason for refusing to allow such person to testify as a witness on the trial of his associates in the criminal enterprise. The circumstances under which the confession was made, and any evidence tending to show that the witness is still laboring under fears, brought about by such circumstances, is admissible to discredit the witness, but the witness is nevertheless competent.

11. HOMICIDE—EVIDENCE—ILL FEELING.

In the trial of a murder case, evidence tending to show a state of bad feeling between the father of the accused and the father of the deceased is admissible for such weight as a jury might see fit to give it in determining whether the accused had a motive in becoming one of a party of assassins to slay the father of the deceased and other members of his family; and this is true, although the father escaped assassination and only two of his children were slain.

12. CRIMINAL LAW—ACTS AND DECLARATIONS OF CONSPIRATORS.

When, in the trial of a murder case, there is evidence tending to show that the accused on trial entered into a conspiracy to slay the deceased and others, the acts, conduct, and sayings of any of the conspirators, while the conspiracy was in progress and before the crime was committed, are admissible as evidence, as well as an act of a conspirator other than the accused, after the commission of the crime, when the act sought to be proved was contemplated by the terms of the conspiracy to be performed after the perpetration of the crime was completed.

13. SAME—ERRORS PENDING TRIAL—CORRECTION.

Errors in the admission of the evidence, made during the progress of the trial, may be corrected by the judge withdrawing the evidence from the consideration of the jury and instructing them not to consider it; and errors in his charge may be corrected by the judge calling attention to the erroneous part of the charge, and in lieu thereof giving to the jury the correct rule.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1992, 1994.]

14. JURY—CHALLENGE TO ARRAY.

Challenge to the array is not the proper method of raising the question of the disqualification of individual jurors.

15. SAME—CHALLENGES BY STATE.

When two are tried jointly for a capital offense, and neither waives his peremptory challenges, the state is entitled to one-half of the whole number of challenges the law allows to both.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 613.]

16. CRIMINAL LAW—INSTRUCTIONS.

A portion of a charge that is substantially correct, wherein a complete proposition is stated, is not erroneous simply because it fails to embrace an instruction which would have been appropriate in connection with that proposition.

17. SAME—ARGUMENTS OF COUNSEL.

Where counsel in argument makes improper statements, counsel for the injured party may move either for an appropriate instruction to the jury or for a mistrial. Where counsel ask simply for such an instruction, which is given, and the case ordered to proceed, a motion for a mistrial then made upon the same ground should not generally be entertained.

18. SAME—CONTINUANCE.

Where a motion is made to continue a criminal case upon the ground that the accused is physically unable to go to trial, and upon such question the testimony introduced is conflicting, the discretion of the trial judge in overruling the motion will not be controlled.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3045.]

19. SAME—ILLNESS OF COUNSEL—ABUSE OF DISCRETION.

A motion for continuance on account of the illness of counsel, like all other motions of the same nature, is addressed to the sound discretion of the trial judge. When counsel, whose illness is the ground of the motion, is himself in court presenting and urging the motion, the court is authorized, in the determination of the question whether the condition of counsel is such that the interests of justice demand a postponement of the case, to take into consideration the general appearance of counsel and the mental and physical vigor displayed in the presentation of the motion, and when such a motion is overruled this court may take into consideration what appears in the record as to the manner in which counsel conducted the case, in determining whether there has been such an abuse of discretion in refusing the continuance as to require a reversal of the judgment. In the present case it does not

appear there was any abuse of discretion in refusing to continue the case.

20. SAME—TRIAL OF ACCESSORY.

In the trial of one charged as an accessory, it is incumbent upon the state to show the guilt of the person charged as a principal beyond a reasonable doubt; and, as a general rule, in order to establish this fact, any evidence may be introduced which would be admissible if the principal was on trial.

21. HOMICIDE—EVIDENCE.

In the trial of one who is charged as an accessory before the fact to a murder, when it appears that the deceased were killed during the night, as they emerged from the home of their father, by persons who had surrounded the house, evidence that the accused had made threats to slay the father, and had offered persons money to kill him, was admissible.

22. SUNDAY—RECEPTION OF VERDICT.

It is lawful to receive a verdict in a criminal case on Sunday.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Sunday, § 82.]

23. HOMICIDE—EVIDENCE.

The evidence as to those who were charged as principals was sufficient to authorize the verdicts rendered against them.

24. SAME—ACCESSORIES.

The evidence as to the accused, charged as accessory before the fact, who was the father of three of the persons charged as principals, was sufficient to authorize the verdict.

25. SAME.

The evidence against the other accused, charged as an accessory before the fact, was not sufficient to authorize the verdict, and the court erred in not granting him a new trial. (Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Leonard Rawlins, Frank Turner, and others were convicted of murder. Leonard and Jesse Rawlins brought error, and Turner also brought error. Judgment on bill of exceptions of Turner reversed, and on other bills affirmed.

Milton, Jesse, Leonard, and J. G. Rawlins were arrested for the offense of murder, and were committed to jail. A special term of the court was called for the disposition of their cases. When the grand jury was organized, and before any indictment was preferred, each of the accused filed a written challenge to the array, upon the ground that the grand jury was not legally organized. The objection was that jury commissioners had arbitrarily excluded from the grand jury all lawyers, ministers, doctors, dentists, railroad engineers, and firemen, there being 10 or other large number of each class in the county who were citizens and residents and possessed the qualifications required by law for grand jurors, and there being upon neither the grand jury list nor in the grand jury box any member of any of such classes. It was contended that the arbitrary exclusion of all of these classes without reference to their qualifications was a violation of the statutes and Constitution of this state, and especially that provision of the Constitution which grants to every one due process of law, and that it was also in violation of the fourteenth amendment to the Constitution of the United States, as well as of other provisions of that

instrument, and had the effect to deny to the accused due process of law, as well as equal protection of the law, and abridged their privileges and immunities as citizens of the United States. On demurrer this challenge was stricken, and the grand jury ordered to retire and enter upon a consideration of the cases. The accused excepted.

The grand jury returned an indictment of which the following is a copy:

"Georgia, Lowndes County. In the Superior Court of Said County. The grand jurors selected, chosen, and sworn for the county of Lowndes, to wit, in the name and behalf of the citizens of Georgia, charge and accuse Milton Rawlins, Leonard Rawlins, Jesse Rawlins, and Alf Moore, of the state and county aforesaid, with the offense of murder, and J. G. Rawlins and Frank Turner, of the county and state aforesaid, with the offense of accessory before the fact to said murder; and for the said Milton Rawlins, Leonard Rawlins, Jesse Rawlins, and Alf Moore, being persons of sound memory and discretion, on the 13th day of June, in the year of our Lord, 1905, in the county aforesaid, with force and arms, one Willie Carter and one Carrie Carter, in the peace of God and said state, then and there being, then and there unlawfully, feloniously, willfully, and of their malice aforethought did kill and murder by shooting the said Willie Carter and the said Carrie Carter with certain guns, which the said Milton Rawlins, Leonard Rawlins, Jesse Rawlins, and Alf Moore then and there had, and giving to the said Willie Carter and Carrie Carter then and there mortal wounds, of which mortal wounds the said Willie Carter and the said Carrie Carter died, and for that the said J. G. Rawlins and Frank Turner, being absent at the time of the commission of the crime aforesaid, in manner and form aforesaid, by the said Milton Rawlins, Leonard Rawlins, Jesse Rawlins, and Alf Moore, did yet then and there unlawfully, feloniously, willfully, and of their malice aforethought procure, counsel, and command the said Milton Rawlins, Leonard Rawlins, Jesse Rawlins, and Alf Moore to commit the crime of murder aforesaid. And the jurors aforesaid upon their oaths aforesaid, do say that the said Milton Rawlins, Leonard Rawlins, Jesse Rawlins, and Alf Moore then the said Willie Carter and Carrie Carter in manner and form aforesaid unlawfully, feloniously, willfully, and of their malice aforethought did kill and murder, and that the said J. G. Rawlins and Frank Turner, being absent at the time of the commission of said crime of murder, did then and there unlawfully, feloniously, willfully, and of their malice aforethought procure, counsel, and command the said Milton Rawlins, Leonard Rawlins, Jesse Rawlins and Alf Moore to commit the said crime in manner and form aforesaid. Contrary to the laws of said state, the good order, peace, and dignity thereof.

"W. E. Thomas, Solicitor General.

"W. L. Carter, Prosecutor.

"July Special Term, 1905."

Each of the Rawlinses filed a written motion for a change of venue, alleging that the special term of the court had been called solely for the purpose of trying the accused, and that, as this was done in response to a call from the people of the county, that fact alone was sufficient evidence that the condition of the public mind in the county was such that they could not get a fair and impartial trial before a jury in that county; that on account of the wide publicity of the case, the false rumors that had gone out, the high feeling and excitement, on account of which the special term had been called within little more than 30 days from the commission of the crime, which was of an atrocious nature, it would be impossible to obtain a legal trial under such circumstances; that a large portion of the jurors had formed and expressed opinions as to the guilt of the accused, either from evidence that had been heard, or statements that had been made in regard to the crime; and that evil-disposed persons had circulated rumors exceedingly damaging to the accused, and that the condition of the public mind was such that it was impossible for the jury to hear the evidence and arrive at a verdict in the manner which the constitution and the law required. Upon this motion the court heard evidence, and after a consideration of the evidence overruled the motions for a change of venue, and each of the defendants excepted.

Each of the Rawlinses filed a general demurrer to the indictment, and also a special demurrer upon the following grounds: The indictment does not charge any overt act that J. G. Rawlins did to make him an accessory before the fact. The indictment does not charge with sufficient particularity the facts alleged to have been committed, so as to put the accused on notice of the particular crime that each was charged with. The indictment does not charge with sufficient particularity the instrument with which the killing was done, simply charging that it was done with certain guns. The indictment does not allege which one of the accused killed Willie Carter, and which one killed Carrie Carter. The indictment charges the principals and accessories before the fact in the same count and in the same indictment. J. G. Rawlins also demurred upon the ground that the indictment did not charge the trial and conviction of the principals in the first degree, or set up the record of the trial, or that the parties were unknown. Turner also filed a general demurrer to the indictment, as well as a special demurrer upon the ground that it did not charge any overt act on his part to make him an accessory before the fact. All of the demurrers were overruled, and each of the accused excepted.

Each of the Rawlinses then filed a challenge to the array of the jury impaneled to try them, upon the same grounds upon which they had challenged the grand jury. These challenges were overruled, and each excepted.

Leonard and Jesse Rawlins were tried

jointly. The others were tried separately. Milton, Jesse, and J. G. Rawlins, and Alf Moore, were found guilty and sentenced to be hanged. Leonard Rawlins and Turner were found guilty and sentenced to the penitentiary for life. Each of the Rawlinses and Turner filed motions for a new trial, which being overruled, each excepted.

John R. Cooper, O. M. Smith, A. J. Little, and S. M. Varnedoe, for plaintiffs in error. W. E. Thomas, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, P. J. 1. The Constitution declares that "the General Assembly shall provide by law for the selection of the most experienced, intelligent and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless the grand jurors shall be competent to serve as traverse jurors." Civ. Code, 1895, § 5877; Pen. Code, 1895, § 851. The General Assembly has provided that the selection of jurors shall be made by a board of jury commissioners composed of six discreet persons appointed by the judge of the superior court in each county. Pen. Code, 1895, § 813. Upon these commissioners devolves the duty of revising the jury list at the time required by law. In this revision they are limited to the names appearing upon the books of the tax receiver of the county, and they are authorized and required to select from the names there appearing "upright and intelligent men to serve as jurors." From the number so selected they are required to select not exceeding two-fifths "of the most experienced, intelligent and upright men to serve as grand jurors." "The entire number first selected, including those after selected as grand jurors, shall constitute the body of traverse jurors for the county." Pen. Code 1895, § 818. The Constitution does not require that all upright and intelligent men shall be selected as jurors. If it were otherwise, the law which limits the jury commissioners to names appearing upon the tax digest, as well as the law which declares that certain county officers shall not be selected as jurors, would be invalid. The Constitution merely fixes the qualifications of a juror, and leaves to the General Assembly the question as to whether all of those persons or a lesser number shall be selected. The law passed by the General Assembly for the purpose of carrying into effect the constitutional provision does not require that all persons possessing the constitutional qualifications shall be selected. It reposes in the jury commissioners, not only the authority to determine what men have these qualifications, but how many of such men shall be selected for jury duty in the county. The jury commissioners may select all belonging to this class, or they may select a lesser number. The jury list of the county is not to be made up of any given number, but this is a matter left to the discretion of the jury

commissioners. The number of persons selected for jury service is to be determined by the jury commissioners in the exercise of a wise discretion, taking into consideration the whole number of persons liable to jury service, the volume of business to be transacted in the various courts which requires the presence of jurors, as well as the facilitation of business in such courts. They should keep in mind on the one hand the right of those entitled to a jury trial, whether in civil or criminal cases, and on the other hand the right of those who are subject to jury duty, making the list embrace such a number as will enable the courts to be carried on according to the spirit of the Constitution and the law, and at the same time not making the number so small that jury service would become burdensome upon those selected for that duty. One placed upon the jury list by the commissioners is, so far as jury service is concerned, declared to be intelligent and upright. But the fact that a person's name is not upon the jury list of the county is no evidence that he is not intelligent and upright, nor that the commissioners did not consider him as such. The Constitution fixes the class subject to this duty. The jury commissioners, under the authority of the General Assembly, select those members of that class who shall be called upon to perform the duty. The jury commissioners should not omit from the jury list persons possessing the qualifications required by law, unless in their opinion the omission of such persons as a class would tend to facilitate the business of the courts. Persons possessing the qualifications required by law should not be excluded because they form a class of persons holding to a particular religious belief, or belonging to a particular political party or society, or because they entertain views, on any matter not affecting the good order of the community or the preservation of the public morals, different from the larger number of the community in which they live. But if there is a class of persons, some of whom possess the qualifications required and others do not, whose business or avocation is such that they are all entitled under the law to claim an exemption from jury service, or who would probably be excused from jury service on application to the judge, the omission of the entire class from the jury list would not be an abuse of discretion on the part of the commissioners; such exclusion being calculated to facilitate the business of the court and avoid the delay incident to the summoning of jurors to take the place of jurors excused from service.

All of the classes that were alleged to have been excluded from the jury box in the present case belonged to either one or the other of the classes above referred to. They were either exempt, or their business was of such a character that it was reasonably certain that the judge would excuse them from serv-

ice. There was no averment in the challenge that the exclusion was due to fraud, or any improper motive. There was no suggestion that either the grand or traverse jurors drawn for service did not possess the qualifications required by law. There was no objection to any of the jurors that were on either list. The sole objection was that the list was deficient in number. In *Daniel O'Connell's Case* the jury was selected under an act requiring that the names of all persons possessing qualifications required by law should be selected, and still a challenge to the array, that the jurors had been illegally and fraudulently selected for the purpose of prejudicing the parties upon trial, was stricken on demurrer, and this ruling was affirmed by a full court on the motion for a new trial, and finally affirmed by the House of Lords, though Lord Dennen and Lord Campbell were of the contrary opinion. *Thompson & Merriam on Juries*, § 140. While this ruling does not commend itself, at the same time we think it clear that where the law reposes in a body of public officers the selection of persons of given qualifications for service as jurors, and there is no charge of fraud or purpose to prejudice the rights of the parties on trial, and no objection to any of the jurors thus selected, a challenge to the array should not be sustained merely for the reason that there were other jurors possessing the qualifications required who might have been added to the list if the commissioners had seen proper to include them. In *People v. Jewett*, 3 Wend. 814, the accused and others were indicted for the offense of conspiracy to abduct William Morgan. It was claimed that the conspirators acted with the Masons, whose secrets Morgan disclosed. A challenge to the array of the jurors was made upon the ground that the supervisors whose duty it was to select the jurors had excluded from the list all persons who were Masons, and had included therein many persons who were anti-Masonic in their feelings. The qualifications fixed by law for jurors were that they should be possessed of certain property qualifications, should be men of integrity, fair character, sound judgment, and well informed. There was no complaint that any of the men selected failed of these qualifications. While Chief Justice Savage expressed in his opinion his condemnation of the exclusion of any set of men on account of their belonging to an association or fraternity, it was held that the challenge to the array was properly overruled. The Chief Justice in his opinion said: "Whilst those who are selected are unexceptionable, the fact that others equally unexceptionable are excluded is no cause of challenge of the array. A challenge can be supported only by showing that the persons selected are not qualified according to the requirements of the statute." There was nothing in the action of the jury commissioners complained of which was in violation of

any provision of the Constitution or any statute of this state, nor is there anything in the statute providing for the creation of the board of jury commissioners and prescribing its duty which could be held a denial of due process of law or of the equal protection of the laws, or an abridgment of the privileges and immunities of a citizen, within the meaning of the different provisions of the Constitution of the United States.

2. The Constitution requires that one charged with crime shall be tried in the county where the offense was committed, unless the judge is satisfied that an impartial jury cannot be obtained in that county. Pen. Code 1895, § 29. When the judge is so satisfied, he is authorized to change the venue of the trial. In determining this question he is authorized to hear evidence in order to throw light on the condition of the public mind, as well as to take into consideration what may fall under his observation as the presiding judge of the court. The matter is of necessity left by the law largely to his discretion. No one could be better endowed with this power than a fearless and conscientious judge, who is present in the county, and can observe the manner and conduct of the people, and can hear the testimony of those witnesses who may be called by the accused and those called by the state, as well as the testimony of any witness he may see fit of his own motion to bring before him. While under the law this court has the right to review a judgment overruling a motion to change the venue, such a judgment will never be overruled unless it is manifest from the record that the discretion vested in the judge has been abused, and as a result the accused has been forced to trial in a county where it was impossible for him to obtain a fair trial before an impartial jury. The judge in the present case heard evidence, and no doubt took into consideration as well those things which fell under his observation not detailed in the evidence, and which of necessity could not be detailed, and, after consideration of the motion, overruled the same. See *White v. State*, 100 Ga. 659, 28 S. E. 423 (1).

3. The general rule is that an accessory before the fact cannot be tried until after the conviction of the principal, but this does not prevent the indictment of the principal and the accessory before the fact at the same term of the grand jury and in the same bill. *Stone v. State*, 118 Ga. 707, 45 S. E. 630, 98 Am. St. Rep. 145. It is also permissible to embrace the accusation against the accessory before the fact in the same count in which the principal is charged. *Bishop v. State*, 118 Ga. 799, 45 S. E. 614. When so indicted, of course, it is not necessary to allege the trial and conviction of the principal, or that the principal is unknown or for other reason cannot be tried.

4. The indictment charges that the four

alleged principals committed the offense of murder upon named persons, and then proceeds to charge that J. G. Rawlins and Frank Turner, being absent at the time of the commission of the crime, did "unlawfully, feloniously, willfully, of their malice aforethought, procure, counsel, and command" the alleged principals to commit the crime. Complaint is made that there is nothing in this language which charges the alleged accessories before the fact with any act which would make them accessories. That which makes one an accessory before the fact is procuring, counseling, and commanding another to commit a crime, and this is the only act necessary to constitute the offense, and when it is charged in the language of the statute that the accused did procure, counsel, and command the alleged principal to commit the crime, he is charged in terms with that which constitutes the offense, and it is hard to conceive how the charge could be made more clear and more specific.

5. The principals were jointly charged with killing each of the persons named in the indictment, and each was therefore charged with the murder of both. The allegations were sufficiently specific to put them upon notice of exactly what they were charged with, and it was unnecessary to allege which one killed Willie Carter and which one killed Carrie Carter, when it was distinctly alleged that all were engaged in the killing of both. The objection in the demurrer that each was not put upon notice of what was charged against him is therefore without merit. The indictment also charged that the killing was done with certain guns, and the objection that there was no allegation as to what were the instruments used in the perpetration of the offense was also without merit.

6. The special grounds in the motion for a new trial filed by Milton Rawlins will now be disposed of. Complaint is made that the court overruled the motion for a continuance based upon the absence of witnesses whose testimony was claimed to be material. In a note to this ground the judge says the motion was overruled, and counsel was notified that the case would be called for trial on the following morning, and in the meantime any number of officers required would be furnished to send for and bring into court the witnesses who were absent, and such officers were furnished, and all the witnesses were brought into court with the exception of those whom the counsel for the accused, in a subsequent recess of the court, informed the court he would not require, and when the case was called on the following morning there was no further motion for a postponement. It is apparent from this statement that this assignment of error is without merit.

7. In one ground of the motion for a new trial it is alleged that the court allowed and

permitted the audience to cheer the Solicitor General while he was making his concluding argument, and failed to rebuke those engaged in this disorder. No motion for a mistrial was made, nor was any ruling invoked by counsel for the accused because of this disorder, and the assignment of error is simply upon the silence of the judge in regard to the same. In a note to this ground the judge says that the applause was brought about by a colloquy between the Solicitor General and counsel for the accused, in which nothing was said about the accused, or any circumstance of the case, and that immediately upon the happening of the disorder he suppressed it and corrected it. This assignment of error might probably be disposed of for the reason that the statements in the ground are not certified, as the facts stated in the certificate are antagonistic to those stated in the ground. But, without basing the matter solely upon this point of practice, it is sufficient to say that neither in the ground nor in the certificate of the judge are the facts sufficiently stated for this court to determine whether the incident in its details was of such a character as to be so prejudicial to the accused as to require a reversal of the judgment, even if the question was properly before us upon an assignment of error based upon some ruling of the judge at the time the disorder occurred. Of course, a judge should suppress disorder and rebuke and punish those engaged in it, without waiting for action on the part of the counsel or parties interested in the case; but, as a general rule, error cannot be assigned upon the failure of the court to interpose under such circumstances of its own motion. Even in a criminal case a judgment will not ordinarily be reversed for misconduct of counsel, parties, or spectators, unless a ruling upon such conduct is invoked from the judge at the time it occurred. *O'Dell v. State*, 120 Ga. 152, 47 S. E. 577 (5). The facts of the *Woolfolk Case* were extraordinary and exceptional, and the reversal of the judgment in that case was not based entirely upon the misconduct of the spectator which had passed without a proper rebuke from the judge. See *Woolfolk v. State*, 81 Ga. 552, 8 S. E. 724 (4).

8. The four persons charged as principals in the indictment, and one of them charged as an accessory before the fact, were all arraigned at the same time, over the objection of the counsel for the accused in the present case. Error is assigned upon this action of the court. It is claimed that, as the accused had elected to be tried separately, they should be arraigned separately. There is no merit in this exception. All of the persons charged in the indictment may be arraigned at one time, and so long as their right to a separate trial, if they desire it, is not interfered with by the court, a joint arraignment cannot be said to be prej-

udicial to any one of them. As the judge recognized the right of the accused to a separate trial, and accorded them that trial, we cannot see that any harm resulted from the joint arraignment. 2 Enc. P. & P. 678.

9. While the case was in progress the sheriff came into court, and in the presence of the jury said to the judge: "Mrs. Rawlins sent me for her grip downstairs. I have it here, and it has a pistol in it." Counsel for the accused immediately objected to this statement, unless it was explained, stating that Mrs. Rawlins had been traveling through the country with her daughters, and that she carried the pistol for their protection. The judge then remarked that he would instruct the sheriff to take the pistol out of the grip before delivering it to Mrs. Rawlins. The court then took a recess, and upon reassembling counsel for the accused made a motion for a mistrial, claiming that the sheriff had come into court in a very excited manner and had made the statement in the presence of every one in the courtroom, including the jury. The court then proceeded to hear evidence from Mrs. Rawlins and the sheriff as to the circumstances under which the pistol was placed in the grip, and also the purpose of Mrs. Rawlins in having it there, and it appeared that it was there solely for the purpose stated by counsel; that is, for the protection of Mrs. Rawlins and her daughters while traveling through the country. It also appeared that the grip was sent for at the request of Mrs. Rawlins, to take therefrom a letter which counsel desired. The Solicitor General admitted in the presence of the jury that the entire statement and contention of counsel as to the presence of the pistol was as stated by him, and that it was not placed in the satchel or brought into court for any improper purpose, and moved the court to instruct the jury that the incident should not in any way prejudice the case of the accused. The court, after hearing the evidence, as well as the statement of the Solicitor General and counsel for the accused, overruled the motion for a mistrial, and instructed the jury that the incident should have no weight with them in making up their verdict. Without reference to the manner in which the sheriff obtained the information that the pistol was in the satchel, whether by an unauthorized search or not, when it came to his knowledge that it was there and the satchel was brought into court, it was his duty to inform the judge of this fact. But this should have been communicated to the judge privately, and not in open court in the presence of the jury, and the conduct of the sheriff in making this communication in this public manner was reprehensible. But after the entire matter had been investigated, and the jury fully informed as to the circumstances as seems to have been the case from

the record, and an instruction by the judge that the incident should have no weight whatever with them, it was not error to overrule the motion for a mistrial.

10. One of the witnesses for the state was an alleged accomplice. It appeared that he had made a confession to the officers who arrested him as to his participation in the crime, and that he was then called as a witness for the state and testified as such. Objection was made to the admissibility of his testimony, upon the ground that he had made a confession to the officers which was improperly obtained, being the result of his being put in fear at the time he made it. It was claimed that the confession was not voluntary, and was made under such circumstances that if the witness had been on trial it would not have been admitted as evidence. The contention is that, as this confession would not be admissible against him if he was placed on trial, he is not competent to testify against his associates to the facts disclosed in the confession, and which he reiterated upon the witness stand. Evidence that the officers first obtained information as to his participation in the crime by placing him under the influence of fear, and that at the time of the trial he still labored under this fear, would be admissible to go to the jury along with his testimony, in order that they might determine upon the weight to be given it; but neither the improper methods used in obtaining the confession nor the apprehension under which the witness labored during the trial would render him an incompetent witness. The court permitted the accomplice to testify, not only as to what had been previously said by him in his confession to the officers, but also as to all the circumstances under which the confession had been made. His testimony as to the confession and all the circumstances went to the jury. They were thus enabled to determine whether his evidence was of such a character as to be entitled to any weight at all. There was no error in admitting the testimony of this witness, nor in any of the various rulings complained of in reference to its admission.

11. Evidence was admitted tending to show that there was a state of bad feeling between the Carter family and the Rawlins family, and especially between the heads of the two families. This evidence was objected to on the ground that the evidence of bad feeling should be limited to any bad feeling that might exist between Milton Rawlins and the children that were killed. There was no merit in this objection. The state of feeling existing between the father of the accused and the father of the deceased was pertinent, and especially was it pertinent to show a state of bad feeling generally between the two families. The weight, of course, to be given to this testimony, was to be determined by the jury in ascertaining whether there was a motive for the accused

on trial to commit the crime with which he was charged.

12. Evidence was admitted showing that J. G. Rawlins had had a conference with the witness Moore before the crime was committed, in which he gave him certain instructions in reference to the commission of the crime, and there was also evidence that on the morning before the killing J. G. Rawlins went to the house of a neighbor and obtained a gun which belonged to him, but which had been in possession of his neighbor for about a year, and also that on the morning after the killing J. G. Rawlins obtained a loan of \$110 from a bank in Valdosta. The objection to this testimony was that anything J. G. Rawlins did or said in the absence of Milton Rawlins was inadmissible against the latter. It appeared from the testimony of Moore, the accomplice, that he and the three sons of J. G. Rawlins were to slay the entire Carter family, and that Moore was to receive \$100 for his participation in the crime, and that this \$100 was to be paid him the morning after the crime was committed. There was evidence tending to establish that the persons indicted had conspired to slay the entire Carter family, and that J. G. Rawlins was the instigator and originator of the scheme. Whether this conspiracy was in fact established was a question for the jury, but there was enough evidence tending prima facie to establish it to authorize the admission of the acts of the alleged conspirators; the jury to give the evidence such weight as they saw fit in the event the conspiracy was established. There was no error in admitting this testimony. *Carter v. State*, 106 Ga. 372, 32 S. E. 345, 71 Ann. St. Rep. 262 (5), and case cited.

13. The court, in charging upon the defense of an alibi, used language which was calculated to create the impression that the defense of an alibi must be established to the satisfaction of the jury beyond a reasonable doubt; but before the jury retired the court called their attention to this portion of the charge, and corrected any error thus made. The court also admitted in evidence an indictment against J. G. Rawlins, which charged him with assault with intent to murder upon Carter, the prosecutor, and a peace bond which had been given by Rawlins at the instance of Carter. The Solicitor General was permitted to withdraw this evidence from the consideration of the jury, and the jury was instructed by the judge that the evidence was withdrawn from their consideration, and they were not to consider it at all. While we realize that an impression once made upon the minds of a jury, either by the charge of the court or by the admission of evidence, cannot always be entirely removed, still when an error has been committed, and the judge does all in his power to correct the effect of the error, the law generally prevents the party against whom the error was committed from com-

plaining of it. In regard to the error in the charge, as well as the error, if it was such, in admitting the evidence, the correction was as complete in each instance as it was possible, and we cannot say that there was anything which appears in the record to show that the prejudicial effect of the error upon the minds of the jury was not removed. There may be an error of such a character that nothing done by the judge can correct the harmful effect of it; but this occurs in rare instances, and it is almost universally held that an error in instruction is sufficiently corrected by attention being called to the improper instruction and a proper instruction being given, and that an error in the admission of evidence is sufficiently corrected by its being withdrawn from the consideration of the jury, with a statement to them that they are not to consider it. Any other general rule than this would result in a verdict being vitiated in every case where the evidence was voluminous, the charge lengthy, and the trial protracted.

There was no error in failing to charge upon the law of confessions and the law of duress, as there was no evidence authorizing instructions upon these subjects. There were a number of other assignments of error upon the charge; but, when these portions are read in connection with the entire charge, it is apparent that there was nothing in any of them which would prejudice the accused. There was sufficient foundation for the admission of the dying declarations. If any fuller instruction on the subject of dying declarations than those given were desired, counsel for the accused should have presented it in an appropriate written request. The counsel in his argument to the jury having admitted that a murder had been committed, there was no error committed by the judge in referring to that fact in his charge.

14. The motion for a new trial in the case of Jesse and Leonard Rawlins raises a number of questions which are similar in their nature to those raised by the motion filed by Milton Rawlins, and so far as these questions are concerned further discussion is unnecessary. We will now treat of such of the special grounds as relate to questions not already discussed. Objection was made to the panel of jurors put upon the accused, upon the ground that there were included in such panel jurors who had been called and rejected on the trial of Milton Rawlins. These objections were overruled, and this ruling is assigned as error, for the reason that such jurors had formed or expressed an opinion as to the guilt or innocence of the accused. This objection was in the nature of a challenge to the array. It is well settled that it is not a proper ground for a challenge to the array that the panel includes individual jurors who would be disqualified to try the case. Such jurors can be eliminated from the panel by a challenge

to the poll. As was said in *Humphries v. State*, 100 Ga. 261, 28 S. E. 25: "If the panel contained any jurors who were subject to challenge, the accused would have an opportunity, when they were put upon their voir dire and qualified, to show the fact of such disqualification by putting the individual juror upon the court as a trior. It is possible that a challenge to the array would be overruled, where the entire panel was composed of persons who would be subject to challenge to the polls; and, on the other hand, a panel made up of jurors not subject to any challenge to the polls might be set aside on a challenge to the array. A challenge to the array goes to the form and manner of making up the panel, without regard to the objections to the individual jurors who compose it; while the challenge to the poll is directed solely to an objection which is inherent in the individual juror." See, also, *Thompson v. State*, 109 Ga. 272, 34 S. E. 579; *Teal v. State*, 119 Ga. 102, 45 S. E. 964 (2); *Taylor v. State*, 121 Ga. 343, 49 S. E. 303.

15. The accused being tried jointly, each demanded the right to challenge peremptorily 20 jurors. This right was accorded to them. Their counsel then objected to the Solicitor General being allowed 20 peremptory challenges. In *Cruce v. State*, 59 Ga. 83, it was held that where two are tried jointly for a felony each is entitled to 20 peremptory challenges. In *Butler v. State*, 92 Ga. 601, 19 S. E. 51, it was held that where two are tried jointly for a capital offense, and neither waives his peremptory challenges, the state is allowed one-half the whole number of challenges which the law allows to both.

16. Exception was taken to the following charge: "The testimony of an accomplice in a case is not sufficient of itself to convict a party charged with the commission of a crime, under the law. That testimony, in order to authorize you to convict, must be corroborated, and the extent of the corroboration of the testimony is a question entirely for the jury. However strong it may be, or however slight it may be, is a question for you to determine, and you will give it such credit as you believe under the law it is entitled to." The assignment of error upon this charge is that the judge instructed the jury that slight evidence might corroborate the testimony of an accomplice, and there was a failure to instruct the jury that corroborating evidence must connect the accused with the commission of the crime. The jury are not authorized to convict upon the uncorroborated testimony of an accomplice. What shall be the extent of this corroboration is a question to be determined by the jury. It may be strong, or it may be slight; but in each case it must be of such character as to satisfy the minds of the jury as to the connection of the accused with the criminal enterprise. As was held in *Chap-*

man v. State, 109 Ga. 164, 34 S. E. 369, the judge should not charge the jury as matter of law that slight evidence is sufficient to corroborate the testimony of an accomplice; but as matter of fact slight evidence is sufficient, if it is satisfactory to the minds of the jury. The objection to the charge in the *Chapman Case* was that it was calculated to make an impression in the minds of the jury that any corroboration, however slight, would compel them to treat the testimony of the accomplice as corroborated. In the present case the judge distinctly charged the jury more than once that the testimony of an accomplice, uncorroborated, was not sufficient to convict. He also charged fully upon the law of reasonable doubt, and the extract from the charge above quoted, when taken in connection with the entire charge, was not calculated to mislead the jury in regard to the amount of corroboration required. He tells them in terms it is a question for them to determine, and they are to consider the corroboration, whether it be strong or slight; and the effect of the charge is simply to state that it is for the jury to determine whether the corroboration was of such a character as to satisfy their minds. The charge did not in distinct terms state to the jury that the corroboration must connect the accused with the criminal enterprise. The extract from the charge complained of is upon the extent of the corroboration so far as its weight is concerned; and upon such a charge an assignment of error cannot be properly based which merely complains of the failure to charge upon another distinct proposition relating to the subject of corroboration. The extract from the charge being substantially correct in regard to matters therein dealt with, the accused cannot complain that other and distinct propositions relating to the same subject were not embraced.

17. Complaint is made that the court refused to grant a mistrial on account of certain remarks made by one of the counsel for the state. In his opening argument counsel used the following language: "Has the time come in the good old county of Lowndes when a man cannot lie down in his home at night and be protected from midnight assassins? It is time for you to put a stop to it, and put such defendants as these out of the way. We do not need them here." The ground of the motion recites that counsel for the accused immediately asked the court to declare a mistrial, and that counsel who had made the remarks then said: "I withdraw my remarks. I do not want to do anything to hurt the defendants before the jury. I apologize for what I have said to the court and to the jury, and I ask his honor to withdraw it from the jury." The court then said: "Yes, gentlemen; these remarks were improper from the associate counsel, and I withdraw what he said from your consideration altogether, and I instruct you that counsel's remarks have no weight with you in your

deliberations. I do not think that the remarks were cause for a mistrial, so I refuse to withdraw the case from the jury, and I overrule the motion of defendant's counsel to declare a mistrial." In a note to this ground the judge states that counsel for the accused first moved the court to instruct the jury not to consider the remarks, which was done, in the language set forth in the ground, and after the court had complied with that request and ordered the case to proceed, counsel for the accused then asked that a mistrial be declared, and this motion was overruled. Without determining whether, under all the circumstances, the remarks of counsel for the state were sufficient to require a mistrial, the refusal to declare a mistrial was not error. Improper remarks of counsel are subject to correction either by proper instruction to the jury or a mistrial, according to the nature of the remarks and the circumstances under which they were made. Counsel for the party claimed to have been prejudiced by the remarks is authorized to determine what his remedy shall be, whether he shall ask for appropriate instruction, or whether he shall ask for a mistrial. When he has asked for one method, and that method has been followed by the court at his instance, he cannot ask subsequently that another method be adopted. See in this connection *Patton v. State*, 117 Ga. 231, 43 S. E. 533 (10).

The foregoing disposes of such of the special grounds in the motion for a new trial in the case of Leonard and Jesse Rawlins as require an elaborate discussion. The instruction on the subject of confessions was appropriate in the connection in which it was used; it being claimed that the alleged accomplice had been compelled to confess under the influence of fear, and that when he testified he was still under the influence of such fear. The other instructions which were complained of, when taken in connection with the entire charge, were not calculated to mislead the jury in regard to any of the vital issues in the case. The instructions as to the form of the verdict were sufficient to show the jury that they were authorized to acquit one or both, or convict one or both, as the evidence authorized, and the refusal to charge the written request on that subject is no cause for a new trial.

18. The motion for a new trial filed by J. G. Rawlins presents some questions similar to those involved in the other cases, and nothing further need be said concerning them. Those grounds raising other questions will now be considered. After the trials of the other defendants, the case of J. G. Rawlins was called, and a motion for a continuance was made upon the ground that the physical condition of the accused was such that he could not go safely to trial. The accused presented his own affidavit to this effect. The court heard testimony of two physicians, one of whom was at the time attending the accused. Both of them swore that, while he

was not perfectly well, he was as well as he had been for a year or more previous to the trial, and was as well as he probably ever would be, and that in their opinion he was not in such a condition that a trial would be either dangerous or specially harmful to his health. In a note to this ground of the motion the judge states that he was satisfied from the evidence that the accused could go to trial without detriment to his health; that during the trial of his sons he had been in the courthouse, and had taken an active part in their defense so far as consulting with counsel was concerned, and had attended the entire trial of each, except possibly during the argument of the cases; and that during the trial of his own case he conferred with his counsel "with apparent ease and activity, and ample strength and ability to do the same, and that with ease and strength he went upon the stand and made his statement, which consumed about two hours and a half." The statement of the judge is, in effect, that neither before the trial nor during the trial was there anything apparent in the condition of the accused to indicate that his condition was such that he could not aid his counsel in the conduct of the trial or sustain the strain of the same. Motions for continuance upon the ground of the physical condition of the accused are addressed to the discretion of the judge. He may consider the testimony produced, as well as the condition of the accused as it appears to him. In such cases the good sense, sound judgment, and humanity of the trial judge must be relied upon as safeguards against injustice. *McDaniel v. State*, 103 Ga. 268, 30 S. E. 29. It does not appear that there was any abuse of discretion in refusing the continuance.

19. When the motion for a continuance just referred to had been overruled, Mr. Cooper, counsel for the accused, made a statement in his place which was in effect as follows: That all of the preceding week he had been hard at work trying the case of Milton Rawlins; that the weather was the hottest he had ever felt; that he worked from Monday morning until Friday night; that he was under great mental strain on account of the intense interest he felt in the case; that he had been notified by the judge to return for the trial of this case; that he had endeavored to obtain a leave of absence on the ground that he was worked down, but the judge refused to grant the same, stating that this case must be tried; that since Monday morning of the present week (the day on which this statement was made being Thursday) he had been engaged in the trial of Leonard and Jesse Rawlins, being leading counsel in that case, had examined the witnesses, and at the suggestion of his associate had argued the case before the jury, making an argument of two hours and a half in length; that he had contracted a cold, and his voice was weak, and his throat out of order, and he did not feel that he was physically able at this time to defend a man

charged with murder; that he did not believe he was physically able to do justice to the case; that he needed a rest, and asked a continuance until his physical condition was such that he could properly represent his client. The judge remarked that he did not remember any formal application for a leave of absence, but that counsel might have stated to him privately that the case should go over, and, while he knew it had been a heavy tax upon counsel and all others in the case on account of the condition of the weather, still counsel had been apparently as active as any member of the bar, more so than most of them, and while he may have contracted some cold, as a great many others had, the court did not think, from the appearance of counsel and his connection with the case up to that time, that he would not be able and fully competent to do justice to his client, and under such circumstances, as there were associate counsel, and the term had been specially called to try these cases, he did not think sufficient cause had been shown for a continuance. In a note to this ground the judge says that counsel had already made two motions to continue the case at the same term of the court, which were overruled, and that as "an additional reason for overruling the motion the appearance, voice, energy, and activity and conduct of the able attorney, Hon. John R. Cooper, at the time he was making the motion, in the judgment of the court demanded that the motion be overruled." And the judge further states that, after overruling the motion, "the activity, energy, and ability exercised and manifested by counsel during the trial could scarcely have been surpassed"; counsel having fully and elaborately argued the case for the space of two hours and a half to the jury.

The rule of the court requires that all grounds of a motion for a continuance shall be urged and insisted upon at once, "and after a decision upon one or more grounds, no others afterwards urged shall be heard by the court." Civ. Code 1895, § 5675. The accused had united with his three sons in a motion to continue the case, before any of the trials, on the ground of absent witnesses. This motion was overruled for the reasons set forth in that paragraph of the opinion which deals with the assignment of error in that ground of the motion for a new trial filed by Milton Rawlins. At the time that this motion was made all grounds for continuance which then existed should have been taken advantage of. Of course, the rule of court would not prevent the judge from entertaining a motion for continuance thereafter upon a ground which had subsequently arisen. When counsel moved to continue the case on account of the physical condition of the accused, as it was claimed that this condition resulted from the trial of his sons, being a cause which arose after the first motion to continue was disposed of, there was no error in the court's entertaining this motion. But

counsel should have embraced in this motion both grounds then claimed to exist; that is, the physical condition of the accused, and the physical condition of counsel. It appears from the record that the motion to continue on account of the physical condition of the counsel was made immediately after the motion to continue on account of the physical condition of the accused was overruled. If both grounds existed, as must have been the case, under the rule of court counsel could not make the motion upon one ground only, and, that having been overruled, then urge the other. In addition to this, there does not seem to have been any abuse of discretion in overruling the motion to continue on account of the condition of counsel, even if the court had authority to entertain it. The illness of counsel when there is but one, or of the leading counsel when there is more than one, is a sufficient ground for a continuance. Pen. Code 1895, § 964. "Illness" is defined to be an attack of sickness, ailment, malady, disease. Cent. Dict. The illness of counsel contemplated by the law is such a physical condition, resulting from sickness, malady, or disease, as would prevent counsel from properly attending to his duties as such. It does not mean any mere indisposition, but indisposition of such character as to disqualify a person from the discharge of those delicate and responsible duties which devolve upon counsel in the trial of a case. The determination of whether such an illness in fact exists as is contemplated by the law is reposed in the trial judge before whom the motion for a continuance is made. If the counsel who is ill is absent, evidence should be heard as to his condition, and where the condition of counsel is in question the court is authorized to determine this question, like all other questions of fact submitted to its decision. If counsel who makes the motion is himself present in court, making and urging the motion in his own proper person, the judge may determine the question by the condition of counsel as it appears to him. Especially would this be the case where counsel had been engaged for a number of days in the trial of other cases before the same judge, who was thus enabled to determine by a trial, in the nature of a trial by inspection, whether counsel's condition on the day the motion is made is essentially different from what it was on other days when he was actively engaged in the conduct of other cases, without complaint as to physical inability. The judge based his refusal to continue the case upon the ground that the energy, activity, and general appearance of counsel at the time that he made the motion was such as to impress him with the fact that while counsel might have been laboring under an indisposition from cold and work in the other cases, he was still mentally and physically competent to discharge the duties incumbent upon him in the coming trial. The judge states that this impression, made at the time that the

motion was made, was emphasized and confirmed by the able manner in which counsel conducted the case through a tedious trial of three days. In addition to this, if the statement of counsel as to his condition is considered in its entirety, it is apparent that he was not ill at all within the sense of the statute. He had a slight cold, probably some huskiness in his voice; but he was suffering under no attack of sickness, disease, or malady, within the meaning of the word "illness" as it is ordinarily understood. He was merely tired, and this condition of body and mind is not sufficient to postpone the trial of a case, unless it reaches the point where mind and body are so exhausted that the duty in hand cannot be performed with justice to those to whom the duty is due. All who have ever been engaged in the practice of law can appreciate that counsel very often are required to perform their duties when they are physically and mentally tired; but the business of the courts would become blocked if such a condition was recognized as a ground for continuance, when the tired condition of counsel was short of exhaustion, mental or physical. During a term of court continuing for two weeks, counsel who are engaged in every case that is tried during that time, of course, become tired and more or less exhausted. The same is true of the judge and the jurors, and all others upon whom the responsibility of the administration of the law rests. But a case must not be postponed on account of the physical condition of counsel being affected by the work in the line of his profession or otherwise, unless the physical condition brought about by the work is such that further effort would imperil his health, or an attempt to perform the duty, under the circumstances, would result in injustice to those interested in the performance of a duty owed to them. This matter, as all matters relating to the continuance of cases upon similar grounds, is addressed to the discretion, judgment, and humanity of the trial judge, and nothing appears in the record which authorizes us to say that this discretion has been abused in the present case. While we have no doubt that the motion to continue was made in the utmost good faith, and counsel really believed at the time that he was in such an exhausted condition that he could not do justice to his client, still, from all that appears in the record, we think, with the trial judge, that our brother was mistaken as to what was really his condition. It is apparent from the record and the assignments of error therein that counsel conducted this case with his usual skill and ability, and if any injustice has been done to his client it has not been made to appear.

20. Upon the trial of one charged as an accessory before the fact it is incumbent upon the state to prove the guilt of the person charged as a principal beyond a reasonable doubt. The record of the conviction of the principal is conclusive evidence as to the fact

of his conviction, and it is prima facie evidence of his guilt. The fact that the state introduces the record in evidence does not preclude the introduction of other evidence tending to establish the guilt of the principal. Therefore, as a general rule, in the trial of an accessory, any evidence which would be admissible against a principal if he were on trial is admissible on the trial of an accessory, for the purpose of establishing the guilt of the principal. Hence, there was no error in admitting in evidence the dying declaration of Willie Carter, to the effect that he was killed by Milton and Jesse Rawlins, nor in the admission of other evidence which tended merely to establish the guilt of others charged as principals in the indictment. The charge of the judge, when considered as a whole, properly limited evidence of this character to the purpose for which it was introduced. There was nothing in the admission of the evidence, nor in the charge of the court in relation thereto, which was prejudicial to the rights of the accused.

21. Evidence was offered to the effect that the accused had threatened the life of the father of the deceased, and had offered to pay persons to kill him. Exception is taken to the refusal of the judge to rule out this evidence upon the ground that the father was not killed, and therefore the evidence was irrelevant. There was also introduced in evidence a peace bond which the accused had been required to give at the instance of the father of the deceased, and an indictment for assault with intent to murder against the accused, in which the father of the deceased was prosecutor. Exception is also taken to the refusal of the court to rule out this evidence on the ground above referred to. This evidence was properly admitted. The deceased were killed at the home of their father by persons who made a deadly assault upon every member of their family that came out of the house. The father was in the house at the time that the slayers of the children surrounded the same, and these threats against the head of the family, and offers of money to others to kill him, could be properly considered by the jury in determining whether those who slew the children went there under the instigation of one whose enmity against the head of the family was such that he had threatened to take his life, and had even offered to pay an assassin to slay him. The weight to be given this evidence was, of course, for the jury; but it was a circumstance to be considered by them in determining whether the accused had instigated the killing of the children as a part of the scheme to kill the father, or whether the killing of the children could have arisen as a natural consequence of a result of the scheme to kill the father in his home.

The court charged the jury upon the law of confessions; but it appears that this was done at the request of counsel for the accused. While the charge was inappropriate

to the case, no exception can be taken to the error which counsel thus caused the court to commit. The testimony showing that on the day of the killing the accused left a watermelon at a store near by his home for Frank Turner, who was jointly indicted with the accused as an accessory before the fact, was properly admitted as a circumstance which the jury might consider in determining whether the testimony of the accomplice Moore was corroborated. It was of little weight, but was nevertheless admissible for what it was worth. What has been said disposes of all the assignments of error in the motion for a new trial filed by J. G. Rawlins relating to the admission of evidence and the charge of the court which require any special notice.

22. The only remaining ground containing a special assignment of error in the motion for a new trial of J. G. Rawlins which need be referred to is that which complains that the verdict was received on Sunday. In *Bass v. Irvin*, 49 Ga. 436, it was held that a verdict received on Sunday was illegal and a nullity. In *Henderson v. Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327, it was held that the question of the legality of a verdict received on Sunday was not necessarily involved in the case of *Bass v. Irvin*, and that therefore that case was not binding authority upon that point; and, having thus disposed of the case of *Bass v. Irvin*, a distinct ruling was made that there is no legal or moral wrong in a judge receiving a verdict and allowing a jury to disperse on Sunday. This ruling was followed in *Weaver v. Carter*, 101 Ga. 206, 28 S. E. 869, in which two judges dissented, but filed no dissenting opinions. It is true that both of these were civil cases, but we see no reason why the rule should not be applicable to criminal cases as well. The soundness of the rule is demonstrated in the opinion in the case of *Henderson v. Reynolds*, and we do not deem it necessary to attempt to add anything to the reasoning therein contained.

23. After laborious and earnest investigation of all the special assignments of error in the motion for a new trial filed by J. G. Rawlins and his three sons, we have been unable to find any error which in our opinion requires a reversal of the judgment. It remains, therefore, only to be considered whether the evidence was sufficient to authorize the verdict. So far as Milton and Jesse Rawlins are concerned, the evidence amply authorizes the verdict, without reference to the testimony of the alleged accomplice. There was not only positive testimony as to their presence at the scene of the killing, but there was the dying declaration of Willie Carter that they were his slayers. This evidence alone is sufficient to sustain the verdict as to them. There was no evidence that Leonard Rawlins fired a gun, though there is evidence that he was present with a gun at the time that Milton and Jesse killed

Willie and Carrie Carter, and that he was actively participating with Milton and Jesse in the acts done by them resulting in the slaying of the two Carter children. Even if this were not sufficient alone as to him, the evidence of the accomplice was that he went with the others for the purpose of engaging in the slaughter of the entire Carter family, and the evidence of his presence and his conduct on this occasion would be a sufficient corroboration of the accomplice to authorize a jury to convict him as a principal in the crime.

24. Whether the evidence was sufficient to authorize a verdict against J. G. Rawlins as an accessory before the fact depends upon whether the testimony of the accomplice Moore was sufficiently corroborated. He swore that J. G. Rawlins agreed to pay him \$100 to go with his sons to the house of the Carters and there slay the entire family, the money to be paid on the following morning; that he gave him and his sons minute directions as to how Carter and his wife were to be killed, the two older children, and the little children; that he gave him a gun with which he was to kill Carter and his wife, a pistol with which he was to slay the older children, and a knife with which he was to cut the throats of the little children; that in pursuance of the plan originated by J. G. Rawlins, and in endeavoring to carry out his instructions, he (Moore) with the three Rawlins boys repaired to the house of Carter after dark; that a barking of a dog attracted the attention of those within the house; that Willie Carter, a young boy of 16, and his sister, Carrie Carter, a girl of about 14, came out into the darkness to see what caused the barking of the dog; that they both were shot down by Milton and Jesse Rawlins, the girl being killed instantly, and Willie Carter being able to crawl back into the house, where he made the declaration to his parents as to who were his slayers, and died the next morning from the effect of the wound he had received. It is hard to conceive of a murder which was more atrocious in plan, and an execution of a plan, which, though only partial, was more heartless in its nature. It required a demon to conceive the plan, and only a monster would have committed its execution into the hands of his own youthful offspring, under the supervision of a vicious negro hireling. Whether J. G. Rawlins was the originator and instigator of this plan, which was only partly carried out, depends upon whether the jury was authorized to treat the circumstances hereinafter referred to as sufficient evidence to corroborate the testimony of a self-confessed assassin, who claims to have been the hireling of J. G. Rawlins.

It is not necessary, in order to convict upon the testimony of an accomplice, that the corroborating circumstances should be sufficient to authorize a conviction. If such were the law, there would be no reason

for introducing the testimony of an accomplice. The corroborating circumstances must connect the accused with the commission of the crime, and must be sufficient, in connection with the testimony of an accomplice, to satisfy the jury beyond a reasonable doubt that the accused is guilty. The corroboration may be strong, or it may be slight; but whether it is sufficient to connect the accused with the commission of the crime, or whether, taken in connection with that testimony and all the other facts and circumstances of the case, the accused is guilty beyond a reasonable doubt, is a question to be decided by a jury. It appeared from the evidence that there had been a state of bad feeling between the elder Carter and the elder Rawlins for a number of years. It also appeared that Rawlins had made threats against the life of Carter at various times, extending from 1902 down to a short time before the homicide; that the year preceding the murder, and the year before that, he had said that before the Carters should stay where they were he would kill them all, from the baby up. He told a negro during the year that the crime was committed that if he would kill Carter it would be worth \$100 to him, and he told another negro, about a week before the killing, that he would give him \$125 if he would kill Carter. It also appeared that on the morning before the killing Rawlins went to the house of one McDonald, and carried a gun which had the stock so cut that it could be easily recognized and was known as the gun of Rawlins, and left it there, and secured in its place a gun belonging to Rawlins which McDonald had had for nearly a year, having no particular mark, and there was evidence showing that this gun was found, along with a knife, which was shown to be the knife of Rawlins, in the shanty where Moore was arrested. The sheriff testified that Rawlins told him that he was satisfied that the gun which was found in Moore's shanty was his gun, and that Moore must have stolen it out of his house while he was at supper, and must have found the knife about the well or about the yard. He told a neighbor that somebody was going to kill Carter, and that when it was done the neighbor should turn his back, so that he could not see anything. He also said to a witness, the day before the murder, that he was in an awkward place, for, if anything should happen to Carter that night, it would be laid on him. He also said that if Carter should get killed, or his house burn up, or anything like that happen, it would be laid on him. A witness testified that he said, a year before the trial, that he did

not believe it would be a sin in the sight of God to kill a man like Carter. Another witness testified that at the term of court just before the killing of the Carter children Rawlins stated that he would not swear that he would not kill Carter before court was over. There was also evidence that on the evening before the murder he came to Valdosta and endeavored to obtain \$100 from the cashier of a bank, but could not obtain it that evening because the bank had closed; that on the following morning he negotiated a loan at the bank for \$110 and left Valdosta in a hired conveyance, going in the direction of his home, but dismissing the conveyance some distance before reaching home, saying to the driver that he might meet some of his sons up there.

There were other circumstances, of more or less significance, indicating the complicity of J. G. Rawlins in the crime; but those that have been referred to are the more important that the record discloses. These that have been referred to are in our opinion sufficient to uphold the verdict of the jury. The credibility of the witnesses was for them. They have seen proper to give credit to the witnesses testifying to these facts. They have also seen proper, in the exercise of the authority which the law vests in them, to treat these circumstances as sufficient to corroborate the testimony of the accomplice. The trial judge has approved their finding, and we cannot say that the corroboration was of such a character that the jury were not authorized to base a verdict thereon. We see no sufficient reason for reversing the judgment refusing a new trial.

25. The negro Turner, who was also charged in the indictment as an accessory before the fact, was convicted, and his motion for a new trial presents, besides the general grounds, several special assignments of error. As we have reached the conclusion that the verdict was not supported by the evidence as to him, it is not necessary to deal with the special assignments of error. The evidence for the state consisted of the testimony of the negro Moore, the alleged accomplice who was indicted as a principal, and, of course, cannot be upheld unless his evidence was corroborated in such a way as to connect Turner with the commission of the crime. A careful reading of the brief of evidence has failed to disclose to us any such corroboration as would authorize the verdict. It was, therefore, error to refuse to grant him a new trial.

Judgment on bill of exceptions of Turner reversed. Judgment on all other bills affirmed. All the Justices concurring.

(124 Ga. 64)

OLIVER et al. v. CITY OF ELBERTON.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. MUNICIPAL CORPORATIONS—BONDS—PROCEEDINGS TO VALIDATE—JURISDICTION.

Where, in accordance with the act of 1897, proceedings were instituted by the Solicitor General of a circuit for the purpose of having a judgment entered confirming and validating bonds of a municipal corporation, to be issued under an election which has been held for that purpose, and at the time set for the hearing it appeared that the notice of such time and place, required by the act to be published twice, had only been published once, but the city had been served with the rule, and by its proper officers had made answer thereto, the court was not without jurisdiction of the cause, but could lawfully continue the hearing to another time and require proper publication to be made.

2. SAME—ISSUE OF BONDS—PROVISION FOR PAYMENT.

Before bonds can be legally issued by a municipal corporation, provision must be made for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of the debt within 30 years. It was not a compliance with the law to provide for the levy of an annual tax sufficient to pay the interest and also to raise a sum each year which would amount in the aggregate to less than the principal, add to create a sinking fund to be loaned by commissioners at interest, with a view of increasing the amount to a sufficiency to pay the indebtedness, but providing that any deficiency should be met by taxation in the year in which the bonds would fall due.

3. SAME—PROVISION FOR TAXATION.

If an illegal provision in regard to providing by taxation for the payment of bonds sought to be issued by a municipality formed a part of the call for an election or the notice thereof, or the authority for holding such an election, so as to affect the election itself with illegality, or to show that it was held on the basis of such an illegal provision, the judge of the superior court should refuse to confirm and validate the issuance of such bonds.

4. SAME—CONFIRMATION OF ISSUE.

If the election was legally held, a failure to provide for payment of the bonds before instituting proceedings to validate the issue would not prevent a judgment of confirmation and validation from being entered. But it would be necessary to make lawful provision for that purpose before the bonds were issued.

5. SAME—PROCEDURE.

Where proceedings were taken for the purpose of validating municipal bonds, and it appeared from the pleadings that the election was regularly held, but that by an independent ordinance the municipality had made a provision for the payment of the bonds which was not in accordance with law, and it declared that if such provision were not lawful it desired to make a lawful one by annual taxation, and objections were filed by intervening citizens to the provision made, the court should not have ignored the issue thus presented, and have entered a judgment of confirmation and validation of the bonds, without more, thus impliedly approving the provision made.

6. SAME.

Direction is given in regard to the question raised in the manner stated in the last head-note.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Application by the Solicitor General for the validating of certain bonds entered by the city of Elberton. A. S. Oliver and others

intervene. Judgment confirming the bond, and interveners bring error. Affirmed.

An election was held in the city of Elberton on June 5, 1905, for the purpose of determining whether or not bonds should be issued to the amount of \$20,000 for the purpose of building and equipping a sewer system, and resulted in favor of their issuance. Notice was given to the Solicitor General of the circuit, and on June 19th, he filed a petition to have a judgment entered confirming and validating the bonds, under the act of 1897 (Acts 1897, p. 82). A rule was issued by the presiding judge setting the hearing for July 4th, at Elberton. Service was acknowledged by the city and its mayor and council, and they filed an answer substantially admitting the allegations of the petition. At the time set for the hearing certain citizens prayed to intervene and were made parties by order. It appeared that the notice required to be published twice before the hearing of such a cause had only been published once in a newspaper. The presiding judge thereupon granted an order continuing the hearing, and setting it for July 17th, at Crawfordville. The clerk of the superior court of Elbert county was required to publish a notice of the time and place fixed for the hearing twice in the newspaper in which the advertisements of the sheriff of the county were published, and also to publish a copy of the order twice. To this order the interveners filed a bill of exceptions pendente lite. The city in its answer alleged that it had made provision for the payment of the bonds, and attached an ordinance passed for that purpose, which provided for the levy of a sufficient annual tax to pay the interest, and also for a sufficient tax to raise a certain amount each year, which aggregated less than the amount of the bonds, but which was to create a sinking fund to be loaned by certain commissioners, and the total amount was to be used for the payment of the bonds at maturity, if sufficient. If this amount should not be enough, then the city should levy a tax in the year 1925, sufficient to enable it to pay the bonds. The interveners filed objections to this method of providing for payment as being illegal. At the hearing they also moved to dismiss the petition, on the ground that the court was without jurisdiction to try the case, because of the insufficiency of publication of notice of the hearing at the time when it was first set, and because of the continuance of the hearing to a time more than 20 days after the filing of the petition. The motion was overruled, and a judgment was entered confirming and validating the bonds. The interveners excepted.

Van Duser & Tutt, for plaintiff in error.
Jos. N. Worley, for defendant in error.

LUMPKIN, J. (after stating the facts). 1. Two points are made in this case. First, it is argued that, inasmuch as the notice of the time and place set for the hearing of the peti-

tion to validate the bonds had only been published once, instead of twice, as required by law (Acts 1897, p. 84, § 6), when the time arrived the court was without jurisdiction and could not continue the hearing or request proper publication to be made, but the entire proceedings went for naught. This point is controlled in principle by the decision in *Wimberly v. County of Twiggs*, 116 Ga. 50, 51, 42 S. E. 478, where it is said: "Certainly the superior court of Twiggs county was the only court which had jurisdiction to validate the bonds, and the fact that the hearing was had before the judge on a day other than that named in the published notice does not render the judgment illegal, when it further appears that the case was regularly continued by the court from the day named in the publication to the day on which the hearing was had. The object of the publication is to inform citizens whose interests are to be affected of the time when the case is set to be heard." This shows that the proceeding is, like a case, subject to continuance from the day first fixed to a later date, and that the court does not lose jurisdiction because the hearing is not had at the time first fixed. Here the municipal corporation had been served with the rule and had answered, and the plaintiffs in error had appeared and been made parties. The court was not wholly without jurisdiction, and had authority to reassign the hearing for another time and place by order, and to cause a new publication to be made rectifying the continuance and giving notice of such time and place. In *Roff v. Town of Calhoun*, 110 Ga. 806, 36 S. E. 214, no petition for the purpose of validating the bonds there concerned was filed until after the lapse of the time allowed by the statute for beginning such proceedings, and it was held that it was then too late to file it. As to the general power to continue cases to have service perfected, where jurisdiction has been acquired, see 4 Enc. Pl. & Pr. 832; *Atlanta & Charlotte Air Line Ry. v. Harrison*, 76 Ga. 757; *Allen v. Mutual Loan & Banking Co.*, 86 Ga. 74, 12 S. E. 268; *Lassiter v. Carroll*, 87 Ga. 731, 13 S. E. 825.

2-6. It is urged that the court erred in passing an order validating the bonds, because provision had not been made for their payment as required by law, and the pleadings and evidence showed that the ordinance actually passed for that purpose was not in accordance with law. Before bonds can be legally issued, such a provision must be made; and their issuance may be enjoined if an attempt be made to issue them without it, or mandamus may be resorted to in a proper case. But it has been held that the making of such a provision is not necessary before a proceeding to validate the bonds can be had. *Epping v. City of Columbus*, 117 Ga. 263-280, 43 S. E. 808. It is true that the following language was used in the decision (page 281 of 117 Ga., page 810 of 43 S. E.): "If, when the application

is made to validate the issue of bonds, it appears to the judge, either from the pleadings or otherwise, that the authorities of the municipality or county do not intend to make provision for the payment of the bonds in the manner required by the Constitution, of course he should not render a judgment validating the issue of bonds." In that case it was alleged as an objection that no provision had been made, and this was held not to render the validation improper. The sentence quoted above was really an obiter dictum; but, construed in the light of the authority cited in support of it and when correctly limited, it was sound. The authority cited was *Wilkins v. City of Waynesboro*, 116 Ga. 859, 42 S. E. 767. In that case there was an unconstitutional clause in the act of the Legislature authorizing the issuing of bonds; and the ordinance calling the election and the notice required to be given under the act of 1897 contained illegal provisions. Thus the election itself was tainted with illegality, and no bonds could be issued under it. If the foundation had been legal and the election proper, on a proceeding to validate the bonds, it has been seen that the failure to show the making of a provision for payment would not cause the refusal of a judgment of validation. In the case at bar it is not claimed that the ordinance calling the election, or the notice given, contained any illegality which affected the election. In fact the ordinance calling the election is not in the record. The municipal authorities did at some time, which does not clearly appear, pass an ordinance providing for payment of interest by taxation and the creation of a sinking fund to pay off the bonds at maturity by levying taxes annually, aggregating less than the principal sum, and lending out the amount at interest. This plan was not in accordance with the Constitution (article 7, § 7, par. 2), and was illegal (Civ. Code 1895, § 5894).

The question is whether this independent ordinance should have the effect of practically overthrowing the election, or whether, if all the steps necessary to a judgment validating the bonds were taken, the bonds should be validated, but this ordinance be declared void, and the city be allowed to make proper provision for payment according to law, before issuing the bonds. The city in its answer set out the plan for making payment which this ordinance embodied, and added that, if this were not a constitutional provision, it would pass an ordinance providing for a sufficient annual tax for the payment of the principal and interest of the bonds. Objections were filed by the plaintiffs in error, and the judgment merely confirms and validates the bonds, saying nothing as to the point so raised. Standing thus, the judgment would seem to include an approval of this provision for payment.

While we think that the entire result of the election should not be destroyed by reason of this illegal ordinance, still it should not be approved, even by implication. We therefore affirm the judgment, but direct that it be amended by declaring the provision for payment set up not to be legal, and that provision for payment must be made according to law before the bonds are issued. No claim is made that this will exceed the constitutional limit of indebtedness which the city may incur, and we therefore presume that it will not do so.

Judgment affirmed, with directions. All the Justices concur.

(124 Ga. 6)

PERKINS v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

HOMICIDE—EVIDENCE—CONFESSION OF ACCUSED—MURDER.

Where, on a trial for murder, the accused admitted the killing, but coupled such admission with declarations which, if believed, showed justification, no presumption that the homicide was murder arose from such admission.

(Syllabus by the Court.)

Error from Superior Court, Taylor County; W. A. Little, Judge.

Will Perkins was convicted of murder, and brings error. Reversed.

O. M. Colbert and Carson & McCutchen, for plaintiff in error. S. P. Gilbert, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. Will Perkins was convicted of murder, and, his motion for a new trial being overruled, he excepted.

On the trial the evidence for the state, if credible, showed that the homicide was committed by the accused without provocation or extenuating circumstances, while the evidence for the accused, if worthy of belief, showed that the homicide was justifiable, in that he killed the deceased to prevent him from committing a felonious assault upon the accused with a deadly weapon. The accused, in his statement made to the jury, admitted the killing, but claimed that the deceased, without provocation, had struck him on the head one time with an iron monkey wrench, and was endeavoring to strike him again with the same weapon, and that he shot the deceased to protect himself from such assault. This was the only admission of the killing made by the accused. The court instructed the jury as follows: The defendant "goes into the case, as I have charged you, remember, with a presumption of innocence; and remember, also, that if in the progress of the trial it shall have been shown at any time, or admitted to you, that the defendant did kill the deceased, as charged in the bill of indictment, that then the law presumes the killing to be murder, and that presumption remains and exists until, from the evidence in the case, it be shown

that a lower grade of homicide than murder is to be found against him, or that the facts and circumstances show a justifiable homicide."

One of the errors assigned upon this charge is that it in effect instructed the jury that a presumption of murder would arise from the admission by the accused that he committed the homicide, though he coupled such admission with "an explanation that might negative malice." As early as *Hudgins v. State*, 2 Ga. 173, 188, it was held: "The law presumes every homicide to be felonious, until the contrary appears from circumstances of alleviation, of excuse, or justification; and it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him." Similar rulings have since been frequently made by this court. See *Dorsey v. State*, 110 Ga. 331, 35 S. E. 651, and cases cited. In *Futch v. State*, 90 Ga. 472 (8), 16 S. E. 102, it was held: "If the accused admits the killing with a deadly weapon, but adds an explanation which might negative malice, no presumption that the homicide was murder would arise on such admission; but, if no explanation were added tending to reduce the grade of the homicide, that presumption would arise." As was said in the opinion in that case: "That part of the statement which, if unexplained, would criminate, although it could be received as evidence of the fact it admitted, could not, to the exclusion of another part which qualified and explained it, create a presumption that the accused was actuated by malice and was guilty of murder." Mr. Justice Evans, in *Owens v. State*, 120 Ga. 299, 48 S. E. 21, basing his remarks on the *Futch Case*, said: "Murder does not consist merely in the killing of a human being. The killing must be done with malice. When the fact of the killing is shown, and the evidence adduced to establish the killing shows neither circumstances of justification nor alleviation, malice may be inferred. Likewise, if the statement of the defendant admits the homicide without explanation, malice may be inferred from such admission. But if at the time of the admission the homicide is justified, such qualification of the admission of the homicide robs it of the vital element of murder." We think it clear that the exception to the charge was well taken. The error was harmful to the accused, and a new trial must be awarded.

Complaint was made of several other instructions given by the court to the jury; but we deem it unnecessary to deal with them, as there is to be another trial, and our learned brother of the trial bench will doubtless then correct any inaccuracies that may have appeared in the charges upon which error was assigned.

Judgment reversed. All the Justices concurring.

(124 Ga. 25)

SAMS v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—SELF-DEFENSE.

One who provokes a difficulty may yet defend himself against violence on the part of the one provoked, if the violence be disproportionate to the seriousness of the provocation, or greater in degree than the law recognizes as justifiable under the circumstances.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 145.]

2. SAME—INSTRUCTIONS.

Except in so far as the charge of the court conflicted with the ruling announced in the preceding note, there was no error on the trial to which exception was properly taken.

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Chand Sams was convicted of shooting at another, and brings error. Reversed.

J. W. Wise and J. W. Culpepper, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

CANDLER, J. The accused was tried under an indictment charging him with assault with intent to murder, and was found guilty of the statutory offense of shooting at another. He made a motion for a new trial, which was overruled, and he excepted.

1. The evidence showed that the accused fired several shots from a rifle at one Frank Porter; one of the shots striking Porter in the leg. There was also evidence for the accused to the effect that Porter was the aggressor, that he threatened the life of the accused and opened fire upon him at the time of the difficulty, and that the accused shot only in self-defense. This, however, was contradicted by the witnesses for the state. The judge charged the jury: "If in this case, gentlemen of the jury, Frank Porter did make an assault upon the defendant, or if he was attempting to make a serious personal injury amounting to a felony on the person of this defendant, or if Frank Porter's conduct—his acts—at the time of the shooting was such as to cause a reasonable man to fear a felony was about to be inflicted upon him, if the circumstances and conduct of the defendant at the time were sufficient to authorize Frank Porter to make the assault upon him, then he would not be justifiable, because no act of Frank Porter in the matter would itself, if the act was brought about by the act of the defendant, justify the defendant, and that act would be no justification of the defendant." While this charge is undoubtedly open to the objection made against it that it was confusing in its tendency, we are not prepared to hold that it was sufficiently so to require the grant of a new trial on that ground. A more serious objection to it, and one which was duly made in the motion for a new trial, is that the concluding clause of the charge, viz., "no

act of Frank Porter in the matter would itself, if the act was brought about by the act of the defendant, justify the defendant," does not correctly state the law applicable to the case. Undoubtedly, if one provoke a difficulty, and the person provoked resent the affront offered in such manner and to such an extent as the law recognizes as reasonable and justifiable, the other party to the difficulty will not be justified in repelling by force an assault for which he was directly responsible. Thus, if A. draw a knife and advance in a threatening manner upon B., the fact that B., upon such provocation, drew a pistol and fired upon A., would not justify A. in killing or wounding B. But, if the resentment of the party provoked is disproportionate to the seriousness of the provocation, the same rule would not apply. It must be such resentment as a reasonable man would indulge; and, if it surpass that, the other party, even though he may have provoked the difficulty, would have the right to defend himself against threatened injury. To pursue the illustration already given, if A. speak contemptuously or insultingly to B., or advance upon him in a threatening manner, but not under such circumstances as to give reasonable apprehension of serious bodily harm, B. would have no right to attempt to take the life of A., and, if he did so, A. would have the right to repel the attempt, though it were necessary to take B.'s life in doing so. This principle has been announced repeatedly in the decisions of this court. See *Boatwright v. State*, 89 Ga. 140, 15 S. E. 21; *Butler v. State*, 92 Ga. 606, 19 S. E. 51; *Fussell v. State*, 94 Ga. 78, 19 S. E. 891; *Barton v. State*, 96 Ga. 435, 23 S. E. 827. In the present case there was evidence from which the jury might have inferred that Porter, the man alleged to have been assaulted by the accused, fired the first shot on account of the fact that the accused had, on the previous day, attempted to induce Porter's wife to have sexual intercourse with him, and the effect of the charge complained of might have been to lead the jury to believe that, if the accused had provoked the difficulty by reason of the conduct referred to, Porter had the right to fire at him, while the accused had no right to defend himself from the assault. The charge excepted to was clearly erroneous, and was cause for a new trial.

2. The remaining grounds of the motion for a new trial disclose no grounds for reversing the judgment of the lower court. The charge to the effect that the man whom the accused shot was justified in assaulting the accused with a deadly weapon, if the assault was necessary to prevent the commission of a felony by the accused on the wife of the other combatant, was not warranted by any view of the evidence; but the motion does not attack it on this ground, and the assignment of error made is with-

out merit. There was ample evidence to authorize the charge on the subject of mutual combat, and it and the other charges complained of were, so far as appears from the record, free from error. The case is sent back for another trial, solely on account of the error pointed out in the first division of this opinion.

Judgment reversed. All the Justices concurring.

(124 Ga. 10)

NOLLY v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

HOMICIDE—EVIDENCE—INVOLUNTARY MANSLAUGHTER.

The accused was indicted for murder, and was found guilty of involuntary manslaughter in the commission of an unlawful act. The motion for a new trial does not complain of any error of law on the part of the trial judge, but contends that the verdict was illegal, in that the evidence did not permit of an intermediate verdict between an acquittal and a conviction of murder. There was evidence from which the jury were authorized to find that the accused, without any intention to shoot any one, carelessly fired his pistol in the general direction of a crowd of persons, of which the deceased was one, and that the deceased was shot and killed; that at the time he shot he was standing at the side of a public road; and that the time of the shooting was at night. It was, therefore, not erroneous to refuse to grant a new trial. *Stovall v. State*, 32 S. E. 586, 106 Ga. 443, is not in point, as in that case it appeared that the accused shot at the deceased, but disclaimed any intention to wound him fatally.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Ted Nolly was convicted of involuntary manslaughter, and brings error. Affirmed.

G. H. Cornwell and Green F. Johnson, for plaintiff in error. J. E. Pottle, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 24)

BUFFINGTON v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. LARCENY—INDICTMENT.

It is essential to the validity of an indictment for larceny that the ownership of the property, if known, be laid in some person or persons.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 82.]

2. SAME—OWNERSHIP.

If the indictment lays the ownership of the goods alleged to have been stolen in a partnership, without alleging the names of the partners composing the firm, it is fatally defective. 12 Enc. Pl. & Pr. 967; *Clark's Cr. Proc.* 228; *People v. Bogart*, 86 Cal. 245. See *Mattox v. State*, 41 S. E. 709, 115 Ga. 219.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 84.]

3. SAME.

The name "Stewart & Reece" imports a partnership, and therefore an indictment for larceny, wherein the ownership of the goods alleged to have been stolen was laid in "one Stewart & Reece," without more, should have been held bad, on special demurrer directed to this defect therein.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Harper Hamilton, Judge.

Marvin Buffington was convicted of larceny, and brings error. Reversed.

M. B. Eubanks, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

FISH, C. J. Judgment reversed. All the Justices concurring.

(124 Ga. 3)

HAMPTON v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. CHATTEL MORTGAGE—GROWING CROPS—DESCRIPTION.

A mortgage on "12 acres of cotton," without any further description, does not sufficiently specify the property upon which it is to take effect. *Civ. Code* 1895, § 2724; *Atkins v. Paul*, 67 Ga. 97; *Osborne v. Rice*, 83 S. E. 54, 107 Ga. 281; *Thomas Furniture Co. v. T. & C. Furniture Co.*, 48 S. E. 333, 120 Ga. 879. See, also, *Broach v. O'Neal*, 20 S. E. 113, 94 Ga. 474; *Stephens v. Tucker*, 55 Ga. 543.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 93.]

2. SAME—FRAUDULENT SALE—INDICTMENT.

An indictment for the wrongful sale of mortgaged property charged that the accused on a given date executed to the prosecutor a mortgage on "12 acres of cotton," to secure a specified debt, and thereafter, without the consent of the mortgagee, sold and disposed "of all the cotton raised on the said 12 acres in said mortgage deed described," with intent to defraud, etc. Held, that a demurrer on the ground of the insufficiency of the description of the property alleged to have been mortgaged and sold should have been sustained.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Harper Hamilton, Judge.

W. A. Hampton was convicted of illegally selling mortgaged property, and brings error. Reversed.

M. B. Eubanks, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

FISH, C. J. Judgment reversed. All the Justices concur.

(124 Ga. 6)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

There was sufficient evidence to authorize the verdict; and, the presiding judge having refused a new trial and no error of law being assigned, this court will not interfere.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Jack Williams was convicted of crime, and brings error. Affirmed.

Wm. Harper, for plaintiff in error. F. A. Hooper, Sol. Gen., for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 8)

NELSON v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

CRIMINAL LAW—TRIAL—INSTRUCTIONS.

The charge complained of really amounted to an intimation or expression by the judge as to what had been proved in the case, and, so construed, a new trial is required under that provision of law which prohibits a judge from expressing or intimating to a jury what has or has not been proved in the case.

(Syllabus by the Court.)

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Elymus Nelson was convicted of larceny, and brings error. Reversed.

Nelson was tried upon an indictment charging him with the offense of hog stealing, and was convicted, and to a judgment overruling his motion for a new trial he excepts. Error is assigned in the motion upon the following charge: "Now the state contends, gentlemen of the jury, that upon the date named in the indictment, and in the manner and form therein set forth, that this defendant took and carried away, with intent to steal, one certain described hog, being the property of the prosecutor, Mr. E. E. Foy. The state contends that that contention has been sustained by the evidence introduced on behalf of the state by the various witnesses that the state has sworn in the case, and also by facts and circumstances that have developed from the defendant's witnesses, and from the defense set up in the case. Now, among other things, the state contends that the indictment has been sustained by the testimony of one Mr. Hunter, who says that he had marked a number of hogs for the prosecutor; that he was familiar with his mark, and that the hog that is in question was inspected by him in company with Mr. Hurst; and that the hog was in the mark of Mr. Foy. The state contends that this contention has been proved or sustained by the testimony of Mr. Hurst. You have heard this testimony. It is contended that he went with Mr. Hunter, and saw the hog in question in the pen of the defendant; that the hog was one with which he was very familiar, having known it from its earliest infancy; that he had marked the identical hog, knew its flesh mark, its color, and that it was the hog of Mr. Foy." This charge is alleged to be erroneous for several reasons, among them being that it contained an intimation of opinion by the court to the jury, and that it is argumentative, and singled out issues of fact.

J. H. Smith, R. F. C. Smith, and Strange & Strange, for plaintiff in error. Livingston Kenan, Sol. Gen., for the State.

COBB, P. J. "The office of a charge by the court is to give to the jury such instruction touching the rules of law pertinent to the issues involved in the pending trial as will enable them intelligently to apply thereto the evidence submitted, and from the two constituents, law and facts, make a verdict. In delivering his charge the trial judge should carefully avoid an invasion of the province of the jury. He should refer to the evidence only so far as is necessary to present the leading issues of the cause, leaving the minor contentions of opposing counsel to the consideration of the jury under appropriate general instructions. It should contain no such summary of the evidence as might to the jury seem either to be an argument or amount to the expression or intimation of an opinion thereon." *Thomas v. State*, 95 Ga. 484, 22 S. E. 315. It was held in the case from which the above quotation was made that it was error for the presiding judge to repeat the substance of the testimony of the state's witnesses, and submit these with the argumentative deductions therefrom by the state's counsel as issues in the case. The judge should not in his charge take up and recapitulate in detail the testimony of the witnesses as it was delivered from the stand, in such a way as is calculated to leave the impression upon the minds of the jury that the testimony of such witnesses has established the fact contended for by one of the parties, or that such testimony is of a nature that it is entitled to more consideration than other testimony in the case. *McVicker v. Conkle*, 96 Ga. 597, 24 S. E. 23. The ruling in the case just cited practically goes to the extent of holding that it is error for the judge to state to the jury what a witness has testified, such a statement being in effect an expression of opinion as to what has been proved. *Suddeth v. The State*, 112 Ga. 400, 37 S. E. 747.

The use of the expression "it is contended," or similar phrases, will not in all cases have the effect to relieve a charge detailing the evidence of a particular witness or witnesses from an objection that it amounts to an expression or intimation of opinion. *Smith v. Hazelhurst*, 122 Ga. 792, 50 S. E. 917. We think that the charge under consideration was liable, not only to leave the impression upon the minds of the jury that the facts testified to by the witnesses named had been established, but also that the testimony of such witnesses was entitled to more consideration than that of other witnesses, who were not named or referred to in the charge. The case is at best upon the evidence close and doubtful, and the error in the charge is in our opinion such as to require a reversal of the judgment refusing to grant a new trial.

Judgment reversed. All the Justices concurring.

(58 W. Va. 122)

CITY OF GRAFTON v. HOLT, Judge.

(Supreme Court of Appeals of West Virginia.
Oct. 31, 1905.)

1. JUDGE—DISQUALIFICATION.

A judge, who is a quasi party to a suit in equity under the description of the bill filed by certain named plaintiffs suing on behalf of themselves and all others similarly situated, and who will be bound by or has the right to come into the suit and take the benefit of the decree which may be pronounced therein, and thereby derive a pecuniary benefit, is disqualified from acting as judge in the hearing and determination of the suit.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, §§ 190-207.]

2. PROHIBITION—ORDER—DISQUALIFICATION OF JUDGE.

An order made by such judge awarding a temporary injunction in such suit is not void, but voidable, and the order cannot be vacated or annulled, or its enforcement prevented by writ of prohibition, on the ground alone that the judge was disqualified by reason of interest at the time he entered the order.

3. TAXATION—WATER RATES.

Water rates exacted by a public corporation from actual consumers are not taxes, but merely the price of a commodity.

(Syllabus by the Court.)

Petition by the city of Grafton for writ of prohibition to John Homer Holt, judge of the circuit court of Taylor county. Writ granted.

Dent & Dent and Eugene Somerville, for petitioner. J. L. Hechmer, O. P. Guard, and Ira E. Robinson, for respondent.

COX, J. This is a petition by the city of Grafton for a writ of prohibition to prohibit Hon. John Homer Holt, judge of the circuit court of Taylor county, from interfering with the city in the management and control of its waterworks plant, and from fixing the rates that said city shall charge consumers of water, and from preventing the city from shutting off the water from such consumers as refuse to pay therefor.

The city of Grafton under its charter authority owns the waterworks supplying the inhabitants and others of the city with water for compensation. On the 27th day of May, 1905, the city, upon recommendation of a committee of its council, adopted a schedule of rates for water to be charged the consumers, uniform as to each class of consumers, but increasing the rates theretofore charged. The increased rates were afterwards embodied in a formal ordinance adopted by the common council, and were required to be collected from and after July 1, 1905. It is claimed that this formal ordinance was not adopted until after the 1st of July, 1905, but that is immaterial here. After the adoption of the new schedule of rates a bill was filed in the circuit court of Taylor county by George M. Whitescarver and certain other persons named, citizens, taxpayers, and consumers of water, on behalf of themselves and the other citizens, taxpayers, and consumers of water of said city, similarly situated, against the city as defendant, for the purpose

of setting aside the order of the common council increasing the water rates, and for an accounting to ascertain the amount justly payable, applicable to all consumers of the same class with the plaintiffs, and for the purpose of restraining the city, its officers and agents from shutting off the water on the premises of the plaintiffs, and the other inhabitants of the city similarly situated; it being alleged in the bill that the city is threatening to turn off the water for failure to pay the increased water rates. Upon presentation of this bill to the said judge of the circuit court on the 8th day of July, 1905, a temporary injunction was awarded, practically as prayed for. Afterwards, on the 12th day of July, 1905, pursuant to notice, a motion was made by the defendant city to dissolve the injunction on the ground, among others, that the said judge was without legal authority to act in the suit by reason of being a consumer of water within the city and personally interested in the subject-matter of the litigation. The motion to dissolve was overruled by Judge Holt in vacation, and this proceeding followed.

The petition proceeds upon the theory that Judge Holt, being a consumer of water supplied by the city waterworks, is in the same situation as the plaintiffs in said bill, and disqualified from acting as judge in that suit, or touching the subject-matter of that litigation, by reason of interest. The fact is not denied, but conceded, that Judge Holt is a consumer of water from the city waterworks, and in the same situation as the plaintiffs in said bill, although not made a party therein by name. The first question for us to determine is whether or not Judge Holt, being so situated, is disqualified by reason of interest from acting as judge in that suit. In order to disqualify, the interest of the judge must not be merely an interest in the legal question involved in the suit, but an interest in the subject-matter to be determined thereby. *Forest Coal Co. v. Doolittle, Judge, etc.*, 54 W. Va. 210, 46 S. E. 238.

We must see if this is the kind of a suit which, if maintainable at all, could be maintained by the plaintiffs named, suing on behalf of themselves and all others similarly situated. The general equity rule is that all parties in interest must be before the court; but there are certain exceptions to this rule, which are as clearly established and as well settled as the rule itself. In cases to which the exceptions apply one or more persons representing a class or common interest or common rights are permitted to sue on behalf of themselves and all others in the same situation. The exceptions to the rule have grown up as matters of necessity to meet the ends of justice. To undertake to review all the authorities defining and sustaining the exceptions would be impracticable in this opinion. We shall content ourselves with the citation of a few of those most pertinent to the case at hand: "The rule requiring all

parties interested in the subject-matter or object of the suit to be made parties, however numerous, is relaxed when its observance becomes extremely difficult or inconvenient, and a person holding a common interest with numerous others may sue in his own name in behalf of himself and such other persons without joining them in the suit." Hogg's Equity Proced. § 39. "In some cases the persons who hold a common relation to the subject are so numerous that to attempt to unite them all in one suit would be, even if practicable, very inconvenient, and would subject the proceedings to the danger of perpetual abatement and other impediments from intermediate deaths, marriages, incompetency, or change of interests. * * * In such cases the court will allow a bill to be brought by some of the parties on behalf of themselves and all others, taking care that there shall be a due representation of all substantial interests before the court." Bart. Ch. Prac. § 47. A clear statement of exceptions is contained in Judge Story's work on Equity Pleading. This eminent author says: "The most usual cases arranging themselves under this head of exceptions are: (1) Where the question is one of common or general interest, and one or more sue or defend for the benefit of the whole. (2) Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole. (3) Where the parties are very numerous, and, although they have or may have separate, distinct interests, yet it is impracticable to bring them all before the court." In speaking of the third class of cases mentioned above, the same author says: "In this class of cases there is usually a privity of interest between the parties; but such a privity is not the foundation of the exception. On the contrary, it is sustained in some cases where no such privity exists. However, in all of them there always exists a common interest or a common right, which the bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish or to narrow or take away. * * * In all these classes of cases it is apparent that all the parties stand, or are supposed to stand, in the same situation, and have one common right or one common interest, the operation and protection of which will be for the common benefit of all and cannot be to the injury of any. It is under such circumstances and with such objects that the bill is permitted to be filed by a few on behalf of themselves and all others, or against a few and yet to bind the rights and interests of the others." Story's Equity Pl. §§ 97, 120, 128. As bearing upon and sustaining the exceptions mentioned, see *Smith et al. v. Swormstedt et al.*, 16 How. 288, 14 L. Ed. 942; *Beech on Inj.* 363; *Railroad Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; 2 *Spelling on Inj.* 973; 15 Enc. Pl. & Prac. 629; *Fletcher, Eq. Pl. & Pr.* § 26; 1 *Daniels, Ch. Pl. & Pr.*

238; *Bull v. Read*, 18 Grat. 86. Where such suit in equity is permitted under the exceptions, the bill must show that it is brought on behalf of those whom the plaintiffs represent, and sufficient parties must be before the court to enable it to fairly and fully adjudicate the questions involved. It seems clear to us that the suit of *Whitescarver et al. v. City of Grafton* comes within the exceptions, and that the suit, if maintainable at all, is maintainable by the plaintiffs, suing on behalf of themselves and all others in the same situation. All consumers have a common interest, a common right, in the subject-matter of the litigation. The number of consumers is large. To require all of them to be before the court would occasion great inconvenience, if not a practical denial of the right to have the subject-matter adjudicated and determined.

Having decided that the suit in equity, if maintainable at all, was properly brought by the plaintiffs on their own behalf and on behalf of all others in the same situation, we have yet to determine what is the character of the interest of Judge Holt, standing in the same situation as the plaintiffs named. In such a suit a person standing in the same situation as the plaintiff is termed a quasi party, and for many purposes has the right of an actual party. 15 Enc. Pl. & Pr. p. 635. It seems that such person is bound by the decree which may be pronounced in the suit, although he does not come into the suit before the decree. This is true in those jurisdictions which, like ours, have no equity rules requiring that the decree be without prejudice to the party standing in the same situation, but not named, unless such party come into the suit before the decree. 15 Enc. Pl. & Pr. 635; *Story's Eq. Pl.* 135. But, whether a quasi party is bound by the decree or not, he has the right to come into the suit at any time before the decree and take the benefit of it. 15 Enc. Pl. & Pr. 636. This being true, Judge Holt has the right in that suit to come in and take the benefit of any decree which may be pronounced therein. In either case he has a disqualifying interest. The right (a right of value) to come in and take the benefit of the decree constitutes a disqualifying interest as much as if he were bound by the decree without coming in. Otherwise, we have the anomalous situation of a judge sitting on the hearing of a case in which he has the right to come in and take the benefit of the decree pronounced by him and thereby derive a pecuniary benefit. It may be said that Judge Holt has signified no intention of coming into the suit and taking the benefit of the decree, but this is immaterial. The mere fact that he has the right to do so disqualifies. *Findley v. Smith*, 42 W. Va. 299, 28 S. E. 370; *Forest Coal Co. v. Doolittle, Judge, et al.*, supra; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. Suitors are entitled to a fair and impartial judgment upon the

matters in litigation, and to have that judgment pronounced by a fair and impartial tribunal. Otherwise, courts of justice are but mockeries, and their judgments are without credit or respect. The maxim of the common law, "Nemo debet esse iudex in propria causa," remains inviolate in this state.

It is claimed, however, that Judge Holt is qualified by reason of our statute (Code 1899, p. 1106), which provides that no judge of any court shall be disqualified from performing his official duties with respect to any cause by reason of the fact that he is a citizen and a taxpayer of the municipal corporation which is interested in or is a party to such cause. In order for this provision to render Judge Holt qualified to act in that suit, it must be assumed that the rates of charge for water are taxes, and that Judge Holt is only interested in common with the other taxpayers of the city in resisting the payment of taxes. We cannot give assent to that proposition. Water rates exacted by a public corporation from actual consumers are not taxes, but are merely the price of a commodity. The charges for water do not constitute a uniform assessment against all or any persons or property within the city. It is wholly optional with the consumer whether or not he will take water from the city waterworks. All of the inhabitants may refuse to do so, and in that event the water rates cannot be collected from them. The city is empowered under its charter to deal in a public utility, and it charges and collects therefor in the same manner as an individual or private corporation engaged in the same business. 30 Am. & Eng. Enc. of Law, 422; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *Dillon's Munic. Corp.* 821; *Prov. Sav. Inst. v. Jersey City*, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102; 1 *Cooley on Taxation*, 5.

It is contended by the petitioner that the writ of prohibition should issue in this proceeding, operating to vacate and annul the order awarding the temporary injunction, on the grounds that the judge was disqualified when he made the order and that there is no equity in the bill. Notwithstanding the fact that Judge Holt was disqualified at the time he made the order awarding the injunction, the order is not void, but voidable. *Forest Coal Co. v. Doolittle*, Judge, etc., *supra*; *Findley v. Smith*, *supra*; *Moses v. Julian*, *supra*; 17 Am. & Eng. Enc. of Law, 742. A writ of prohibition cannot be made a process for the correction of errors and take the place of an appeal or writ of error. *County Court v. Boreman*, 34 W. Va. 362, 12 S. E. 490; *State v. Kyle*, 8 W. Va. 711; *Sperry v. Sanders*, 50 W. Va. 70, 40 S. E. 327; *McConaha v. Guthrie*, 21 W. Va. 140; *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 443; *N. & W. Railway Co. v. Pinnacle Coal Co.*,

44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414; *Yates v. Taylor County Court*, 47 W. Va. 376, 35 S. E. 24; *Morley v. Godfrey*, 54 W. Va. 54, 46 S. E. 185. A number of our cases hold that, where there is a total want of jurisdiction and the judgment is void, the enforcement of the judgment may be prevented by a writ of prohibition; but those cases do not apply here, where the order complained of is only voidable and we have not examined the bill for the purpose of seeing whether it is with or without equity. If it be without equity, or if the order complained of may be avoided, the city of Grafton has another plain and adequate remedy.

This proceeding was argued and submitted at the September term, 1905, of this court. On the 18th of October, 1905, being the first day of this special term, the city of Grafton, pursuant to notice, made a motion to strike out the answer of Judge Holt in this proceeding as being frivolous, impertinent, and scandalous, and as being foreign to a proper defense. The record does not disclose that any motion was made to strike out the answer previous to or at the hearing and submission of this proceeding, and such motion now comes too late to be considered. It follows from what we have said that a writ of prohibition must be awarded restraining the Honorable John Homer Holt, judge of the circuit court of Taylor county, from further acting as judge in the hearing and determination of said chancery suit, but not from entering such orders as shall be necessary to bring the suit to a hearing and determination before a qualified court or judge.

In awarding this writ we do so without in any way reflecting upon Judge Holt. He no doubt was perfectly honest and sincere in the belief that he was qualified to sit in the suit mentioned and that it was his duty to do so. It is often a question of grave doubt as to the qualification of a judge, and he should not refuse to sit when qualified, any more than he should insist on sitting when disqualified.

(38 W. Va. 119)

SWIGER v. SWIGER.

(Supreme Court of Appeals of West Virginia.
Oct. 22, 1905.)

1. APPEAL—DISMISSAL—NEW PETITION.

When an appeal and supersedeas have been dismissed under rule 3, of the Supreme Court (45 S. E. viii), a new petition, reciting the fact of the former petition and allowance and dismissal, and referring to the assignments of error contained in the former petition, and making them a part of the new petition, is sufficient upon which to allow an appeal, although such new petition prays "that said order of dismissal may be set aside, and that said appeal and supersedeas heretofore allowed may be renewed."

2. HUSBAND AND WIFE—CONVEYANCE TO WIFE—TITLE ACQUIRED.

Where a husband conveys land directly to his wife, not in fraud of his creditors, she takes only the equitable title, while the legal

title remains vested in the grantor in trust for his wife, the grantee.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 236.]

3. SAME—INCUMBRANCE BY HUSBAND.

In such case the husband cannot convey the legal title to another, or incur the same by deed of trust or otherwise.

4. ACKNOWLEDGMENT—CERTIFICATE.

The certificate of the acknowledgment of a deed imports verity, and cannot be overcome, except by clear and satisfactory proof. The evidence of the grantor denying the execution of the deed and the opinion of experts that the signature thereto is not that of the grantor, are not sufficient.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Acknowledgment, § 346.]

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County.

Bill by Nancy Swiger against Benoni A. Swiger and others. Decree for plaintiff, and Benoni A. Swiger appeals. Affirmed.

J. V. Blair and Davis & Davis, for appellant. M. R. Crouse and G. W. Farr, for appellee.

McWHORTER, J. Daniel Wright died seised of 89½ acres of land on Crane's Nest Run, in Tyler county, which descended to his eight children, subject to the dower of his widow, Prudence Wright. Nancy Wright married Benoni A. Swiger in 1857. After the death of Daniel, Nancy and her husband instituted a suit in the circuit court of Tyler county for partition of the land among the heirs and to assign the dower of Prudence Wright therein. In the partition there was assigned to Nancy lot No. 8, containing 9½ acres, of which 2 acres and a fraction were subject to the dower set apart to her mother, Prudence Wright. Benoni purchased the interests of all the heirs, except that of Nancy, his wife. On the 24th of September, 1888, B. A. Swiger conveyed to his wife, Nancy Swiger, in consideration of \$1,000, the said tract of 89½ acres, subject to the dower of Mrs. Wright in 6 acres of said tract. On the 1st day of December, 1890, said Nancy Swiger, by deed of that date, in consideration of \$1, granted, bargained, sold, and released to the said B. A. Swiger all her right, title, and interest in said 89½ acres of land, except the 9½ acres set apart to her by the commissioners of partition and decreed thereon, and also on the same day the said parties executed the following writing: "This indenture, made this the first day of December, one thousand eight hundred and ninety, between B. A. Swiger, of the first part, and Nancy Swiger, his wife, of the second part: Whereas, divers disputes and unhappy differences have arisen between the party of the first part and his wife, for which reason they have consented and agreed to live separate and apart from each other during their natural life: Now, therefore, this indenture witnesseth, that

the said party of the first part, in consideration of the premises, does hereby covenant, promise, and agree to and with his said wife at all times hereafter to live separate and apart from him, and that he shall and will allow and permit her to reside and be in such and such place or places, and in such family or families, and with such relations, friends, and other persons, and to follow and carry on such trade or business, as she may from time to time choose or think fit for living separate and apart from him, or compel her to live with him, nor sue, molest, disturb, or trouble any other person whomsoever for receiving, entertaining, or harboring her, and that he will not, without her consent, visit her or knowingly enter any house or places where she shall dwell, reside, or be, or send or cause to be sent any letter or message to her, nor shall or will at any time hereafter claim or demand any of her money, jewels, plate, clothing, household goods, furniture, or stock in trade, which she now has in her power, custody, or possession, or which she shall or may at any time hereafter have, buy, or procure, or which shall be devised or given to her, or that she may otherwise acquire, and that she shall and may enjoy and absolutely dispose of the same as if she was a feme sole and unmarried; and, further, the said party of the first part further agrees to deliver his wife one spotted cow and five pictures, small, and enlarged pictures in frame, and cupboard ware, all she desires. The said Nancy Swiger is to have full control of her daughter, Mary Margaret Swiger. In witness whereof, the said parties have hereunto affixed their hands and seals this first day of December, 1890. B. A. Swiger. [Seal.] Nancy Swiger. [Seal.]" Which was duly acknowledged on the day of its date, and recorded in the clerk's office of the county court of Tyler county on the 22d day of December, 1890. On the 10th of May, 1894, the said Benoni A. Swiger made to the South Penn Oil Company an oil and gas lease on said tract of land, calling it 90 acres, more or less, and by deed of August 10, 1898, said B. A. Swiger conveyed to said South Penn Oil Company the one-half of the one-eighth royalty reserved to the lessor, Swiger, in said lease of May 10, 1894.

On the 14th day of November, 1900, as stated in the petition for appeal, as well as in the appellant's brief, Nancy Swiger sued out of the clerk's office of the circuit court of Tyler county her subpoena in chancery, and at the January rules, 1901, filed her bill of complaint therein against Benoni A. Swiger, Nathan Knight, Emmanuel Elder, the South Penn Oil Company, a corporation, and the Eureka Pipe Line Company, a corporation, alleging her marriage to the said B. A. Swiger, and that the said 89½ acres, of which her father, Daniel Wright, died seised, became the property of herself and

her husband, he having purchased the interests of the other heirs, and alleging the conveyance to plaintiff by defendant B. A. Swiger of all his interest in said tract of 89½ acres of land by said deed of September 24, 1888, under which she was placed in possession of said land by her husband, whereby she became the owner in fee simple of the entire tract, subject to the dower of said Prudence Wright; that the plaintiff lived with her said husband on said land, exercising the rights of ownership thereof, until her husband, seeming to be desirous of getting possession of said property and the title thereto, began to insist upon plaintiff's reconveying said land to him or to one of his sons, which plaintiff declined to do, which state of affairs continued for some time, and, as it continued, her husband became more violent and abusive towards her, until by threats of personal violence and by personal violence to her forced her to leave home, which was about the summer of 1890, when he took forcible and unlawful possession of said tract of land, in spite of the entreaties of plaintiff to him to regard her rights in the premises; that after forcing her to leave her home he continued his threats of violence and abuse toward plaintiff until he coerced her, by intimidation and through fear of him, into executing the paper writing dated the 1st day of December, 1890, purporting to be a deed for said tract of land, except the 9 acres; that plaintiff was about 65 years of age, frail and delicate, almost blind, and illiterate, and did not know at the time she executed said deed of December 1, 1890, what her rights were in the premises, and, being afraid of him, was afraid to inquire, and that not until quite recently, within two years, was she apprised of what her rights in the premises were; that she brought the ejectment suit and this suit at the risk of her life, because her husband was a smart, scheming, and unscrupulous man, and regarded as a dangerous man when angry at a person or seeking to accomplish his ends; that he was a dangerous and quarrelsome man, and had been engaged in lawsuits more or less all of his life, and also a strong, able-bodied man; that shortly after he forced her to execute the deed of December 1, 1890, he gave an oil and gas lease on said land, receiving a large sum of money as a bonus, and had received rentals, etc., in all aggregating \$1,000 or more; that defendant sold a large amount of trees and lumber off of said land, which trees and lumber were worth at least \$1,000; that he afterwards sold and conveyed to the South Penn Oil Company one-half of the one-eighth royalty oil reserved by him in the lease for the sum of \$500; that he conveyed by deed to Nathan Knight six acres of said tract of land—alleging that said deed from plaintiff to defendant of December 1, 1890, and defendant's lease to

the South Penn Oil Company, and his deed conveying one-half of the royalty oil reserved in said lease, and his deed to Nathan Knight for the six acres, part of said tract of land, are clouds upon the title of plaintiff, which she was entitled to have removed by a court of equity, and accordingly prayed therefor and for general relief.

The defendant Benoni A. Swiger filed his demurrer, and also his answer, denying the allegations of the bill alleging his mistreatment of the plaintiff and the threats against her, and averring that the deed dated December 1, 1890, from his wife to himself was a free act on her part, and filed, with his answer, as an exhibit, another writing, bearing date the 1st day of December, 1890, styled an "indenture," executed by himself and the plaintiff, purporting to be an article of compromise, which paper is copied in the early part of this opinion. Defendant denied that he made, signed, acknowledged, executed, and delivered the deed of September 24, 1888, and averred that the same was a forgery, "procured and caused to be made and falsely certified, through and by the acts, solicitations, connivances, and deceptions of the said Nancy Swiger and Jacob Swiger, son of plaintiff and defendant, who confederated and conspired together, as respondent is informed, and by false representations, personations, and otherwise induced and deceitfully caused the notary, Amaziah Ashburn, to write said deed, to which the said Jacob, as respondent is informed, wrote, signed, and forged the name of 'B. A. Swiger,' after which the said Nancy and Jacob wrongfully and deceitfully procured the false and untrue certificate of said notary thereto, with intent and purpose on the part of said Nancy and son Jacob to cheat and defraud this respondent; that the making of said deed was kept secret from this respondent for a long time; that it was not, in fact, admitted to record until, to wit, the 22d day of January, 1889; that immediately upon receiving some information that such writing was in existence respondent began to make inquiry and investigation, and to his surprise and astonishment he ascertained that such writing had been made as hereinbefore stated;" that he went to plaintiff, and she denied that any deed had been made; that he then went to the county clerk's office and found it on record, after which he saw plaintiff and so informed her, when she admitted that such writing was made in his absence; that she and her son had caused it to be made, only intending to use it in the event that anything should happen respondent—should he die or not return home. Respondent denied that any of the bonus, rentals, or other moneys that came to his hands by reason of or under or by virtue of said oil lease and gas lease, said royalty grant, proceeds on oil, gas, timber, or otherwise be longed to plaintiff, and denied that an accounting therefor should be ordered, and prayed that said land, 89½ acres, except said

lot No. 8 and said dower interest, might be held and decreed to be the property of respondent, free and acquit from the claim of plaintiff; that said lease and royalty grant and the said Knight deed might be held firm and stable; that said writing purporting to be a deed dated the 24th day of September, 1888, from respondent to plaintiff, might be decreed null and void and set aside; and that plaintiff might be forever enjoined and restrained from using said writing or claiming title thereunder, and for general relief.

The plaintiff filed her demurrer to the affirmative matter set up in said answer and cross-bill, and her answer and special replication thereto, denying the allegations of said answer and cross-bill setting up new matter. The South Penn Oil Company also filed its answer.

Many depositions were taken and filed on behalf of the plaintiff, as well as of the defendant Benoni A. Swiger, and the cause was finally heard on the 2d day of October, 1903, when the plaintiff replied generally to the answer and cross-bill of the defendant B. A. Swiger, except as to the affirmative matter, to which she had filed a special replication, which the defendant moved to strike from the record, which motion the court overruled. The court found that the plaintiff and defendant B. A. Swiger were husband and wife, and had never been divorced; that B. A. Swiger had made, executed, and delivered to plaintiff, Nancy Swiger, the deed of September 24, 1888, and that the same was not forged as charged in defendant's answer and cross-bill, and decreed that defendant B. A. Swiger was not entitled to the relief prayed for in his answer and cross-bill; that since this suit was brought the said Nancy Swiger, the South Penn Oil Company, and Nathan Knight had separately compromised the matters and differences between them in regard to their respective interests and purchases of said tract of land, and the oil and gas therein, and that B. A. Swiger was then and had been in possession of said tract of land, except the part by him conveyed to Knight, embraced in the litigation in this cause, ever since the 1st of December, 1890, enjoying the rents, issues, and profits thereof, collecting bonuses made thereon, and selling timber thereon, and that said tract of land had produced a large amount of oil, and that a part thereof was by the South Penn Oil Company turned over to the defendant B. A. Swiger, before the institution of this suit and shortly thereafter, and further decreed that the plaintiff, Nancy Swiger, was entitled to the relief prayed for in her bill, and that she did not by deed dated December 1, 1890, pass to said B. A. Swiger her interest or right in and to the tract of land and property in controversy in this suit, and the court was further of opinion that said deed of December 1, 1890, was a cloud upon Nancy Swiger's right, title, and interest, and decreed that the same be set aside, annulled, and vacated

and held to be void, and that the said Nancy Swiger was the owner in equity of said tract of land, and the rents, issues, and profits thereof be subject to her compromise with the South Penn Oil Company and Nathan Knight and their respective interests, which had been theretofore compromised, and subject to the dower interest of Prudence Wright in about 4 acres, part of the 7 acres and 118 poles now owned by the defendant B. A. Swiger, and upon which well No. 1, drilled upon said farm, was located, and it was further decreed that the South Penn Oil Company or the Eureka Pipe Line Company turn over to M. R. Crouse and G. W. Farr, attorneys for Nancy Swiger, all the one-sixteenth part of the oil produced by the South Penn Oil Company since the 10th day of May, 1901, and yet to be produced from the tract of $89\frac{1}{2}$ acres of land which had been claimed by Benoni A. Swiger, and which had been held since the 10th day of May, 1901, the court being of opinion that Benoni A. Swiger did not own said oil, but that the same belonged to said Nancy Swiger, except the said oil company or pipe line company should turn over to Lathrop R. Charter, Jr., who was appointed as special receiver to receive the same, one sixteenth of all the oil produced since the 10th day of May, 1901, and yet to be produced during the life of Prudence Wright in well No. 1, drilled within the dower interest of the said Prudence Wright, and now owned by the defendant B. A. Swiger, and authorizing the special receiver to sell the production from well No. 1, and loan the proceeds thereof and pay the interest from such loans to the defendant B. A. Swiger or his assigns, during the lifetime of Prudence Wright, and upon the death of said Prudence, after the payment of legal charges and costs connected with the receivership, the principal derived from the sale of the production from said well No. 1 to be turned over to the attorneys for Nancy Swiger, and on motion of plaintiff the cause was referred to a commissioner to ascertain and report the share of oil due Nancy Swiger under the tract of land or already produced therefrom, by whom held, and the value thereof, if the same had not already been turned over, as before provided in said decree, by the said oil company, or pipe line company, or both of them, and said commissioner was also directed to ascertain and report the rental value of the surface of said tract of $89\frac{1}{2}$ acres of land per year from December 1, 1890, less a part thereof already conveyed to Nathan Knight, and who was liable for the rent thereof, and also to ascertain and report the amount of rentals, bonus money, and other money received by the defendant B. A. Swiger from the tract of land in controversy since December 1, 1890, and to ascertain and report the amount and value of the oil received by the said B. A. Swiger from said tract of land, and to state and settle the accounts between B. A. Swiger and Nancy Swiger, and also directed to credit

the said B. A. Swiger with any permanent improvement and the value thereof put upon said land since the 1st day of December, 1890, and also credit him with the taxes paid thereon, in so far as the same might be legally shown to exist before the commissioner. From this decree, defendant B. A. Swiger appealed.

Appellee contends that there is no appeal pending, and that on the 8th of September, 1904, an order was entered dismissing the appeal granted January 1, 1904, under rule 3 of the Supreme Court (45 S. E. viii), for failure to print the record. On the said 8th day of September, 1904, a supplemental petition was filed, making the original petition and assignment of errors and transcript of the record of the case a part of such supplemental petition, and prayed "that said order of dismissal may be set aside, that said appeal and supersedeas heretofore allowed may be reinstated, and said cause matured and heard by your honors." It is contended by appellee's counsel that the order granting the second appeal makes no reference to the order of dismissal, nor does it reinstate the cause, that it does not renew the appeal and supersedeas, and that the order entered is responsive to the prayer of the original petition, but not responsive to the prayer for appeal and supersedeas to be renewed. The fourth section of rule 3 of the Supreme Court provides: "An appeal or writ of error dismissed in accordance with this rule may be renewed upon presenting a new petition reciting the fact of the former petition and allowance and dismissal and referring to the assignments of error contained in the former petition." And the new petition, praying that the order of dismissal might be set aside, and that said appeal and supersedeas heretofore allowed may be renewed, complies with the rule, in that it refers to the former petition and assignments of error and the transcript of the record, and made them a part of said petition, and, the new petition being presented within two years from the date of the decree appealed from, the appeal was properly allowed.

Appellant says that the court erred in overruling his demurrer to the bill, first, because the bill's own allegation shows that the plaintiff had abandoned her husband and the land in the summer of 1890, and her suit was not brought until December 14, 1900, and the bill filed at January rules, 1901. More than 10 years having elapsed, her suit was barred. The subpoena in chancery was not copied into the record, but the petition for appeal says: "The summons was issued by the clerk of the circuit court of Tyler county, November 14, 1900, and the bill filed at rules held for said court on the first Monday in January, 1901." Section 5, c. 124, Code 1899, provides that "the process to commence a suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action." It has

been frequently held by this court that the date of the issuance of the writ is the commencement of the suit. See *United States Blow Pipe Company v. Spencer*, 46 W. Va. 590, 33 S. E. 342; *Lambert v. Manufacturing Company*, 42 W. Va. 813, 28 S. E. 431; *Abney v. Lumber Company*, 45 W. Va. 448, 32 S. E. 256. The allegations of the bill do not show that the plaintiff abandoned her husband and the land in the summer of 1890, but she alleges that after the execution of said deed of the 1st day of December, 1890, defendant drove her off the land, and she was forced to move onto the tract of land belonging to her mother in Doddridge county, and the proof is not certain as to when she actually left the place, and dates are given from about the 15th of December until March, 1901. The suit is not for a divorce nor for separation, nor does plaintiff pray for the possession of the land, to the exclusion of defendant, but that her property shall be restored to her possession and control, and the deed made by her of the 1st day of December, 1890, be set aside and annulled and held as void. There can be in this case no limitations in favor of B. A. Swiger, by adverse possession or otherwise, because his possession of the wife's land cannot be adverse to her interests, and the doctrine laid down in *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231, does not apply. That was not a contest between husband and wife, but between a married woman and an innocent purchaser for value from the purchaser from plaintiff, the married woman, when the husband had joined in the conveyance to the purchaser and the purchaser had conveyed to Casey, who had held the possession 13 years under color of title before Mrs. Randolph brought her suit. After the deed of September 24, 1888, from B. A. Swiger to Nancy Swiger, the possession by Swiger was that of trustee for his wife; his conveyance of September 24, 1888, being only a conveyance of the equitable title, and the legal title still remaining in B. A. Swiger for her benefit. In *Helakill v. Powell*, 23 W. Va. 717 (Syl., point 2), it is held: "When the relation of trustee and cestui que trust is once established, no subsequent dealing with the trust property by the trustee can relieve the property of the trust as between the trustee and the cestui que trust." And (point 3): "The bar of the statute of limitations will not be applied in equity to the enforcement of a claim of which equity alone has cognizance." And in *Cramer v. McSwords*, 24 W. Va. 594 (Syl., point 3), it is held: "In a suit in equity to enforce a purely equitable demand, the defense of the statute of limitations can have no application of itself or by analogy to any limitation in courts of law. Such cases must be determined by courts of equity upon rules and principles of their own." And point 5 is as follows: "While ignorance of law will not prevent the operation of the statute of limitations, the rule is different

in equity, a court of conscience. In such court moral, as well as legal, grounds may be considered, and a satisfactory moral excuse may be entertained, although it resulted from ignorance of law." See, also, *Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866; *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324. *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357 (Syl., point 1): "The claim of a wife against her husband is not barred by the statute of limitations during coverture, if at all, until 20 years from the original inception or written renewal thereof."

It is insisted by appellant that the demurrer ought to have been sustained for want of parties, and that B. Engle, trustee, and J. V. Blair the beneficiary under deeds of trust executed by B. A. Swiger upon the property, to secure certain debts of B. A. Swiger to said Blair, should have been made parties to the bill. *Robinson v. Dix*, 18 W. Va. 523, holds that "a demurrer to a bill for want of parties should properly name the necessary parties defendant who have been omitted, so as to enable the plaintiff to amend his bill and call the attention of the court to this defect, and, if it does not, the demurrer cannot complain that the demurrer is not sustained." The demurrer in the case at bar fails to mention want of proper parties. In *Thomas v. Wood*, 61 Ind. 132, it is held: "An objection to a complaint that there is a defect of parties should be taken by demurrer, where such defect appears upon the face of the complaint. * * * Where such defect does not appear upon the face of the complaint, the objection should be taken by answer. * * * Such objection, if not so made in court below, is thereby waived, and cannot be raised for the first time in the Supreme Court of Appeals." And in *Hutton v. Cuthbert*, 51 Mich. 229, 16 N. W. 386, it is held that "a defendant to a bill in equity cannot object to the omission to implead parties whose names they themselves will not disclose." It is not made to appear by any pleadings in the cause that Engle and Blair were necessary parties in the cause, nor that such trust deeds were in existence; but copies of two deeds of trust executed on said property by B. A. Swiger, one dated October 29, 1891, the other April 6, 1892, were filed as exhibits by the defendant with the deposition of Nathan Knight, taken and filed in the cause, which deeds of trust purport to secure on said property the indebtedness mentioned therein, due from B. A. Swiger, and it nowhere appears in the record that the indebtedness so secured or any part of it remains unpaid. Defendant was not competent to incur said property by deeds of trust, or otherwise; it being held in trust by him for Nancy Swiger. Section 1, c. 66, Code 1899; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421, 5 L. Ed. 651; *Chaffe v. Oliver* (C. C.) 3 Fed. 809; *Heiskell v. Powell*, supra; *Cranmer v.*

McSwords, supra; *Seborn v. Beckwith*, 30 W. Va. 774, 5 S. E. 450; *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405; *Mundy v. Vawter*, 8 Grat. 519; *Heth v. Railroad Co.*, 4 Grat. 482, 50 Am. Dec. 88. From the time of the conveyance by said B. A. Swiger to Nancy Swiger of September 24, 1888, the grantor became the trustee of Nancy, holding for her the legal title, which he could neither transfer nor incur, and the said deed, being of record, was notice to Engle and Blair, as well as all others, that he held such title only as trustee. Therefore the said deeds of trust were void. The deed of December 1, 1890, from Nancy to B. A. Swiger, was no protection to them, as the same was null and void.

But it is contended by appellant that the said deed of December 1, 1890, is aided by the compromise deed of the same date, signed, sealed, and acknowledged by both of them, when considered and construed together, as is proper to be done; and he cites 2 Pom. Eq. Juris. (2d Ed.) § 850, and also *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17, where it is held: "Where a compromise of a doubtful right made between parties, it is binding, and cannot be affected by any subsequent investigation or result; and this is so whether it is a compromise of doubtful question of law or fact." See section 850, just cited, that such compromise "will not be disturbed for any ordinary mistake, either of law or fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without judicial controversy." Such compromise, to be effective, must be fair and equitable. By the "terms of the deed of compromise" in case at bar, the only consideration passing from B. A. Swiger to his wife Nancy is "one spotted cow and five pictures, small, and enlarged pictures in frame, and cupboard ware, all she desire." By it he is relieved from all liability to assist or support the said Nancy Swiger, and he agrees to live separate and apart from her, and in no wise to interfere with her business or thereafter "claim or demand any of her money, jewels, plate, clothing, household goods, furniture, or stock in trade, which she now has in her power, custody or possession, which she shall or may at any time hereafter have, buy, or procure, or which shall be devised or given to her, or that she may otherwise acquire, and that she shall and may enjoy and absolutely dispose of the same as if she was a feme sole and unmarried." It would seem that the principal consideration for the deed of compromise and the conveyance of the land of December 1, 1890, was the solemn agreement on the part of the vendee to live separate and apart from his wife during their natural lives. If the evidence of his treatment of her is to be believed, that might be construed to be a consideration, or at least a benefit to her, in case her property was restored to her; but can it be said that one spotted cow and five cheap pictures and

some cupboard ware could be a sufficient consideration for the 80 acres of land conveyed by her to him? It does appear to me that this compromise is not fairly made, and is in no sense equitable and just.

The court is asked by the appellant to consider and construe together the deed of December 1, 1890, and the compromise deed of the same date. If there was any doubt about the deed of December 1, 1890, being inequitable and without consideration, the compromise deed executed on the same day would dispel all such doubt and make it clear that some improper influence was brought to bear to bring about its execution. The compromise deed, as far as appears upon its face, is entirely independent of the other deed, makes no reference to it or the land in any respect, but is simply an agreement to live separate and apart, not only relieving defendant from the support and care of his wife, whom he had pledged himself solemnly to love, cherish, and support, but casts upon the plaintiff, Nancy Swiger, the burden of the care and control of their daughter, Mary Margaret Swiger. In *Switzer v. Switzer*, 26 Grat. 574, it is held (Syl., point 2): "A contract between a husband and wife in an agreement for a separation cannot be sustained in any case in which it does not clearly appear that in the negotiation which preceded the agreement, as well as the time of executing the same, the wife was in a position in which she could act and did act, not only with perfect freedom, but with a full knowledge and appreciation of all the circumstances of her situation, and of her individual and marital rights; and the contract in itself must be fair and just, wholly free from exception, and such as a court of equity might have imposed upon the parties in a case in which their persons and their property had properly fallen under its jurisdiction and control." See, also, *McKenzie v. Railroad Company*, 27 W. Va. 306, 311. It cannot be said that this contract is fair and just, wholly free from exception, and such as a court of equity would impose upon the parties in a suit between them. In *Cheuvront v. Cheuvront*, 54 W. Va. 171, 46 S. E. 233 (Syl., point 3), it is held that "in a suit brought by a wife against the husband to set aside and cancel a deed or contract between them for fraud in its procurement, by which the husband obtained an advantage over her, the burden of proof is on the husband to show that the wife was fully informed as to the effects of the transaction, and also the utmost fairness thereof." The deed of December 1, 1890, conveying from plaintiff to defendant the land, recites as the consideration therefor one dollar, and there is almost no evidence of any other or further consideration. Not even the "spotted cow and five pictures" are mentioned in that deed. The defendant in his own deposition does make a lame attempt at trumping up a show of consideration, claiming the amount of \$881 as passing to his wife as a considera-

tion; but on cross-examination he fails to make a statement of it at all satisfactory. The burden of proof is on B. A. Swiger to show that his dealings were fair, just, and equitable, and this he has failed to show. *Cheuvront v. Cheuvront*, supra; *Darlington's Appeal*, 86 Pa. 512, 27 Am. Rep. 726.

It is insisted by appellant that the court erred in sustaining the deed of September 24, 1888, from B. A. Swiger to Nancy Swiger, claiming that the proof is clear that the same was a forgery. There is a vast amount of testimony as to the genuineness of the signature to this deed, and the evidence is very contradictory, scarcely a preponderance either the one way or the other, as to the signature. It is useless to go into a discussion of the evidence taken in the cause. Four witnesses, including the plaintiff, swear positively that they saw the deed delivered by defendant to plaintiff. Defendant examined quite a number of witnesses, some of whom testify that they did not believe the signature to be that of B. A. Swiger, while others say it looked like his, but they were not able to say whether it was his or not. On the other hand, many others testified that they believed it to be his genuine signature. There were very few who could be regarded as experts in the matter of handwriting, some of whom were of opinion that it was not the handwriting of defendant, while others, equally as well qualified as experts, were of the opinion that the signature was genuine. There are some circumstances which tend largely to prove the genuineness of the deed. It is not denied that the notary public, Amaziah Ashburn, certified the acknowledgment. In his answer defendant Swiger does not charge that Ashburn fraudulently made the certificate, but charges that plaintiff and her son, Jacob Swiger, conspiring together, had wrongfully and deceitfully procured the false and untrue certificate of said notary to said deed, "with intent and purpose on the part of said Nancy and son, Jacob, to cheat and defraud this respondent." There seems to have been no disposition on the part of plaintiff to conceal the fact that she had the deed, telling the fact, soon after she got it, that her husband had made a deed to her for the property, and within four months after its execution she placed it upon record. She says, and some other witnesses say, that she did so at his suggestion. He says in his answer, referring to the date of the recordation of said deed, "that immediately upon receipt of some information that such writing was in existence respondent began to make inquiry and investigation, and to his surprise and astonishment he ascertained that such writing had been made as hereinbefore stated." And in his testimony states that he first learned of the existence of the deed from his son in the wheat field, or at wheat harvest, in 1889. A very significant fact was brought out by the testimony of William M. Ashburn, who testified that he went to B. A. Swiger to

get a lease on the land on which Swiger lived; that they agreed on a lease; that was in the evening, and the next morning he went to Swiger, who told him the old lady objected to signing the lease; that he (Ashburn) went into the house to persuade her to sign the lease, as it was his business to get it, and while they were talking Swiger began talking to her, persuading her to sign it; that he went out of the house, or they went into another room; they were by themselves, anyhow. When he got with them again, she agreed to sign the lease and signed it. The lease was made to W. S. Furbee & Co. There is a lease filed as an exhibit with the depositions, dated November 15, 1888, made by Nancy Swiger to W. S. Furbee & Co. The lease taken by Ashburn, and which B. A. Swiger induced Nancy to sign, was not signed or executed by B. A. Swiger. What could have been the object of defendant Swiger in having Nancy Swiger to execute the lease, if he did not recognize the fact that it was her land? And if hers, it could only be such under the deed of September 24, 1888. Under this lease she reserved to herself the one-eighth part of the oil produced, and the lessee was to pay her \$200 per annum for each and every gas well drilled on the premises, payable within 60 days after the completion of said well, and the lease provided for a rental of 50 cents per acre to be paid to the lessor in case of certain delays mentioned. The evidence in relation to this lease is undenied in any particular by defendant Swiger. Jones on Evidence, § 237. "Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may reasonably be taken for the truth." So that it is made clear, and not denied by Swiger, that after he knew of the deed of September 24, 1888, he induced the plaintiff to lease the land as her own, and did not at that time lay claim to it, or question her right to lease it, but insisted upon her leasing it. "Where a certificate of acknowledgment is regular on its face, a strong presumption exists in favor of its truth, and the burden of proof rests on the party assailing it." 1 Cyc. 632; Rollins v. Menager, 22 W. Va. 461. In Kerr v. Russell, 69 Ill. 666, 18 Am. Rep. 634, it is held: "As a fine and recovery at common law was subject to impeachment for fraud, so the certificate of acknowledgment of a deed by a wife may be impeached; but the proof to sustain such charge must be of the clearest, strongest, and most convincing character and by disinterested witnesses." And in McPherson v. Sanborn, 88 Ill. 150: "Very clear and satisfactory proof is required to impeach a certificate of acknowledgment of a deed or mortgage." And in Tunison v. Chamblin, 88 Ill. 378, it is held: "The certificate of acknowledgment of a deed imports verity, and cannot be overcome, except by clear and satisfactory evidence. The evidence of the grantor denying the execution of the deed and the opinion of experts that the signature thereto is not

that of the grantor are not sufficient." See, also, Lickmon v. Harding, 85 Ill. 505. Judge Holt, in Machine Co. v. Burlack, 35 W. Va. 647, 657, 14 S. E. 319, 322, speaking of the delivery of instruments, says: "First, we must under such circumstances look to the thing done, and not to the thing said; and, second, a solemn deed is not to be exposed to the danger of falsehood and fraud, nor to the 'uncertain, slippery memory of man.'" The signature of Ashburn, the notary public, to the certificate of acknowledgment, is unquestioned, and there is no charge in the pleadings that the notary acted fraudulently, or that he did not make such certificate in good faith. The presumption is that he did his duty. The statute prescribes his duty in the premises, and the certificate is in accordance therewith; and when a duty is laid upon a public officer the presumption is that he performs it according to law, and the contrary must be shown by the objecting party. Lamb v. Cecil, 25 W. Va. 238. The notary, Ashburn, was dead before this litigation. Defendant B. A. Swiger testified that Dr. Amaziah Ashburn, the notary, had his son write a paper for him, which he signed, to the effect that defendant had never signed or acknowledged the deed before him, and that Lovina Swiger and Valentine Underwood testified that they were present when Francis did the writing, but did not know just what he wrote and gave to Benoni. But Francis, on the other hand, swears absolutely that no such thing ever took place, that he was not called upon by his father to do such writing, and that it was absolutely false. The defendant failed to produce any such writing, and failed to account satisfactorily for its non-production.

After a careful review of the whole cause, I am unable to see that the circuit court erred in its decree, and therefore the same is affirmed.

(58 W. Va. 146)

STATE v. MOYER.

(Supreme Court of Appeals of West Virginia.
Oct. 31, 1905.)

1. EMBEZZLEMENT—WHAT CONSTITUTES.

Embezzlement is a fraudulent appropriation or misapplication of the property of another by one in whose care it has been intrusted, with the intention of depriving the owner thereof.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 1-10.]

2. SAME.

Under section 19, c. 18, p. 89, acts 1903, in order to constitute the crime of embezzlement it is necessary to show (1) the trust relation of the person charged, and that he falls within that class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession or was placed in the care of the accused under and by virtue of his office, place, or employment; (5) that his manner of dealing with or disposing of the property constitut-

ed a fraudulent conversion and an appropriation of the same to his own use; and (G) that the conversion of the property to his own use was with the intent to deprive the owner thereof.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 1-10.]

3. SAME—DETENTION OF MONEY.

The mere detention of money belonging to another, without a fraudulent intent to deprive that other of his property, does not constitute embezzlement.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 8.]

4. SAME—EVIDENCE.

On a trial for embezzlement, evidence of the solvency of the defendant, at or immediately prior to the time of the alleged embezzlement, is admissible.

5. CRIMINAL LAW — GOOD CHARACTER — EVIDENCE.

In a criminal prosecution, evidence of the previous good character of the defendant is always admissible; but it should be confined to the trait of character at issue.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Criminal Law, § 840.]

6. EMBEZZLEMENT—JOINT OWNERSHIP.

Where by the terms of the contract under which an agent is employed to collect money on commission he is required to turn over to his employer the whole amount collected before being entitled to commissions, the agent is not such a joint owner of the fund as will prevent his prosecution and conviction for the embezzlement of the whole sum.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 14.]

7. SAME—INSTRUCTIONS.

On a trial for embezzlement, it is not error to instruct the jury that if the money, or any portion of the money, alleged to have been embezzled, came into the defendant's hands as the agent of and in behalf of his principal, and that he fraudulently converted the said money, or some portion of the same, to his own use, he would be guilty of the embezzlement thereof.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 13.]

8. SAME—EVIDENCE.

Under an indictment for embezzlement, it is sufficient for the state to prove the embezzlement of any part of the amount alleged to have been embezzled.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 58.]

9. SAME—DEMAND.

In a prosecution for embezzlement, it is not necessary to show a demand for the return of money collected by an agent, and a refusal upon his part to do so, where by the terms of the contract the time for an accounting and the payment of the money is definitely fixed.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 9.]

10. SAME—PRESUMPTIONS.

But under our statute, in a prosecution for embezzlement, if it appears that the money or property is unlawfully withheld by the accused from the person entitled thereto, and that he has failed to restore or account for such money or other property within 30 days after proper demand has been made therefor, he shall be presumed to be guilty; but such presumption may be rebutted by proof.

11. SAME—DEMAND.

While such demand may be made for the purpose of creating the presumption of fraudulent conversion against the accused, yet it is not essential when the embezzlement or fraudulent conversion can be otherwise proven,

except when under the peculiar circumstances of the case a demand should be made.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 9.]

12. SAME.

On the trial of a charge of embezzlement, proof that the money alleged to have been embezzled by an agent was received in several sums, at different times, and from different persons, during a course of continuous dealing between such agent and his principal, will support a verdict of the jury finding the aggregate sum as the amount of a single embezzlement.

Poffenbarger, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Fayette County.

William C. Moyer was convicted of embezzlement, and brings error. Reversed.

Adam Littlepage and J. R. Thrift, for plaintiff in error. C. W. May, Atty. Gen., Frank Lively, E. L. Nuckolls, and C. W. Osenton, for the State.

SANDERS, J. This case is here on a writ of error to the judgment of the criminal court of Fayette county, convicting the defendant of embezzlement.

We are asked by the Attorney General to dismiss the case, for the reason that application for the writ of error should first have been made to the circuit court, or judge thereof, and upon the refusal of the court or judge to grant the writ, or upon the affirmance of the judgment by the circuit court after granting the same, then application could be made to this court for such writ. The printed record does not show that the prisoner's application for a writ of error was acted upon by the circuit court; but this is a clerical error, for the original transcript of the record shows that the defendant did present his petition to the judge of the circuit court for such writ, and that it was refused. Therefore the law in this respect has been complied with.

The conviction is sought to be upheld under section 19, c. 18, p. 89, Acts 1903, amending and re-enacting section 19, c. 145, p. 955, of the Code of 1899, which provides: "If any officer, agent, clerk or servant * * * of any incorporated bank, or other corporation * * * embezzle or fraudulently convert to his own use, bullion, money, bank notes, security for money, or any effects or property of any other person, which shall have come into his possession or been placed under his care or management, by virtue of his office, place or employment, he shall be guilty of larceny thereof. In the prosecution of any such officer, agent, clerk or servant, charged with such embezzlement, fraudulent conversion or larceny, if it appear that the possession of such bullion, money, bank notes, security for money or other property is unlawfully withheld by such officer, agent, clerk or servant, from the person or persons entitled thereto, and that such officer, agent, clerk or servant has failed or refused to restore or account for such bullion, money,

bank notes, security for money or other property, within thirty days after proper demand has been made therefor, such accused officer, agent, clerk or servant shall be presumed to be guilty of such offense; but the accused may rebut such presumption by disproving any such facts or by other competent testimony germane to the issue, upon the trial." The defendant is charged with having entered into a contract with the Prudential Insurance Company of America, a corporation, to solicit and write life insurance for it, and that he entered upon his employment thereunder as such agent, and solicited and received various applications for life insurance policies, and collected the premiums therefor, and fraudulently converted the amount thereof to his own use. The defendant admits the employment, and the collection by him of the various sums of money as premiums on said policies, but claims that he made a true accounting thereof to his employer.

Embezzlement is purely a statutory offense. It was unknown to the common law, and the statute was enacted for the purpose of supplying what were regarded as defects in the common law of larceny, so as to reach and punish for the fraudulent conversion of money or property which could not be reached by the common law. And while our statute denominates the offense "larceny," and concludes by providing that the person so committing an act of embezzlement shall be deemed guilty of larceny, yet embezzlement is generally regarded as a separate and distinct crime, and is so treated. The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes. Under our statute, referred to, it is necessary to show, first, the trust relation of the person charged and that he falls within that class of persons named; second, that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; third, that it is the property of another person; fourth, that it came into the possession or was placed in the care of the accused under and by virtue of his office, place, or employment; fifth, that his manner of dealing with or disposing of the property constituted a conversion and appropriation of the same to his own use; and, sixth, that the embezzlement or fraudulent conversion of the property to his own use was with the intent to deprive the owner of his property. A mere detention of money belonging to another, without a fraudulent intent to convert it to the use of the one by whom it is detained and to deprive that other person of such property, does not constitute embezzlement. The appropriation of money held by

an agent is not, under our statute, larceny, unless it be done with the fraudulent intent to deprive the owner of his property, or the use and benefit thereof. The mere fact of the appropriation or use of property may be an innocent exercise of dominion, if the intention exists to repay or restore it. It is the fraudulent intent that constitutes the offense—the intention to make an absolute appropriation, as contradistinguished from a temporary use without any design to defraud the owner or deprive him of his property. If the Legislature intended to make the mere use of money or other property mentioned an offense, it should not have used the language in the act, which says, to "embezzle or fraudulently convert to his own use."

Now, applying the facts to this case: It is established—in fact, it is not otherwise contended—that the accused was the agent of the insurance company, and as such agent he solicited and wrote for it certain life policies and received the premiums therefor. The persons for whom the policies were written and the amount of the premiums paid therefor need not be given, because there is no material difference, if any at all, upon this question. But while the state contends that these premiums have not been paid to the insurance company, yet the defendant claims to have paid all the premiums collected by him, and, in addition, that the company was indebted to him at the time he ceased to work for it. Therefore, upon this question, there is a direct conflict between the defendant and the witness Carter, who was the agent of the company to whom the defendant was authorized to make these payments. The defendant claims that he made all these payments to Carter, while Carter denies this statement. These witnesses stand, in this case, with equal interests, because, if Carter did receive the money, he is liable to his company, the same as the defendant would be, if he has not made such payments. But, inasmuch as this was a question of fact, and the jury found that fact against the prisoner, the next question is, was there a fraudulent conversion of the money by the prisoner to his own use, with the intention of depriving the owner of his property; but if there has been a conversion of any kind shown, and, if so, whether or not it is shown to have been done with fraudulent intent, so as to come within the foregoing definition, we will not say, inasmuch as the case must be reversed for another reason. Neither will we refer to the evidence, except in so far as may be necessary in dealing with the other questions involved.

The defendant complains that the court refused to permit him to introduce evidence showing the amount of money he had on deposit in bank when he quit the employment of the company. In a prosecution for embezzlement, the law does not presume, merely because money has been intrusted to an in-

dividual, he has embezzled it; but, when the state makes such charge, it must prove its truth. It does not devolve upon the defendant to disprove it, or to show what disposition he made of the money. "Since the crime of embezzlement depends upon the existence of a fraudulent intent in the mind of the person by whom the money or property is alleged to have been converted, a wide scope is given to the evidence which may be introduced by the state to show a fraudulent or criminal intent, or on behalf of the defense to show the absence thereof." 10 Am. & Eng. Ency. Law (2d Ed.) 1032, and cases cited. "Since from its nature intent is incapable of direct proof, great latitude is necessarily allowed in proving this element of the offense. Broadly speaking, any evidence is admissible which has a tendency, even the slightest, to establish fraudulent intent, on the one hand, or, on the other, to show the bona fides of the accused." 15 Cyc. 529. On the question of fraudulent conversion and criminal intent, it is competent to prove the financial condition of the defendant. Proof of solvency would be admissible to show the improbability of the act, and all evidence and circumstances, however slight, which tend to prove the improbability of the commission of an offense, should go to the jury, as the question of criminal intent is for the jury to pass upon, from all the facts and circumstances before them. "On the other hand, the fact that a person was in possession of money tends to negative a desire to obtain it by crime or by borrowing, and is always admissible." 1 Wig. on Ev. p. 476. And in *U. S. v. Camp*, 2 Idaho (Hask.) 231, 10 Pac. 228, the court held: "On a trial for embezzlement, evidence is competent of defendant's pecuniary condition immediately prior to and during the time the offense is alleged to have been committed." It is true that Moore, a witness for the state, testified that the defendant had in bank \$205.15, but this does not conclude the defendant. He is not bound by this statement; but, on the other hand, he had the right to contest it, if he so desired.

Then, again, the court instructed the jury that, if at the time the defendant left the service of the company he had enough money in the bank to discharge anything that he might have owed the company, they should consider the fact in determining whether he had an intention to embezzle the funds. If the jury were to take this fact into consideration, it certainly was proper for them to hear evidence on this point, and it should not be confined to the state giving evidence of this character; but the defendant should have been permitted to show what funds he had there. He may have had many times the amount of the company's claim, which was about \$150, and, if so, he had the right to put this fact before the jury. Motive is generally an important

inquiry in a criminal prosecution. It would be improbable that a man of much means would embezzle a very small sum of money, and the jury should have all such facts before them in passing upon the question of fraudulent conversion and criminal intent.

The defendant excepted to the ruling of the court in refusing to permit certain questions propounded by him to witnesses in an effort to prove good character to be answered. Evidence of previous good character of a person charged with crime is always admissible. It is a fact which he is entitled to have submitted to the jury, the same as any other fact or circumstance favorable to him. Justice Cooley, in *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, in calling attention to the importance of this class of testimony, said: "Good character is an important fact with every man, and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases when it becomes a man's sole dependence, and yet it may prove sufficient to outweigh evidence of the most positive character." So, also, in *Hanney v. Commonwealth* (Pa.) 9 Atl. 339, in holding that evidence of good character is a substantial fact, like any other fact tending to establish defendant's innocence, and that it should be so regarded by both the court and jury, it was observed that "character is of importance in this: It may of itself, in spite of all evidence to the contrary, raise a reasonable doubt in the minds of the jury, and so produce an acquittal. An honest man may, through malice or otherwise, be charged with crime, and his life or liberty be endangered by fallacious circumstances or perjury, and he may be able to produce no evidence to prove his innocence, except his own oath; and if, in such case, a blameless life and unstained character are of no avail—are a mere make-weight in a doubtful case—his condition is a sad one." It is so fundamental that every man charged with a criminal offense has the right to prove his previous good character that it is not necessary to say more on the subject; but the evidence should be confined to the trait of character involved in the prosecution. As in this case, the trait of character in issue is one of honesty and fair dealing, evidence that the defendant is a peaceable, quiet and law-abiding citizen, or that he is a man of sober and industrious habits, would not be admissible, because these questions do not bear upon the defendant's character for honesty. The questions asked may be too general in form; but as to that we do not say, because they can be corrected upon the next trial.

It is claimed that the court erred in giving certain instructions for the state, and in refusing two instructions offered by the defendant. The first instruction given for

the state is as follows: "The court instructs the jury that if a person is an officer, agent, clerk, or servant of a corporation, and receive money for or on account of such corporation, and he fraudulently converts the whole sum to his own use, he will be guilty of embezzlement, though he may be entitled to a share of such money as commission." This instruction involves the question as to whether or not an agent who collects money under a contract to retain a certain amount thereof as commission, and to turn over the remainder to his principal, has such an interest in the fund that he cannot be convicted of embezzlement of the whole. This question is presented by the instruction, yet it does not arise in this case, because, by the contract under which the defendant was employed, he was not given the right to retain his commission; but the contract provides that he shall not be entitled to commissions except when the premiums have been paid to the company in cash, and also he is required each week to make a true account of all moneys received by him, and to return, at the same time, all moneys whatsoever received by him, and that he is to receive a salary amounting to a certain per cent. of his collections. Therefore the instruction, without the concluding words, "though he may be entitled to a share of such money as commissions," is good, and, if good without these words, the fact that they are added does not in any way prejudice the defendant.

Instruction No. 2, complained of, is as follows: "The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the prisoner, Wm. C. Moyers, was an officer, agent, clerk, or servant of the Prudential Insurance Company of America, a corporation, from the 1st day of April, 1903, to the 1st day of January, 1904, and as such officer, agent, clerk, or servant of said corporation that the money or any portion of the money mentioned in said indictment came into his hands for and in behalf of the said the Prudential Insurance Company of America, and that the prisoner fraudulently converted the said money or some portion of the same to his own use, then the said prisoner would be guilty of the embezzlement thereof as charged in the indictment." Complaint is made against this instruction as telling the jury that, if the defendant embezzled any portion of the money mentioned in the indictment, he would be guilty of embezzling the whole sum charged. I do not think it subject to this criticism, because it says if the money or any portion of the money mentioned in the indictment came into the defendant's hands, and that he converted the same, or some portion thereof, to his own use, then he would be guilty of the embezzlement thereof, as charged in the indictment. This evidently means that he would be guilty of embezzling that portion

of the money which came into his hands, and which he fraudulently converted to his own use, and would not mean that he embezzled the whole amount, as charged in the indictment.

To the other four instructions given on behalf of the state we see no objection, and think there was no error in giving them.

Instruction A, which the court refused to give for the defendant, presents the question as to whether or not it was necessary for the company to have demanded payment of the money by the defendant, and refusal on his part, before he could be found guilty of embezzlement. It is held by some of the courts that it is necessary to make demand upon the defendant to pay the money or return the property only when the statute makes such demand and refusal elements of the crime. 7 Ency. Pl. & Pr. 404, and cases cited; *Edelhoff v. State* (Wyo.) 36 Pac. 627. "Whether proof of a demand is necessary to show the conversion depends wholly upon the language of the statute." *Underhill on Crim. Ev.* § 284. 15 Cyc. 495, says: "However, the weight of the authority is to the effect that a demand for the money or other property alleged to have been embezzled need not be made by the prosecution, in the absence of statute to the contrary, except under the peculiar circumstances of the particular case." Our statute does not require a demand and refusal to be shown, and as to whether or not a demand is necessary depends upon the circumstances of the particular case. But in a prosecution under the statute, if it appears that the possession of the money or property alleged to have been embezzled is unlawfully withheld by the defendant from the person lawfully entitled thereto, and that the defendant has failed or refused to restore or account for the same within 30 days after proper demand has been made therefor, such accused officer, agent, clerk, or servant shall be presumed to be guilty. But this presumption is not conclusive, and may be rebutted by any competent evidence. This statute is not designed to require a demand to be made before one can be convicted of embezzlement, but it affords a cumulative remedy; that is, if the state can show that the money or property is unlawfully withheld, and that the statutory demand has been made therefor, and that the money has not been paid or the property restored within the time named in the statute, then the defendant will be presumed to have converted it to his own use, without other proof of a fraudulent conversion. But while the statute provides for such demand, and raises a presumption of guilt against the accused when the same is shown to have been made and not complied with within the statutory period, it does not change the rule, so as to dispense with a demand when, under the peculiar circumstances of the case, it should be given. In this case, under the

contract, the defendant agreed to make weekly reports, and to remit all money received by him every week, and, inasmuch as a definite time is fixed by the contract for the payment of the money, it would seem from the authorities that no demand for its payment is necessary, but the fact of conversion can be proved by other evidence. In all cases for embezzlement or fraudulent conversion, evidence of demand for a return of the money or property, and its refusal by the defendant, is competent for the purpose of tending to show conversion; but while it is always admissible, yet it is not always necessary. In the case of *Reynolds v. State* (N. J. Sup.) 47 Atl. 644, the court, speaking upon this subject and in reference to the case of *Fitzgerald v. State*, 50 N. J. Law, 475, 14 Atl. 746, says: "This assignment is undoubtedly grounded upon what this court said on the subject of a demand in *Fitzgerald v. State*, 50 N. J. Law, 475, 14 Atl. 746. That case has given some misapprehension as to the law on this subject, although a careful reading of it seems to leave it free from any uncertainty. That case does not hold that it is necessary, in all cases where money comes lawfully into the hands of an agent or other person within the statute, to make demand before criminal proceedings may be instituted. All that was held there was that the mere neglect to pay over will not justify a conviction for fraudulent conversion where funds have come lawfully into the hands of the defendant. A demand is only one class of evidence for proving fraudulent conversion. Other classes are: (1) Where, by statute, a public officer is required to pay over funds at a definite time, and fails to do so, and there is proof that he has not done so, and has applied the same to his own use, that is evidence from which a jury may find a fraudulent conversion, even without a demand; or (2) where, by the rules and regulations or agreement under which the defendant is employed and to which he is required to conform, a time is definitely fixed for him to account for moneys received, and it appears that he has lawfully received moneys of his employer, but has not paid over same in accordance with such rules, regulations, or agreement, but has converted the same to his own use, this is also evidence from which the jury may find that there was a fraudulent conversion of such funds without formal demand; or (3) where it appears by the evidence that the embezzler has fled after the alleged embezzlement, and that his act and conduct were of such a character, in connection with his flight, as to indicate that his intent was to fraudulently take or convert the funds which he retained, there the jury may also find from such facts a fraudulent conversion, even without a demand. In all cases not coming within any of the classes above mentioned, but

which are of an uncertain, or general, or special agency, where the time for the return of the funds collected is indefinite, or not fixed, or which is at the pleasure of the agent or servant, there a demand or other evidence of a fraudulent intent to convert may be necessary to put the defendant in a position of having fraudulently converted the money to his own use. It should be said, however, that a demand and refusal does not of itself in any case establish fraudulent conversion, or conversion by a defendant to his own use, but that it is only evidence to go to the jury upon the question of the defendant's fraudulent conversion." Therefore we think it was not error to refuse to give the instruction in this case.

The defendant's instruction B, presenting the theory of joint ownership, was properly refused, for the reason, as stated in the discussion of instruction No. 1 for the state, under the contract of the defendant with the company, he was not entitled to any part of the money collected by him until he had paid it over to the company, and, therefore he could not have been a joint owner with the company of the fund.

It is assigned as error that the court permitted the state to introduce evidence of a number of distinct transactions, in order to make up the aggregate sum alleged to have been embezzled. It is true the evidence shows that the money which the defendant is charged with having embezzled was collected by him at different times and from different persons; but the collection of these several sums by the defendant was lawful, and in the due course of his employment, and, if there was shown to be a conversion, it was not a distinct and independent conversion of each sum, but the conversion of each sum as one transaction. "On a trial of a charge of embezzlement, the fact that the money alleged to have been embezzled by the defendant was received in several sums, at different times, and from different persons affords no ground for requiring the prosecutor to elect on which sum he will rely for conviction." *Gravatt v. State*, 25 Ohio St. 162. We do not think the court erred in this respect.

For the reasons given herein, the judgment of the criminal court is reversed, the verdict of the jury set aside, and a new trial awarded the defendant.

POFFENBARGER, J. (dissenting). Unless prejudicial to the prisoner, error in rulings on evidence and instructions is not ground for a new trial. In the absence of something in the record by which the court can clearly see that no injury or prejudice to the prisoner could have resulted from such an erroneous ruling, it is cause for a new trial; for error is presumed to have been prejudicial unless the court can see that it was not. *State v. Musgrave*, 43 W. Va. 672,

28 S. E. 813; Robinson v. Lowe, 56 W. Va. 308, 49 S. E. 250; Ward v. Ward, 47 W. Va. 768, 35 S. E. 873; Osborne v. Francis, 38 W. Va. 812, 18 S. E. 591, 45 Am. St. Rep. 859; Ward v. Brown, 53 W. Va. 228, 44 S. E. 488; State v. Douglass, 23 W. Va. 298. The rule in civil and criminal cases is the same in this respect. State v. Douglass, 23 W. Va. 298.

The prisoner was entitled to show his financial condition, and the court refused to allow him to testify concerning it in one instance; but, if other evidence in the case disclosed it, how could he have been injured by the error? He himself was permitted to say, in the course of his testimony, at another time, that he had had about \$350 when he began work for the company, and had nothing at the time of the trial. What money he had in bank appeared from the evidence adduced by the state, as shown by Judge SANDERS' opinion. In this way the jury had before them the financial condition of the prisoner in substance. It was conceded that he had had more money, at the time the conversion is alleged to have been made, than he was charged with having misappropriated, and could have paid what he owed, and his own statement as to what he had had when he began work made it plain that he was probably worth nothing more. He had no right to have his financial condition made the principal issue in the case and ascertained with the exactness and accuracy with which a commissioner in chancery would have reported it. As it substantially appeared in the case, no matter how, he had all the benefit from it that could have resulted from an ascertainment of it to the dollar, and was not injured in the least by the failure of the court to allow him to show it in a particular manner and at a particular time.

The error herein noted being the only one found in the record, I cannot agree to reverse the judgment and allow a new trial for that alone, and therefore dissent.

(38 W. Va. 163)

GRANT v. CUMBERLAND VALLEY CEMENT CO.

(Supreme Court of Appeals of West Virginia. Oct. 31, 1905.)

1. MECHANICS' LIENS — ACCOUNT — SUFFICIENCY.

A verified account, filed in the clerk's office of a county court under the provisions of section 8 of chapter 75 of the Code of 1899, for the purpose of preserving a mechanic's lien, must show on its face substantial compliance with the conditions specified in the statute as the requisites of such lien; but, however informal it may be, the lien will stand if it shows such compliance.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 208.]

2. SAME—SPECIFICATION OF ITEMS.

When the basis of such lien is work and labor, and the recorded paper shows the kind, amount, and price thereof, failure to enter each month's, day's, or year's service, as the case may be, as a separate item of charge, and

credit each payment as a separate item, with the date thereof, will not vitiate such paper, if on its face it discloses with reasonable certainty the kind, amount, and contract price of the service and time of performance. Itemization in form is unnecessary, if it appear in substance and effect.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 234, 236, 256.]

3. SAME—CONSTRUCTION—CONSIDERATION OF STATEMENT.

To determine the sufficiency of such an account and claim, the account proper and the sworn statement appended to it may be read together and considered as a whole.

4. SAME—PRIOR LIENS—ADJUDICATION.

If there be prior liens by mortgage, deed of trust, judgment, and claims under the mechanic's lien statutes, on the property sought to be subjected to a mechanic's lien, it is not error of which the debtor can complain, if at all, to make the holders of all of such liens parties, convene them before a commissioner, adjudicate them, and decree a sale of the property to satisfy them, although no controversy as to the amounts or priorities of any of them is alleged.

5. SAME—INTEREST IN LAND—EQUITY OF REDEMPTION.

An equity of redemption is not the difference between the value of the property in respect to which it is held and the amount of the liens thereon, but an equitable estate in the property, capable of being enlarged into complete legal title by discharging the liens, and in such case the interest of the owner therein, within the meaning of section 3 of chapter 75 of the Code of 1899, is such equitable estate.

6. EQUITY—BILL—SUFFICIENCY.

If a bill and its exhibits, read together, show all the facts necessary to be alleged in a bill sufficient in law, a demurrer thereto is properly overruled.

7. REFERENCE—PROPER TIME.

An order of reference, made on a bill, to the gravamen of which the answer does not respond by denial, is not premature.

(Syllabus by the Court.)

Appeal from Circuit Court, Mineral County.

Suit by James Grant against the Cumberland Valley Cement Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. McDonald, for appellant. Wm. Clayton and Chas. N. Finnell, for appellee.

POFFENBARGER, J. Complaining of a decree of the circuit court of Mineral county in a suit brought by James Grant to enforce a mechanic's lien against the property of the Cumberland Valley Cement Company, a corporation, given by section 7 of chapter 75 of the Code of 1899, said corporation has appealed, assigning as grounds of error the overruling of its demurrer to the bill, premature entry of an order of reference, and provision for the sale of its property for the satisfaction of prior liens thereon, as well as the mechanic's lien, so as to pass the estate in fee simple therein, instead of the sale of its mere equity of redemption in its real estate.

Upon the demurrer it is insisted (1) that the account filed in the clerk's office of the county court for the preservation of the lien

lacks some of the requisites of "a just and true account of the amount due," after allowing all credits; (2) that said account does not show the services, for which the lien is claimed, to have been rendered within nine months before the lien was recorded; (3) that prior lienors were made parties to the bill. The account, with the affidavit verifying it, an attested copy of which is exhibited with and made part of the bill, reads as follows:

"The Cumberland Valley Cement Company,
to James Grant, Dr.

1903.

May 17th. To salary as superintendent under contract with said company from May 17th, 1899, to May 17th, 1903, four years, at \$1,200 per year, to be paid monthly, \$100 per month.....\$4,800 00

Cr.

By aggregate of all payments made to said James Grant on account of salary up to this date.....\$4,000 00

Balance due James Grant.....\$ 800 00

"State of Maryland, County of Alleghany—to wit:

"James Grant, being first duly sworn, deposes and says that the foregoing is a just and true account of the amount due him, said James Grant, after allowing all credits, from the Cumberland Valley Cement Company a corporation duly incorporated and organized under the laws of the state of West Virginia, and having its plant, works, real estate, and personal property at Cedar Cliff in Mineral county, West Virginia, for work and labor expended and performed for said company by him as superintendent, under a contract made on the 17th day of May, 1899. And said affiant further says that the real estate of said corporation is a tract of 140 acres of land, more or less, situate, lying, and being at and near Cedar Cliff on the North Branch of the Potomac river and Knobley Mountain, in said county of Mineral, adjoining lands of Carrie Brady and others, which was conveyed to said Cumberland Valley Cement Company by S. Dana Lincoln and wife, by deed dated 13th June, 1899, recorded in the office of the clerk of the county court of Mineral county, West Virginia, in Deed Book Number 20, pages 606 & 607, and on which tract are situated the works of said company at which the said James Grant performed the work and labor aforesaid. And this account is filed for the purpose of securing to said James Grant the benefit of the lien therefor on all the real estate and personal property of said company, which is provided for by the statutes of the state of West Virginia, and the work and labor for the value of which this lien is claimed was not performed more than nine months before the filing of this account.

"James Grant."

The account and sworn statement annexed to it are to be read together upon the in-

quiry as to whether the statutory requirements have been complied with. U. S. Blowpipe Co. v. Spencer, 40 W. Va. 698, 21 S. E. 769. The account proper sets forth correctly the name of the defendant, without describing it as a corporation; but the sworn statement supplies this defect, if defect it be, by the positive affirmation that it is a corporation. Though it is nowhere stated in so many words that the services for which the lien is claimed were rendered within nine months next preceeding the filing of the account, it is declared, in the language of the statute, that "the work and labor for the value of which this lien is claimed was not performed more than nine months before the filing of this account," and the account claims the salary to May 17, 1903, the day before the filing thereof. It also shows the amount of the earned salary, \$4,800, to have been paid to the extent of \$4,000, leaving a balance due of \$800, a sum less than the salary for nine months. As the services continued until the filing of the account, and the balance due is less than nine months' salary, and the services unpaid for were not performed more than nine months before the filing of the account, the claim must be for services rendered within nine months. In both the account and the statement the claim is described as one for service rendered under a contract with the owner of the property against which it is asserted. Is the account sufficiently itemized? It does not show each month's salary charged as a separate item and each payment as a separate item of credit, in conformity with the view of counsel for the appellant, as to the requirement of the statute. But his objection seems to go to the form of the account, rather than to matter of substance. Itemization is required, so that the debtor and other creditors may determine from an inspection of the recorded account, for what the lien is claimed—whether for work and labor, and, if so, the nature of it, when performed, and at what price; or materials, and, if so, the kind, quality, and price, and when furnished; or both labor and materials, and, if so, the kind, quality, and price of each, and when performed and furnished. The account and sworn statement accompanying it in this case, read together, plainly show the requisite facts, notwithstanding the lack of formality and clerical taste.

A case relied upon as an authority against the form of statement adopted is Rude v. Mitchell, 97 Mo. 365, 11 S. W. 225, cited in Phil. Mech. Liens, § 350, holding as follows: "A lumping item of the whole contract price on the one hand and the credits on the other is no compliance with the law." But this language must be referred to its subject-matter, the account filed in that case, for illustration. It is too general to permit application to all accounts. They differ in nature, according to the subject-matter. The one considered in the case cited was under a

contract to make additions to a building, thus involving both labor and materials of several different kinds, and the account was lumped into three large items, without any indication whatever as to how much was for labor and how much for materials. Here it appears on the face of the account that the basis of it is labor, and the kind, amount, and price are all plainly disclosed. What reason is there for requiring further specification? To require more would impose upon the contractor duties which are outside of the purpose underlying the statute, which is that the owner may be able to ascertain the correctness and reasonableness of the demand asserted against his property, and that purchasers and incumbrances may have information concerning the nature and amount of the lien. Phil. Mech. Liens, § 349. "The intention was that the mere inspection of a record to be found at a particular place should disclose all the information necessary in order to enable those interested therein to determine as to the existence of liens on the property." *Loan Co. v. Furbush*, 80 Fed. 631, 26 C. C. A. 38. Such being the purpose, it obviously follows that a substantial, though not technical, compliance with the statute is sufficient, and this court has so decided in *U. S. Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769. "All that is required is that enough should appear on the face of the statement to point the way to successful inquiry." Phil. Mech. Liens, p. 617, § 350, citing *Knabb's Appeal*, 10 Pa. St. 186, 51 Am. Dec. 472; *McLaughlin v. Shaughnessy*, 42 Miss. 520; *Wilvert v. Sunbury*, 81 Pa. 57.

An attested copy of the account and sworn statement is exhibited with the bill and made part thereof. This supplies the want of certain specific allegations which should otherwise have appeared in the bill, but were not inserted. Reading the bill and exhibit together, as the court may do (*Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Johnson v. Anderson*, 76 Va. 766; *Thompson v. Clark*, 81 Va. 422), all the necessary allegations appear, as above indicated in the analysis of the account and statement. Mr. Hogg, in his *Equity Procedure*, at section 124, gives the following clear and concise statement of the requisites of such a bill as this: "The bill to enforce a mechanic's lien must show on its face that the claimant has taken the steps necessary to the creation of such a lien; that the work was done or material furnished in pursuance of a contract with the owner of the property or his authorized agent, to be used in constructing, altering, repairing, or removing the house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure against which the lien is claimed; the filing of the account with the proper officer within the time required by law after the claimant has ceased to work or furnish material, together with a description of the property against which the lien is

claimed; and there should be an averment of the name of the owner of the property against which the lien is claimed at the time the work was performed or the materials furnished, and it should appear that the suit was brought within the time required by law. The bill must also show the existence of the debt, at the time suit is brought, for the payment of which the lien is sought to be enforced."

The objections based upon the bringing in of prior and subsequent lienors as defendants and upon the direction of the decree to sell the property for the satisfaction and discharge of all the liens reported by the commissioner, may be disposed of together; for they are founded upon one and the same conception and view of the nature of the suit. Section 3 of chapter 75 of the Code of 1899, concerning mechanics' liens, provides that persons who are entitled to assert such a lien shall have liens upon the house or other structure for which labor or materials are furnished "and upon the interest of the owner in the lot or lands on which the same may stand, or to which it may be removed." As there was a prior mortgage and also a prior deed of trust on the real estate of the defendant, in consequence of which it had only an equity of redemption in the property, it is insisted that the mechanic's lien extends to and covers only such interest, and hence that only such persons as are interested in the equity of redemption, namely, the owner and subsequent incumbrancers, should be made parties, and that only the equity of redemption should be sold. This view is supplemented by reference to section 10 of said chapter, by which the mechanic's lienor is required to make all other persons having liens on the property under said chapter parties; the assumption being that only those persons who are designated by the statute as parties should be made defendants. Both of these propositions are untenable. The interest of the owner referred to by the statute is not merely the value less the liens, but is the estate in the land, which may be an estate in fee simple, a life estate, or a term for years, or a mere equitable title, such as enables him, upon compliance with certain requirements, to call in the legal title. The defendant has such title, though incumbered by liens. The legal title is outstanding in the mortgagee; but, upon payment of the mortgage and trust deed debts, the owner would be entitled to call it back and have it revested in him. His equity of redemption is the right to pay the debts and reacquire the legal title, and vest in himself a complete legal fee-simple title. It is upon this right that the plaintiff acquired a lien, and not upon the value of the property less the liens. Suppose some prior liens had been discharged after the mechanic's lien had attached; can it reasonably be said that the interest thus relieved would not be covered by the mechanic's lien, and, if all

the prior liens had been thus discharged, this mechanic's lien would not be the first lien? If this were not true, the lien clearly would not cover the interest of the owner.

In some jurisdictions the courts hold that prior lienors are not necessary or proper parties. *Tompkins v. Horton*, 25 N. J. Eq. 284; *Smith v. Shaffer*, 46 Md. 573; *Portones v. Hadenock*, 182 Ill. 377, 23 N. E. 349. Who are necessary parties is determined in the various states by the statutes providing for the enforcement of the lien. In New Jersey, the action is at law and the judgment enforced by execution. In Maryland, the statute authorizes enforcement by bill in equity and says that in such case the same proceeding shall be had as were used by the courts of equity to enforce other liens; but the courts hold it improper to make a prior lienor a party unless he comes in and consents to be made a party. The Illinois court held that it was not error to decree a sale subject to a prior deed of trust without making the cestui que trust a party. Of the failure to make him a party the debtor only complained. In that case, however, the trustee was a party. The Illinois practice seems to be very similar to our own. Our statute provides, at section 12 of chapter 75, that, if the lien be established in favor of any of the creditors whose claims are presented in the suit, the court shall order a sale of the property on which the lien is established, or so much thereof as may be sufficient to satisfy such claims, in like manner as in other suits in chancery. *Hogg's Equity Procedure*, at section 70, after referring to the statute, says: "A suit to enforce a mechanic's lien is carried on with all the rights, principles, and methods of procedure incident to a court of equity; so that the question of parties is usually determined by these principles and methods." This court seems never to have passed directly upon the question of proper parties in such a suit. Hence it becomes necessary to resort to the general principles governing chancery practice in other cases for a solution of it. In all creditors' suits against decedents' estates and suits for the enforcement of judgment liens, it is necessary that all lienors be brought before the court. For this we need look no further than the statute. Code 1899, cc. 86, 139. Upon bills to enforce mortgages, judgment creditors and other lienors must be made parties. *Hogg's Eq. Pro.* § 72. But there are some cases in which it is not necessary, such as bills to set aside fraudulent conveyances and bills to enforce vendors' liens. *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. 246; *Neeley v. Ruleys*, 26 W. Va. 686. But in such cases, and, indeed, all cases, it seems necessary that the legal title be before the court. *Turk v. Skiles*, 38 W. Va. 404, 18 S. E. 561; *Bensimer v. Fell*, 35 W. Va. 17, 12 S. E. 1078, 29 Am. St. Rep. 774; *Smith v. Parsons*, 33 W. Va. 653, 11 S. E. 68; *Blunyer v. Sherman*, 23 W. Va. 657; *Norris v.*

Bean, 17 W. Va. 655; *Baker v. Oil Tract Co.*, 7 W. Va. 454. This seems to accord with the Illinois practice, as indicated by the case above cited, in which the trustee only was made a party. Very well considered cases, decided by the Supreme Court of Minnesota, are of the same import. *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645; *Bassett v. Menage*, 52 Minn. 121, 53 N. W. 1064. The former case holds that a mortgagor or any other party claiming an interest in the premises may be made a party, and his rights adjudicated whenever it might be done, in an action to foreclose a mortgage. The statute in that state, however, says the lien may be enforced in the same manner as in actions for the foreclosure of mortgages upon real estate, except as otherwise therein provided. There, as here, most of the provisions of the statute refer to mechanic's lien claims; but the court says that is because such lien is the subject of which the statute specially treats, and the mention of such liens and claims does not forbid the making of other interested persons parties to the suit.

In this case there was a prior mortgage and a prior deed of trust, in consequence of which the legal title was not in the defendant, and it was necessary to make the mortgagee and trustee parties. By his bill the plaintiff subordinated his lien to the mortgage and the deed of trust, several judgment liens, and a prior mechanic's lien, and claimed no priority over any of them. None of these lienors made any defense to the bill and are not complaining of the decree. Whether, if said prior lienors had appeared and demurred to the bill, the court would have sustained their demurrer, holding them not to be necessary parties, there is no occasion to say. By not doing so they have waived the error, if any there was. The defendant is not in a position to complain, for the reason that the error, if any, is not prejudicial to it. Moreover, there seems to be a precedent for making all lienors and interested persons parties to a suit of this kind in the case of *U. S. Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769. There, a judgment lienor was made a party defendant, but the bill was held good on demurrer. Though, in bills to set aside fraudulent conveyances, it is not necessary to make all creditors parties, it is the general practice to do so, and our Reports are full of cases in which it has been done. As no complaint is made by the creditors on that ground, and the debtor and its grantor are not in a condition to complain, because not prejudiced by any irregularity in that respect, since all the creditors are entitled to have satisfaction out of the property, if sufficient, upon the establishment of the fraud alleged, the decree is allowed to stand. When the mechanic's lien is established, so as to give jurisdiction, no reason is perceived why all creditors may not, if they choose to do so, come in and have

their liens enforced in the same cause. The power of a court of equity, having jurisdiction of a cause, to hear all persons interested in the subject-matter thereof, is very broad. Every lienor could maintain a separate and contemporaneous suit for the enforcement of his lien, unless required in some way to present his claim in some other suit, and the court could hear them all together, and make one decree of sale to satisfy all, and this would be necessary in order to avoid confusion. There is no lack of jurisdiction here. The lien gives that, and, it having been conferred, the court may take cognizance of such incidental matters, germane to the subject-matter, as may be necessary to give definiteness and certainty to its decree and full relief to the plaintiff. Is it a hardship upon the defendant to precipitate upon him the liens of all his creditors? If he is able to pay the lien for which the suit is brought, he may, by doing so, stop the proceedings. If he cannot do so, the property must go to sale anyhow to satisfy it, and his interest in it is extinguished by the sale. He is not, therefore, prejudiced or injured by making them parties. However this objection on the part of the defendant might have been viewed by the court below, it cannot avail him here to reverse the decree, all the alleged improper parties having acquiesced in it and thereby signified their willingness to take the benefit of it; for the rule is well settled that judgments and decrees, though erroneous, will not be reversed at the instance of persons who are not prejudiced by the error. Nor did the court err in decreeing a sale of the land to pay the liens thereon, instead of the equity of redemption; for the statute provides that the court shall order a sale of the property as in other suits in chancery, and it is the universal practice to order a sale of the land for the purpose of satisfying all the liens that are adjudicated and ascertained in the suit.

The order of reference was not premature; for, at the time it was made, the bill and its exhibits showed a number of liens. The requirement that a prima facie case be made before the allowance of an order of reference was fully met. The answer substantially admitted indebtedness on account of services as superintendent, but denied that it existed "in manner and form" as alleged in the bill, and averred that a true account would show that "said work, or the greater part thereof, was performed before the time mentioned in said claim of lien." It did not deny the other liens set forth in the bill. It is argumentative and evasive, not making a full and square denial of the plaintiff's claim. It admits indebtedness, but denies the correctness of the amount claimed, and contests the lien claimed on the ground of defects in the recorded notice. In such a state of the pleadings, an order of reference could properly

be entered without proof to sustain the allegations of the bill. All allegations not denied are taken as true. Code 1899, c. 125, § 36; *Gardner v. Landcraft*, 6 W. Va. 36; *Dickinson v. Railway Co.*, 7 W. Va. 390; *Warran v. Syme*, 7 W. Va. 474; *Burlew v. Quarrier*, 16 W. Va. 108.

For the foregoing reasons, the decree complained of will be affirmed.

(38 W. Va. 213)

RILEY et al. v. YOST.

(Supreme Court of Appeals of West Virginia.
Oct. 31, 1905.)

1. PLEADING—PROFERT—OYER.

Profert cannot be made, or oyer demanded, unless the declaration avers a sealed instrument. [Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 913, 918, 922.]

2. SAME—DECLARATION.

The fact that a declaration makes profert does not alone make the writing part of the declaration, without a demand of oyer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 919, 923, 925.]

(Syllabus by the Court.)

Error to Circuit Court, Taylor County.

Action by Oscar F. Riley and Columbus N. Mason against F. Harris Yost. Judgment for defendant, and plaintiffs bring error. Reversed.

Dent & Dent, for plaintiffs in error. Davis & Davis and E. D. Lewis, for defendant in error.

BRANNON, P. Oscar F. Riley and Columbus N. Mason brought an action of assumption in Taylor county against F. Harris Yost. The declaration contains the common counts and one special count upon a written contract. Under a demurrer there was a judgment of nil capiat, and the plaintiffs brought the case here.

The defendant says that the written contract does not support the action as stated in the special count upon it; but we must take that count without considering the written contract. That count avers the executing of a written contract and makes profert of it. We cannot consider it for these reasons. The count does not say that the contract is under seal. There can be neither profert nor oyer of a contract not under seal, and though profert be made, it is unavailing to make the writing part of the declaration. There cannot be profert, because the declaration does not profess to declare upon a sealed instrument; and, there having been no oyer demanded, we could not read the contract, even if said to be sealed, because to read it there must be, not only profert, but oyer. *Duval v. Malone*, 14 Grat. 24; 16 Ency. Pl. & Prac. 1087. There can be no profert or oyer, except of certain sealed instruments. *Andrew's* Stephen on Plead. 159; 1 Barton, L. Pr. 316; 16 Ency. Pl. & Prac. 1083. Such is the common-law rule of pleading. There

seems to be an erroneous idea with some that a profer of an instrument, sealed or unsealed, makes it a part of the declaration, and we meet with declarations sometimes which file writings marked as exhibits, just as if the case were in chancery. That does not make such paper part of a common-law pleading, though it does in the case of equity pleadings. A declaration at law on a writing must give the legal effect of the writing, and to do so must state so much of it as will support the action; but that does not make the instrument a part of the pleading. It is not generally the office of common-law pleading to incorporate writings. Perhaps, where the declaration sets out the instrument by its tenor—that is, in its very words—it becomes a part of the declaration, but not where the tenor is not given. 8 Ency. Pl. & Prac. 740. It may be asked, how can a variance between the declaration and writing be taken advantage of? By objection to the introduction of the paper in evidence; if a sealed instrument, also by oyer and demurrer; or, where it is claimed that the writing does not support the action, a demurrer to the evidence would raise that question.

Looking, then, at the special count, and not reading the writing, we find that it states that the plaintiffs owned various options giving them the right to purchase the coal in various tracts of land, and that they sold and assigned to the defendant all their rights in said options in consideration of \$150 cash and other considerations, one of which was that the plaintiffs were to receive from the defendant the difference between \$18 per acre and the purchase price per acre of the option for each and every acre of coal the defendant "may purchase under said option." It is claimed that this gave the defendant only the option to purchase the tracts—that is, option to consummate the options assigned to him—without obligation to pay the plaintiffs the difference between the purchase price named in the option and \$18 per acre, unless he should purchase the land under the option, and that the declaration should have averred such purchase. But the declaration goes on and avers that by the writing the defendant "agreed to pay plaintiffs the difference between \$18 per acre and \$15, the purchase price under the option, to wit, \$3 per acre, for each and every acre of coal which the defendant could and might purchase under said options, whenever the number of said acres of coal should thereafter be ascertained and determined during the life period of said option as limited on the fact thereof, or as extended at the special instance and request of the defendant, whose duty it became to keep alive said option, until consideration for the transfer thereof were fully paid and satisfied, and his purchase could be fully compensated thereunder." The count then avers that the number of acres of the coal had been ascertained to be not less than 2,000. Now, from

that count on its face Yost did not have the right to determine not to purchase under said option and refuse the plaintiffs the \$3 per acre; for the declaration says that the defendant was to pay the plaintiffs \$3 for every acre which he "could and might purchase under said option," and that he was to make such payment whenever the number of acres of coal should be ascertained. The count says that the instrument bound Yost to keep alive the options until the consideration should be paid, thus importing intent to impose absolute liability for the consideration. Testing the matter by the declaration alone—that is, by its version and legal effect of the legal contract—an absolute liability was imposed on Yost to pay that \$3 per acre to the plaintiffs, whether he purchased the coal under the options or not. I repeat that we do not say whether or not that liability is imposed on the defendant by the written contract.

We reverse the judgment, overrule the demurrer, and remand the cause.

(73 S. C. 443)

MILHOUSE v. SOUTHERN RY.

(Supreme Court of South Carolina. Oct. 13, 1905.)

1. PLEADING—OBJECTIONS TO EVIDENCE FOR INSUFFICIENCY OF PLEADING.

Where defendant does not move to strike out certain allegations of the complaint, he cannot object to evidence in support of the same.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1433.]

2. CARRIERS—FLAG STATIONS.

Civ. Code 1902, § 2134, providing that trains shall stop at stations for the accommodation of passengers, does not apply to flag station, but only to regular advertised stopping places.

3. SAME—REFUSAL TO STOP—DAMAGES.

Where an engineer willfully passes a flag station, seeing a passenger standing there, the latter can recover punitive damages.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1038.]

4. TRIAL—INSTRUCTIONS.

A request covered by an instruction already given is properly denied.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

5. CARRIERS—FAILURE TO STOP AT STATION.

In estimating damages for failure of a train to stop for a passenger at a flag station, inconvenience, the direct cause of the negligence, may be considered in estimating the damages.

6. SAME—INSTRUCTIONS.

Where a complaint alleges that the conductor was acting within the scope of his duty when he failed or refused to stop the train at a flag station at which plaintiff was waiting, a request to charge that the conductor of a train is not called upon to look out for signals of intending passengers at flag stations was properly refused as inapplicable.

Appeal from Common Pleas Circuit Court of Lexington County; Jas. F. Izlar, Special Judge.

Action by John A. Milhouse against the Southern Railway. Judgment for plaintiff, and defendant appeals. Reversed.

Defendant appeals on following exceptions:

"(1) Excepts because his honor erred in allowing the plaintiff to testify, over the objection of defendant, that his feelings were hurt and that he was subjected to inconvenience, upon the ground that the same were not elements of damage in this case.

"(2) Excepts because his honor, the presiding judge, erred in charging the jury as follows: 'You have heard the testimony in this case, and you must determine the question whether or not he was a passenger on that occasion. If he was, he was entitled to the rights of a passenger. He was entitled to board the train with his ticket, and to be transported with safety and convenience to the point of his destination. I say that was his contract, that is what the railroad had undertaken to do, and that is what the railroad company is bound to do, in my opinion, under that state of facts'—the error being that under the testimony Perry was a flag station for train No. 30, which the plaintiff desired to board, and it was necessary that it be flagged, and it was not required to stop for plaintiff without being flagged, even though plaintiff held a ticket.

"(3) Excepts because his honor erred in reading to the jury section 2134 of Code of Laws of South Carolina of 1902, to wit, 'Every railroad company in this state shall cause all its trains of cars for passengers to entirely stop upon each arrival at a station, advertised by such company as a station for receiving passengers upon such trains, for a time sufficient to receive and let off passengers,' and in charging the jury as follows: 'Now, a request to charge from the defendant is that that does not apply to flag stations; but I charge you that it does. It applies to every advertised station, and if they advertise this as a flag station, and passengers are to get on and off at that point, why the train was bound to stop and receive those passengers, and it was bound to stop long enough for them to get on and off, notwithstanding it may not be a regular station on the line of their road'—the error being that said section of the Code does not apply to flag stations at all, or to trains which stop only on flag. Further, the evidence showing that Perry was a flag stop for the train in question (No. 30), this charge required the train to be stopped there, whether flagged or not, which is contrary to law and to said section of the Code.

"(4) Excepts because his honor erred in charging the jury, at plaintiff's request, as follows: 'When a passenger purchases a ticket from the agent of a railroad company at a station where tickets are sold, he is entitled to passage on the train of cars for passage on which the ticket was purchased to his destination; and it is the duty of the railroad company to stop its train at such station long enough for said passenger with

such ticket to get aboard for the purpose of traveling thereon to his destination'—such charge being inapplicable to this case, erroneous, and to defendant's prejudice. It is submitted that, Perry being a flag stop for the train in question, the defendant was not required to stop for plaintiff unless such train was flagged.

"(5) Excepts because his honor erred in charging the jury, at plaintiff's request, as follows: 'That it is the duty of the employees of the company, its agents and servants on its train, to keep a lookout at its stations where tickets are sold along its route; and any such train for riding on which tickets have been sold will fail to stop for such passenger at its peril, as failure to stop is negligence in the law, which will entitle such passenger to such damages as he may prove by the preponderance of the testimony under the allegations of his complaint against the negligent company, defendant.' (1) Such charge was erroneous, in that it did not declare the law with reference to the stopping of trains at flag stations, where the train is required to be flagged before it will stop. (2) It exacted more than the law required, and held defendant to the duty of keeping a lookout and stopping its trains at flag stations, whether properly flagged or not. (3) It was further erroneous in declaring that a failure to stop is negligence in the law which will entitle the passenger to damages; whereas, on the contrary, it is incumbent upon the plaintiff to prove negligence on the part of the railroad company in failing to stop at a flag station after the train has been properly flagged.

"(6) Excepts because his honor erred in failing to charge defendant's second request to charge, which was as follows: 'It is only when it is shown that an engineer actually saw an intending passenger, or there is sufficient evidence to authorize a jury to find that the engineer saw him, that there can be such a willful disregard of the plaintiff's right, or such personal indignity to him, in rolling by without stopping, as would entitle the plaintiff to recover punitive damages'—the same being a correct proposition of law and applicable to this case.

"(7) Excepts because his honor erred in failing to charge defendant's third request to charge, which was as follows: 'The burden is upon the plaintiff to establish the allegations of his complaint by the preponderance of the evidence, and unless the jury is satisfied therefrom that the engineer of the train in question actually saw the signal to stop and willfully disregarded it, the plaintiff is not entitled to any exemplary damages in this case'—the same being a correct proposition of law and applicable to this case.

"(8) Excepts because his honor erred in failing to charge defendant's fourth request to charge, which was as follows: 'If the engineer, with reasonable care, ought to have seen, but did not see, the signal to stop, if

such was given, this would present a case of only ordinary negligence, and in such case plaintiff would not be entitled to any exemplary damages—the same being a correct proposition of law and applicable to this case.

“(9) Excepts because his honor erred in failing to charge defendant's fifth request to charge, which was as follows: ‘Damages for the mere failure of a carrier to stop its train on signal at a flag station consists in compensation for the actual loss sustained by the intending passenger. This will include the actual loss sustained as the direct consequence of the carrier's failure to stop the train’—the same being a correct proposition of law and applicable to this case.

“(10) Excepts because his honor erred in failing to charge defendant's sixth request to charge, which was as follows: ‘If you find from the evidence in this case, if there be such evidence, that the engineer of the train in question, in the exercise of reasonable care, failed to see the signal to stop at the flag station of Perry on the morning in question, if such signal was given, or that it was mere negligence on the part of said engineer in not seeing such signal, if it was given, then your verdict, if you find for the plaintiff, can only be for the actual damages sustained by the plaintiff, which actual damages must be the direct and necessary consequence of the failure to stop the train’—the same being a correct proposition of law and applicable to this case.

“(11) Excepts because his honor erred in failing to charge defendant's seventh request to charge, which was as follows: ‘Mere inconvenience is not a ground of damages in an action against a carrier for failure to stop its train on signal at a flag station’—the same being a correct proposition of law and applicable to this case.

“(12) Excepts because his honor erred in failing to charge defendant's eighth request to charge, which was as follows: ‘Plaintiff in this case is not entitled to any damages for inconvenience, pain or annoyance’—the same being a correct proposition of law and applicable to this case.

“(13) Excepts because his honor erred in failing to charge defendant's ninth request to charge, which was as follows: ‘Section 2134 of Code of South Carolina of 1902, does not apply to what are known as flag stations, but only to what are known as regular stations, where the train is advertised to stop regularly’—the same being a correct proposition of law and applicable to this case.

“(14) Excepts because his honor erred in failing to charge defendant's tenth request to charge, which was as follows: ‘The conductor of a railroad train is not called upon to look out for signals to stop or for intending passengers at flag stations. That is the duty of the engineer’—the same being

a correct proposition of law and applicable to this case.”

E. M. Thompson, for appellant. Andrew Crawford and G. T. Graham, for respondent.

GARY, A. J. This is an action for damages, which the plaintiff claims he sustained, by reason of facts set out in the complaint, which alleges: “That on the morning of the 8th day of February, 1904, between 4 and 5 o'clock, the plaintiff, who had arranged to go to Columbia, S. C., on the morning of the said 8th day of February, 1904, to consult with Dr. Taylor, who was to examine and treat plaintiff for an injury to his side, from which injury he was suffering, and having purchased a ticket from Perry Station, on said railroad, to Columbia, S. C., from the station agent of the defendant at Perry, and paid the station agent the fare usually demanded and paid for a ticket from Perry to Columbia, and as defendant's passenger train from Savannah to Columbia was then due at Perry, the plaintiff, in company with said station agent and others, walked out to defendant's railroad tracks at a point where the defendant's railroad trains always stop, for the purpose of allowing its passengers to get off and on its trains, and when the defendant's passenger train from Savannah to Columbia came in sight, the said station agent directed one Martin N. Price to signal the train, and the said Price having given the signal pursuant to the direction of the said station agent, the said train slackened up the speed at which it was running and slowed up to about six miles an hour, when the conductor of said train (who was the agent and servant of the defendant and acting within the scope of his authority as such), with a lantern in his hand came out of one of the cars of said train with the porter thereof to the lowest step of the platform of said car, whereupon the said station agent of the defendant called out to him, ‘I have five passengers for you, or ‘there are five passengers here for you.’ That it was the duty of the defendant to stop said train at said Perry Station long enough for plaintiff to get on board of it and carry him to Columbia aforesaid, but regardless of its duty in that respect, and in utter disregard of the rights of the plaintiff, the conductor of said train, who heard said station agent when he announced that said passengers were awaiting transportation, and who was the agent and servant of the defendant and acting within the scope of his authority as such, negligently, recklessly, wantonly, and willfully failed and refused to stop said train for plaintiff to get on board thereof, and negligently, recklessly, wantonly, and willfully caused the speed of the train to be increased and to move off rapidly towards the city of Columbia, so as to make

it impossible for plaintiff to get on said train, thus leaving the plaintiff standing on the cold wet ground in the rain at Perry Station. That by reason of the negligent, reckless, wanton, and willful conduct of the defendant and its agents and servants in falling and refusing to stop said train at Perry Station long enough for plaintiff to go on board of it, and in increasing the rate of speed of said train when it was informed that passengers were at said station for the purpose of boarding said train, and as a direct result thereof, plaintiff was insulted, his feelings injured, he was compelled to remain at said Perry Station several hours in the cold rain before he could board another train for Columbia, he was greatly annoyed, delayed, and inconvenienced in reaching Columbia, was delayed from 24 to 36 hours in Columbia, during all which time he suffered much pain, annoyance, and inconvenience, and was subjected to considerable pecuniary loss and expense, and was greatly inconvenienced and delayed in getting back to his home, and was otherwise greatly injured, to his damage \$2,000." The answer of the defendant was a general denial. The jury rendered a verdict in favor of the plaintiff for \$500. The defendant appealed upon exceptions which will be incorporated in the report of the case.

1. First exception: As the testimony was responsive to the allegations of the complaint, the defendant is not in a position to raise the objection that it was inadmissible, after failing to make a motion to strike out the said allegations. *Martin v. Ry.*, 70 S. C. 8, 48 S. E. 616.

2. Second, third, fourth, fifth, and thirteenth exceptions: Section 2134 of the Code of Laws of 1902 is as follows: "Every railroad company in this state shall cause its trains of cars for passengers to entirely stop upon each arrival at a station, advertised by such company as a station for receiving passengers upon such trains, for a time sufficient to receive and let off passengers." At the time mentioned in the complaint, Perry was a flag station for the train upon which the plaintiff expected to become a passenger. He had seen a regular timetable, advertising the fact that it was a flag station for said train, and his own testimony is to the effect that he had full knowledge of such fact. There is no testimony showing that the regulation making Perry a flag station for said train was unreasonable or oppressive; and, as the company did not advertise Perry as a station for receiving passengers on the train in question, we do not think that the plaintiff, under these circumstances, had the right to invoke the provisions of said section. The defendant was only bound to stop its train at such a station when duly flagged.

3. Sixth, seventh, and eighth exceptions: The failure of an engineer to see a passenger may not only be the result of negligence,

but likewise of willfulness. If he should intentionally fail to see a passenger, punitive damages would be recoverable.

4. Ninth and tenth exceptions: While the requests were refused, the propositions therein stated were substantially charged by the presiding judge.

5. Eleventh and twelfth exceptions: When there is testimony showing that the inconvenience was the direct and proximate result of negligence or willfulness, it may be taken into consideration by the jury in awarding damages. *Cen. R. & B. Co. v. Strickland (Ga.)* 16 S. E. 352.

6. Fourteenth exception: Conceding that the request contained a sound proposition of law, it was inapplicable to this case, as the complaint alleged that the conductor was acting within the scope of his authority, when he failed or refused to stop the train at the station. *Wilson v. Ry.*, 51 S. C. 79, 28 S. E. 91.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

(72 S. C. 395)

SPEARS v. FIELDS.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. CHATTEL MORTGAGE—TENDER—PRODUCTION OF PAPERS.

Where a chattel mortgagor tenders the amount due, he has a right to demand surrender of the note and mortgage; but the mortgagee has a reasonable time in which to procure them, and, where the mortgagor then gives notice that he will not pay, it is unnecessary for the mortgagee to proceed further.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 501.]

2. DAMAGES—CONTRACT—BREACH—SPECIAL DAMAGES.

In an action of claim and delivery by a chattel mortgagee, defendant set up, as a defense to plaintiff's allegation of a debt due, damages resulting from the mortgagee's refusal to carry out a part of the mortgage contract. The evidence showed that the mortgagee had contracted to advance supplies to the amount of \$50, but that he was unable to furnish all the fertilizers required by the mortgagor, whereby the mortgagor was unable to cultivate certain land which he had rented. Held, that the damages arising from such circumstances were not recoverable, unless the special circumstances were known to the mortgagee at the time he broke his contract.

Appeal from Common Pleas Circuit Court of Darlington County; Gary, Judge.

Action by C. M. Spears against W. D. Fields. From circuit order reversing judgment of magistrate court, defendant appeals. Affirmed.

George W. Brown, for appellant. Spears & Dennis, for respondent.

WOODS, J. The defendant gave to the plaintiff a chattel mortgage of a horse to secure agricultural advances for the year 1902 to the amount of \$50. Only \$20.67 was advanced, for the reason, as defendant al-

leges, that the plaintiff did not have in his store and could not furnish fertilizers and other staple supplies. After the time fixed for the payment of the advances, the plaintiff brought this action of claim and delivery to obtain possession of the mortgaged property. The defendant set up two defenses: (1) Tender of the sum advanced, \$20.67; and (2) damages due to his having to leave uncultivated 10 acres of land, which he had rented at \$2.50 per acre, and to loss of time in trying to make other arrangements for advances. The judgment of the magistrate in favor of the defendant was reversed by the circuit court. The question of law made by the appeal is whether there was error of law in not sustaining the defenses set up.

1. The finding of fact by the circuit court that the tender was conditional is not reviewable by this court. We may remark, however, that it is admitted the defendant demanded immediate delivery of the note and mortgage as a condition of the tender. The mortgage was then in the clerk's office, but was subsequently procured and offered to the defendant, who objected that the note was not also offered. Upon plaintiff's agent proposing to procure and surrender the note also, defendant replied it would be useless, as he would not pay. The defendant had a right, on tender of the amount due, to demand surrender of the note and mortgage; but the plaintiff could not be denied reasonable opportunity to procure them, and, when the defendant denied liability and gave notice he would not pay, it was not incumbent on the plaintiff to proceed further. The exceptions as to tender cannot be sustained.

2. In considering the question of damages, it is to be borne in mind the defendant is not setting up the loss resulting from having to leave a portion of his farm uncultivated as damages for the "taking and holding" of the property allowed by the statute in claim and delivery proceedings. The claim rests on an entirely different foundation. The plaintiff's right to the possession of the property depends on his ability to prove that he held a chattel mortgage and the defendant owed an overdue debt secured by it. The action will therefor be defeated if the defendant can show there was really no debt. He undertakes to do this by offering proof that, although he received \$20.67 under the mortgage, yet by reason of the plaintiff's refusal to carry out his part of the mortgage contract he was damaged more than \$20.67. The damages thus resulting are not set up as a counterclaim, but as a defense to plaintiff's allegation of a debt due under the mortgage. Therefore on this point the case stands precisely as if the plaintiff had sued on the note and mortgage to recover a money judgment, and the defendant had denied the debt because it had been absorbed by the damages inflicted by the plaintiff's failure to carry out his part of the mortgage contract. The inquiry, then, is

whether such damages as are here claimed are allowable on the issue of debt or no debt. It is not necessary to decide whether they are too remote, and therefore may not be deducted from the debt, because, aside from that point, there is nothing to indicate they were to be anticipated, when the contract was made, as a result of its breach, in view of the peculiar situation and circumstances of the defendant. There is no evidence whatever that the plaintiff knew the defendant had rented land and was dependent on the advances he was to make to cultivate it, or that plaintiff was acquainted with the peculiar condition of defendant's agricultural interests in any respect, or contracted with reference to defendant's special circumstances. This being so, the damages arising from plaintiff's alleged breach of contract due to circumstances peculiar to the defendant are not recoverable, and therefore cannot be taken into consideration in determining whether the defendant owed a debt secured by the chattel mortgage. The following statement of the principle under which the case falls is taken from *Hadley v. Baxendale*, quoted with approval in *Sitton v. McDonald*, 25 S. C. 68, 71, 60 Am. Rep. 484: "Damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract." *Colvin v. Oil Company*, 66 S. C. 61, 44 S. E. 380; *Hays v. Telegraph Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 396)

GREEN v. SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. MASTER AND SERVANT — NEGLIGENCE — DEFECTIVE MACHINERY.

Where an accident happens to a servant by the breaking of a machine in ordinary use, and there is neither proof of defects in the machine nor of error in its use by the servant, the law will not draw the inference that the machine was defective, and then from that the inference of lack of care of the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 881, 884.]

2. SAME — EVIDENCE.

Where an engine hostler was injured by an alleged defect in the machinery, and the cause of the accident was not shown by plaintiff's evidence, and it did not appear that it might not have been due to causes for which the defendant was not responsible, and there was no evidence that any of the causes mentioned by plaintiff as possible causes were present, a judgment for defendant was proper.

Appeal from Common Pleas Circuit Court of Greenville County; Gary, J.

Action by T. A. J. Green against the Southern Railway Company and others.

From order of nonsuit, plaintiff appeals. Affirmed.

McCullough & McSwain, for appellant. T. P. Cothran, for respondents.

WOODS, J. This is an appeal from an order of nonsuit. The action is to recover the sum of \$10,000 damages on account of personal injuries received the 17th day of May, 1903. The allegations of the complaint are that at that time plaintiff was a hostler in the employ of the defendant, Southern Railway Company; that, as hostler, it was his duty to shift engine No. 1,072, which pulled in train No. 40, going north, and place it upon the side track to be inspected and repaired by the defendants, and, when informed by them that the engine was ready, to place it upon the main track, so that it might pull train No. 97, going south; that the engine was left standing near the turntable pit, and, after plaintiff was informed by the defendants that the engine was ready, he reversed the lever and turned on the steam, but, instead of the engine going backward, as it would have done if it had been in proper repair, it moved immediately forward, and fell into the turntable pit, a depth of several feet, and plaintiff received the injuries mentioned in the complaint. The acts of negligence charged are: First. Furnishing the plaintiff with a defective engine; second. failing properly to inspect and repair the same. At the conclusion of plaintiff's testimony, the circuit judge granted a nonsuit upon the ground "that there is no evidence tending to establish the allegations of negligence contained in the complaint."

The following is a statement of the material testimony: Plaintiff testified that, after placing the engine upon the side track, so that it might be inspected and repaired, as was the custom and duty of the defendants, he left it from 50 minutes to an hour. The defendants West and Greeson were about the engine, as plaintiff supposed, for the purpose of inspecting and repairing the same, as was their duty. He did not see either of the defendants under the engine, but did see two of the "helpers," who were not expert machinists, under it. To properly inspect an engine it is necessary that the machinists should go underneath it. Between the time that he left the engine and went back to it, the defendant Greeson was on the engine, and "moved the lever backwards and forwards to disconnect the valve stem." After West and Greeson had finished their work upon the engine, Greeson told him that "No. 1,072 was ready to move." Thereupon plaintiff mounted the engine, and put the lever in reverse gear. He then reached for the bell cord, which was wrapped in some way, and after it was unwrapped, he "gave the engine steam and pulled the throttle open." Thereupon the lever fell in head gear to where he had brought it from, and the engine, instead of going backward, went for-

ward into the pit, and he was injured. As hostler, it was not his duty to inspect the engine; but, if it had been his duty, he could have discovered the defect by reasonable inspection. The witness did not undertake, however, to say what the defect was, but, on the contrary, testified on cross-examination that he did not know what caused the reverse lever to fly from back gear to forward gear, but that it could have been caused by several things, viz., lost motion, loose springs, rough valve, weak springs, waste in the notch, or a piece of coal in the notch. It was dark when plaintiff was told the engine was ready to be pulled upon the main line, and he did not look down in the quadrant to see whether the latch of the lever went into the notch or not. "There is not an engineer on the road that does that. You cannot light a torch to see whether it is in or not." C. L. Cauble testified that he had been working for the Southern Railway Company for 21 years, and had been an engineer for 17 years. He said: "If an engine or locomotive has its lever reversed and the latch fastened in rear end of quadrant, and if steam be applied, and the reverse lever fly out of the notch and into forward end of the quadrant, I would say such engine is in a very defective condition. If the engine be just starting off, I do not think such thing possible, and I have not seen such in my experience." Edward Day, formerly a locomotive engineer of 13 years' experience, testified as follows: "Q. If an engine, a locomotive engine, would have its reverse lever reversed and put in back gear, and if, when the steam be applied, that engine moves forward by reason of the reverse lever flying forward, would you say that engine is in defective condition? A. Yes, sir. Q. What do you say as to that? A. I think it would be badly out of order if it would fly from back to front when steam is applied. Q. Do you think it would be possible for an engine which was standing perfectly still with its reverse lever in back gear for the reverse lever to fly forward upon the application of steam? A. Not unless she is in mighty bad shape, sir. If the engine was standing perfectly still and the reverse lever was in back gear, and when steam was applied she would have to be in a bad worn condition for it to fly forward. I never had one to do it with me. I have had them to fly out of gear and go down to where it was worn into head gear. As a general thing, they work considerably more in head gear than in back gear, which leaves the back latch gear and notches in good shape."

In every suit of a servant against a master for personal injury arising from the use of machinery, inquiry is directed mainly to two forces operating under natural laws, namely, the master's machine supplied to the servant, and the servant's mind and hands acting on the machine. The injury is usually due either to the error of the master in failing to supply safe machinery, or to the error of

the servant in the use of his mind and hands, or to both of these causes acting together. But an error of the master in furnishing a defective machine does not conclusively imply negligence by the master, for he may have used due, and even great, care in its selection; nor does an error of the servant in the use of the machinery conclusively imply negligence on his part, for he may be in actual error while doing just what a prudent man would do under like circumstances. Neither the master nor the servant is charged with perfect knowledge of all natural laws and forces under which they act, nor even with errorless conduct in applying their imperfect knowledge of such laws and forces; and hence they are chargeable only with the results of errors which are due to negligence. The servant on entering the employment assumes the risk of his own errors, whether due to negligence or not, and he assumes also the risk of the operation of the machine and of the errors of the master, unless the master fails to use due care in making the machine safe. When an injury to a servant is proved to result from a defective machine, the law puts upon the master the burden of proving that he used due care in making it safe. *Lasure v. Mfg. Co.*, 18 S. C. 275; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; *Branch v. Railway Co.*, 35 S. C. 405, 14 S. E. 808. But when an accident happens by the breaking of a machine in ordinary use, and there is neither proof of defects in the machine nor of error in its use by the servant, the law will not draw first the inference that the machine was defective, and then from that inference infer the lack of care of the master. *Gentry v. Railway Co.*, 66 S. C. 256, 44 S. E. 728; *Edgens v. Gaffney Mfg. Co.*, 69 S. C. 529, 48 S. E. 538. Natural forces beyond the control or foresight of the master, such as heat and cold and moisture, the action of outside persons having access to the machine without knowledge of the master, and, most probable of all, the unconscious errors of the servant in the use of his mind and hands, may cause a perfect machine to break. These agencies are often as obscure and as little susceptible of being made evident as a latent defect in the machine itself. Therefore, aside from judicial authority, the rule of reason seems to be that it is not safe to infer latent defect in the machine from the fact if its breaking in what to all seeming is ordinary use, because experience teaches the breaking may be due to imperfectly known natural forces, or to unconscious and undiscoverable errors of the human mind and hand controlling the machine. "It sometimes happens, however, that a description of the appliance and of the nature of the accident will indicate negligence by the master in providing appliances which he could not, as a reasonable man, regard adequate for the purpose for which they were used. But this is an inference from proof of the circumstances or physical facts

as given in evidence, and not a presumption of law." *Edgens v. Gaffney Mfg. Co.*, 69 S. C. 529, 48 S. E. 538; *Gentry v. Railway Co.*, supra; *Hicks v. Sumter Mills*, 39 S. C. 89, 17 S. E. 509. Proof of negligence is a condition precedent to the liability of the master. The proof may be either direct or circumstantial, but the plaintiff must assume the burden of furnishing evidence of one kind or the other.

We now consider the facts of this case in the light of the principles above stated. It is not contended there is proof of any specific defect in the engine or negligence on the part of the railroad company. The inquiry then is, does the case fall within the doctrine of *res ipsa loquitur*? The engineers put up as expert witnesses testified if the catch of the lever of an engine, fastened in the notch in the rear of the quadrant, flies out and into the forward end of the quadrant, they would regard the engine in a very defective or worn condition. Neither of them said, in so many words, in what respect the engine would have to be defective or worn for this result to be produced; but it is sufficiently manifest they meant to catch the lever or the notch on the quadrant would have to be so much worn as not to hold fast. Both said they never had such a thing to happen when the engine was standing still, and one said, in his opinion, it was not possible for it to happen. There was not the slightest evidence that either the catch or the notch was worn. The strong proof to the contrary was that both had worked satisfactorily several times under the hand of the plaintiff within an hour before the accident. The plaintiff himself testified he did not know what caused the accident; that it could have been produced by any one of five causes: (1) A piece of waste in the notch of the quadrant, which would prevent the latch on the lever from catching; (2) a piece of coal similarly lodged; (3) a weak spring to the latch on the lever not forcing the latch into the notch on the quadrant; (4) lost motion in the links; (5) a rough valve. Assuming that the defendant would be responsible for all these possible defects, if they existed, the plaintiff does not say the accident was not or might not have been due to other causes for which the defendant was not responsible, nor is there the slightest evidence that any of the conditions mentioned by him as possible causes were present. The cause of the accident is purely conjectural. There is no more reason to suppose it was due to a defect in the machine than to an unconscious error of the plaintiff in its operation, or to some other undiscoverable cause for which neither party was responsible. "A servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition whether the injury was or was not due to the negligence of the master." 2 *Labatt on Master & Servant*, § 837.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 404)

**EQUITABLE BUILDING & LOAN ASS'N
v. CORLEY et al.**(Supreme Court of South Carolina. Oct. 7,
1905.)**1. BUILDING AND LOAN ASSOCIATIONS—LOAN
—CONSTRUCTION.**

Where money is advanced to a member of a foreign building association, and the bond executed provides that the obligation is a Georgia contract, governed by the laws of Georgia, it will be construed, as to applications of payments, in accordance with such laws.

**2. VENDOR AND PURCHASER—CONDITIONS—
NOTICE.**

Where the mortgage securing a bond refers to the bond for conditions, and the bond is not recorded, it is not notice to a purchaser of the land of any other conditions than those appearing on the record of the mortgage.

3. SAME—BONA FIDE PURCHASER.

Evidence held to show that a purchaser of land covered by a mortgage had notice of the conditions of the mortgage, though such conditions appeared only in the bond, which was not recorded.

Appeal from Common Pleas Circuit Court of Lexington County; Watts, Judge.

Action by the Equitable Building & Loan Association against P. H. Corley and the Roof & Barre Lumber Co. From circuit decree, defendant appeals. Affirmed.

Efrd & Dreher, for appellants. R. W. Shand, for respondent.

WOODS, J. The Equitable Building & Loan Association, a corporation having its principal place of business in Augusta, Ga., brings this action to foreclose a mortgage on land in Lexington county, S. C., executed by the defendant Corley, a resident of South Carolina. The land was afterwards conveyed by Corley to Roof & Barre, and by them to the defendant Roof & Barre Lumber Company. The answer sets up the plea of payment. The first question arising under this plea is whether all sums paid to the Equitable Building & Loan Association by Corley and his grantees, after Corley made the mortgage and borrowed the money, should be credited on the sum borrowed and interest, or should be applied not only to that, but also to the expenses of the association and premiums, as provided by the bond.

We first consider this question as it effects the rights of Corley, the original mortgagee. If the contract is governed by the law of this state, as defendants contend, the former method of computation would be correct, and the bond and mortgage would be overpaid. *Association v. Holland*, 65 S. C. 448, 43 S. E. 978. The circuit judge, however, held the contract fell under the law of Georgia, and that by that law the bond was to be computed according to its terms, which included, not only the sum actually borrowed, with interest, but the expenses and premiums for which Corley was liable as a borrowing member of the association. The following is the statute of Georgia under which the computation in the circuit decree was made: "Be it further enacted, that no fines, interest or pre-

miums paid on loans in any building and loan association shall be deemed usurious, and the same may be collected as debts of like amount are now collected by the law in this state, and according to the terms and stipulations of the agreement between the association and the borrower." Laws Ga. 1890-91, vol. 1, p. 181, § 8. This statute was construed by the Supreme Court of Georgia, in *Cook v. Equitable Building & Loan Association*, 30 S. E. 911, and *Burns v. Equitable Building & Loan Association*, 33 S. E. 856. If the Georgia statute governs the contract, it is obvious from its terms, as construed by the Supreme Court of Georgia, that there was no error in the decree of the circuit court. The complaint alleges "that at Augusta, in Georgia, on August 3, 1895, the plaintiff advanced to the defendant Patrick H. Corley, on four shares of the stock of this plaintiff held by him, the sum of \$400, and in consideration thereof the said Patrick H. Corley made, executed, and delivered to plaintiff his bond, dated August 3, 1895, in the penal sum of \$800." The pleadings and the bond and mortgage are silent as to the place of payment. The law of the place where the contract is made governs as to its construction and the obligations which arise from it, where it does not provide for the application of the law of a different place and makes no mention of the place of payment. 9 Cyc. 668; *Touro v. Cassin*, 1 Nott. & McC. 178, 9 Am. Dec. 680; *Pegram v. Williams*, 4 Rich. Law, 219. Here it is not only admitted the contract was made in Georgia, but also that by the bond the parties expressly contracted "that this obligation is a Georgia contract, and in all respects subject to and governed by the laws of Georgia." The law applicable to such an agreement is so well and accurately stated by Scates, C. J., in *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651, 654, that we quote at some length from his opinion, though it would be sufficient to refer to our own cases of *Thornton v. Dean*, 19 S. C. 538, 45 Am. Rep. 796, *Association v. Hoffman*, 50 S. C. 303, 27 S. E. 692, and *Association v. Rice*, 68 S. C. 236, 47 S. E. 63: "The contracts were made in this state, and the laws of this state would, had the parties been silent, have become part of the contracts for the construction and meaning of the parties in ascertaining and fixing their mutual rights and obligations. But parties may substitute the laws of another place and country than that where the contract is entered into, both in relation to the legality and extent of the original obligation and in relation to the respective rights of the parties for a breach or violation of its terms. This I call a substitution of the laws of another place or government for those of the place of entering into the contract, and which is noted by the authorities as an exception to the general rule. This is allowed in all civilized countries, and recognized as part of the *jus gentium*, or law of nations,

respecting private and personal rights, and in all cases where the subject-matter of the contract is not *malum in se*, immoral, or contrary to the local policy, or dangerous to the peace and good order of the particular community in which it is sought to be enforced. When parties seek to enforce such obligations in the courts of the country whose laws have been adopted as those of the contract, it presents only an ordinary case of jurisdiction to the court over a contract made under the same laws of the forum, and by parties within its jurisdiction. But, when the enforcement of the contract is sought in the courts of a country governed by a different rule than the local or adopted law of that contract, the law governing it has no force or obligation *ex proprio vigore* in that forum, but *ex comitate*, under the general public law, the court will enforce it, giving extraterritorial effect to the laws of another government, where it is not dangerous, inconvenient, immoral, nor contrary to the public policy of the local government. Where the Legislature does not define and prescribe the extent of this comity, it must be declared by the courts in each case, governed by precedents, under the general public law." 9 Cyc. 665-666. We conclude the contract was governed by the law of Georgia, and as to Corley the computation was correctly made.

The serious question remains whether the plaintiff can foreclose the mortgage on the land in the hands of the Roof & Barre Lumber Company, a subsequent purchaser, for more than a debt of \$400 and interest, less the payments made. The bond contemplates that Corley should remain a member of the association after he became a borrower, with the obligation of a member to pay \$1.20 per month on each share of his stock until the series to which his certificate belonged should mature; maturity being the date when these payments would aggregate enough, after taking out expenses and premiums, to liquidate the principal of the debt of \$400. It contemplates, further, that he should pay in addition each month interest on the \$400 at the rate of 6 per cent. per annum until the stock should mature, and that his four shares of stock should be assigned to the association as collateral for the obligations of the bond. Upon these payments being kept up until the maturity of the series, the bond stipulated that the obligation would be at an end. The mortgage contains none of these provisions as to the payment of stock, but merely recites that it is given to secure the payment of a bond in the penal sum of \$800, conditioned for the payment of \$400 "as in and by the said bond and conditions thereof, reference being thereunto had, will more fully appear." There is nothing whatever in the record of the mortgage to indicate or to put a purchaser of the land on notice that Corley was a member of the association or anything more than an ordinary debtor; for we do not think the fact that it was given to a building and

loan association and no date of maturity specified could be regarded sufficient for that purpose. If, therefore, there was nothing beyond the record of the mortgage to show notice of the terms of the bond, the principles of *Association v. McCartha*, 43 S. C. 72, 20 S. E. 807, would be applicable, and the defendant Roof & Barre Lumber Company would not be chargeable with notice of anything beyond an ordinary debt of \$400 secured by the mortgage. We find, however, that Roof & Barre Lumber Company answered the complaint, not separately, but jointly with Corley, and the answer, while admitting the execution of the bond and mortgage by Corley, says nothing of a want of notice of the terms of the bond set out fully in the complaint. But, what is still more significant, Roof & Barre and Roof & Barre Lumber Company continued to pay each month after the purchase, for 64 months, the sum of \$6.80, which was precisely the amount called for each month by the bond, and which, before the sale of the land, had been paid by Corley. There is no evidence that there was any demand made by the mortgagee for these payments, and it is a fair inference that these parties bought the land with knowledge of the character of the debt represented by the bond which the mortgage secured, and undertook to pay it. They never have indicated, however, in any way that they knew of the provision for the collection of attorney's fees, and the circuit judge correctly held these fees could not be collected from the land.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 410)

WHITMAN v. CORLEY.

(Supreme Court of South Carolina. Oct. 7, 1905.)

EVIDENCE—DEED—CONSIDERATION.

A valuable consideration, in addition to that expressed in a deed, may be shown by parol. [Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1912, 1913.]

Appeal from Common Pleas Circuit Court of Saluda County; Welch, Judge.

Action by Bettie A. Whitman against John A. Corley. From judgment for plaintiff, defendant appeals. Affirmed.

Barnard B. Evans, for appellant. J. N. O. Gregory, C. J. Ramage, and J. W. Thurmond, for respondent.

WOODS, J. The complaint alleges the conveyance by the plaintiff to defendant of a tract of land in consideration of a promise of future support, and the failure of the defendant to perform his agreement. The answer denies the promise and alleges the conveyance was made in consideration of the sum of \$200 actually paid. The plaintiff recovered judgment, and the defendant appeals.

The deed was introduced and was found to express only a consideration of \$200. The

plaintiff was then allowed to introduce evidence to the effect that the real consideration was, not the payment of \$200, but the promise of support set out in the complaint. This evidence was objected to as an attempt to vary the terms of a written instrument by parol, and the alleged error in its admission is the basis of this appeal. The case of *Latimer v. Latimer*, 53 S. C. 483, 31 S. E. 304, is authority for the proposition stated in the syllabus: "Except in cases of fraud, it is not competent to show by parol that a deed, purporting to be based on good consideration and executed for a specific purpose, was based on valuable consideration and executed for an entirely different purpose." But that case recognizes and affirms the rule that, where a deed expresses a certain valuable consideration, an additional or a different valuable consideration may be proved by parol. In *Garrett v. Stuart*, 1 McCord, 514, the consideration expressed in a bill of sale of a slave was \$1,000. In an action on a warranty of soundness contained in the bill of sale it was held competent to show that the exchange of another slave was the real consideration. *Curry v. Lyles*, 2 Hill, 404; *Rountree v. Lane*, 32 S. C. 160, 10 S. E. 941; *Rice v. Hancock*, Harp. 393; 2 Devlin on Deeds, 823.

The judgment of this court is that the judgment of the circuit court be affirmed.

(129 N. C. 366)

HALL v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Oct. 24, 1905.)

1. STIPULATIONS—CONSTRUCTION.

Where it was agreed in writing between the parties to a cause that a certain copy of a statute of another state, should be accepted as a statute of that state, and that a certain decision be accepted as the law of the other state upon all the points therein, the agreement should be given effect by considering it as if it had been written into the complaint.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Stipulations, § 48.]

2. PLEADING—DEMURRER—SCOPE.

Where, in an action against a telegraph company for failure to deliver a message, mental suffering was not set up as a separate cause of action, but as an element of damage, a demurrer seeking to eliminate such feature was defective.

3. TELEGRAPHS—FAILURE TO DELIVER MESSAGE—DAMAGES.

Where a telegram read: "How is mother to-day? Let me know at once, and I will come at once"—and was not delivered, the character of the message was such as to notify the company that unless a satisfactory answer was received the sender would undertake a journey, and, he having done so, the cost thereof was a proper element of damage.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 65.]

4. TENDER—STATUTORY PROVISIONS—TENDER WITH DEMURRER.

Code, § 575, providing that a tender may accompany an answer, does not authorize a tender in aid of a defective demurrer.

5. CONTRACTS—WHAT LAW GOVERNS—PLACE OF MAKING.

In an action on a contract made in Virginia, the rights of the parties are to be determined by the Virginia law, so far as applicable.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 724.]

Appeal from Superior Court, Cumberland County; Ferguson, Judge.

Action by M. H. Hall against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Busbee & Busbee and R. C. Strong, for appellant. Rose & Rose, for appellee.

HOKE, J. After some formal allegations, the plaintiff complains and alleges as follows:

"That on the 7th October, 1902, the plaintiff delivered to the agent of the defendant, at its office in Newport News, Va., the following message: 'John Hall, Care Mr. Herbert Lutterloh, Fayetteville, N. C. How is mother to-day? Let me know at once, and I will come at once. Miles Hall.' That the plaintiff duly paid the defendant the amount charged for the transmission and delivery of the message to the sendee named therein, and the defendant collected the charges therefor. That the message was received by the defendant at its office in Fayetteville, N. C., but on account of the carelessness, negligence, and gross indifference on the part of the defendant the message was never delivered to either the sendee or Herbert Lutterloh. That the sendee, and especially Herbert Lutterloh, is well known to the defendant's agent in Fayetteville, N. C., and the message could have been delivered to either of them soon after its receipt. That the defendant, having by its carelessness and negligence failed to deliver the message to the sendee named therein, negligently and carelessly failed to notify the plaintiff of the nondelivery of the same, so that he might be able to give a better address, or to pay any additional charges for its delivery, if any such should be necessary. That by reason of the aforesaid carelessness, negligence, and gross indifference on the part of the defendant the plaintiff suffered great mental anguish by not hearing as to his mother's condition, and knowing that she was sick, and not being able to hear from her by reason of the defendant's gross negligence, he was forced to come to Fayetteville, N. C., to his great expense and loss of time from his work, to wit, in the sum of \$1,500. That upon his arrival at Fayetteville, N. C., he found that his mother's condition was much better, and, had the message been delivered, his mental suffering would have been relieved, and he would not have been forced to leave his work, and put to the expense of coming to Fayetteville. That the plaintiff has made demand upon defendant for dam-

ages he has suffered, but defendant refuses and still neglects and refuses to pay him therefor. That at the time of the aforesaid negligent conduct of the defendant, the following was the statute law of the state of Virginia, relative to such matters, as he is informed and believes:

"An act in relation to special damages recoverable of a telegraph company, approved March 2, 1900.

"1. Be it enacted by the General Assembly of Virginia that all telegraph companies shall be liable for special damages occasioned by the negligent failure of their operators or servants in receiving, copying, transmitting or delivering dispatches, or of the disclosure of the contents of any private dispatch to any person other than him to whom it was addressed or his agent, the amount of these damages to be determined by the jury upon the facts in each case. Grief and mental anguish occasioned to the plaintiff by the aforesaid negligent failure may be considered by the jury in the determination of the quantum of damages. Special damages recoverable under this act shall not be barred by regulations of the company concerning the repeating of messages, or by any special undertaking to relieve the company from the consequence of its own negligence.

"2. That it shall be in force from its passage."

"Wherefore the plaintiff demands judgment against the defendant for the sum of \$1,500, the costs of this action, and such other and further relief as he may be entitled to in the premises."

The defendant demurs as follows:

"The defendant demurs to the amended complaint, for that it does not in whole or in part, or in any part thereof, state facts sufficient to constitute a cause of action.

(1) No damages for mental anguish can be recovered under the allegations of paragraph 8 of the complaint; the same being purely speculative, and, furthermore, contrary to the language of the written message forming the basis of this action, and not in contemplation of the parties to the contract of the transmission and delivery thereof. (2) No damages for mental anguish can be recovered under the allegations of paragraph 9 thereof, which sets forth that upon the arrival of the plaintiff at Fayetteville he found that his mother's condition was much better, and, had the message been delivered, his mental suffering would have been relieved, and he would not have been forced to leave his work and put to the expense of going to Fayetteville. But if the court should be of opinion, based upon the allegations in the complaint, that the plaintiff should recover nominal damages, the defendant hereby tenders to the plaintiff the sum of \$1.00 as such damages, and the costs of the action to the time of the trial hereof, upon this demurrer. Therefore the defendant prays that it go hence without day."

An agreement entered into by counsel is made a part of the record in the cause as follows: "Fayetteville, N. C., May 10, 1905. It is agreed that the copy of the Acts of the Assembly of Virginia 1899-1900, in the hands of Rose & Rose, attorneys, be accepted as the statute of Virginia in the case of Miles Hall v. Western Union Telegraph Co., and that the case of Connelly v. Western Union Telegraph Co. (N. C.) 40 S. E. 618, 56 L. R. A. 663, be accepted as the law of the state of Virginia, upon all points therein, in the same case." This agreement, while somewhat unusual in aid of a demurrer, can, we think, be given effect by considering the same as if it had been written into the complaint, and such was, no doubt, the design and intent of the parties. Giving the agreement such placing, however, we are of the opinion that the judgment overruling the demurrer should be affirmed.

Here is a plain and concise statement of a cause of action for breach of contract in the negligent failure of the defendant company to deliver a telegram. It would seem that the character and urgency of the message were such as to notify the defendant that, unless a satisfactory answer was received in regular course of transmission, the plaintiff would go to Fayetteville, which in fact he did, according to the allegations of the complaint. If this be the correct and reasonable interpretation of the message, the cost of the trip to Fayetteville would be an element of damage. There is an additional allegation addressed to the question of mental anguish. This is not stated as a separate cause of action at all, but only as a further element of damage. Its consideration may or may not arise on the further hearing, and in any event the demurrer, which seeks to eliminate this feature of the plaintiff's demand at the present stage of his case, is irregular and defective. Giving such defect its technical term, we should say the demurrer is too broad. It goes to the entire complaint, and this, as we have seen, contains a good cause of action well pleaded, and if the facts can be proved as alleged the plaintiff can recover some damage. The defendant seems to have been sensible of this difficulty, as he tenders a judgment of \$1.00 as nominal damage, but we are aware of no law or practice which will permit a tender as an aid to a defective demurrer. Code, § 575 et seq., provides that such a tender may accompany an answer, and this alone is its proper placing, so far as a pleading is concerned, or in reply to a counterclaim.

The complaint averring that the contract was made in Virginia, the rights of the parties to this controversy will be determined by the laws of Virginia, so far as the same apply. Bryan's Case, 133 N. C. 607, 45 S. E. 938; Hancock's Case, 137 N. C. 497, 49 S. E. 952. Both a statute of the state of Virginia and a decision of the Supreme Court construing the same are set forth in the com-

plaint, and admitted—the one by the demurrer, and the other by the agreement. But we do not think it desirable or proper that we should discuss or decide the rights of the parties under the law until the facts are before us, after proceedings had in accordance with the course of practice of the court. Judgment overruling demurrer is affirmed.

No error.

CONNOR, J., concurs in result. BROWN, J., did not sit on the hearing of this case.

(139 N. C. 490)

CLARK v. CITY OF STATESVILLE.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. ELECTIONS—REGISTRATION OF VOTERS.

Under Const. art. 3, § 4, prescribing an educational qualification for voters, but providing that no male person who was, on or prior to January 1, 1867, entitled to vote in any state of the United States wherein he then resided, and no lineal descendant of such person, shall be denied the right to register and vote at any election in this state by reason of his failure to possess the educational qualifications prescribed therein, and providing for a registration of all voters of the latter class and the making of a permanent roll of their names, persons so registered in the permanent roll are not thereby excused from registering at each election in the precinct where they are entitled to vote.

2. SAME—QUALIFICATION OF VOTER.

Registration is a necessary qualification of a voter, so that, when the law requires that a majority of the qualified voters shall have cast their votes for a given proposition before it becomes the law, it means a majority of the registered voters; the question as to the qualification of a voter by the payment of his poll tax not being involved in this case.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, §§ 92, 210-215.]

Appeal from Superior Court, Iredell County; Long, Judge.

Action by R. R. Clark against the city of Statesville. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This action was brought to determine the validity of an election held in Statesville on the 15th day of August, 1905, under the provisions of chapter 375, p. 956, of the Private Laws of 1905, at which election the question of issuing \$30,000 of bonds for graded school, water, sewerage, and electric light purposes was submitted to the qualified voters of said city. The only question in the case is, as will hereafter appear, whether a majority of the qualified voters of the city voted for the issue of the bonds. The proper authorities ordered a new registration for the said election, under and by virtue of chapter 750, § 3, of the Acts of 1901. At the time of the election there were registered on the permanent roll of registered voters, in the office of the clerk of the superior court, the names of more than 250 persons residing in Statesville who were 21 years old and possessed the qualifications mentioned in article 3, § 1, of the Constitution. These 250 voters were also registered on the old registration books

of Statesville at the time the mayor and aldermen ordered a new registration, having registered their names on the said books during the month of March, 1903; but they did not register their names again on the books of the new registration ordered by the city authorities. The permanent roll of registered voters, kept in the clerk's office, shows the names, alphabetically arranged, of voters residing in each of the four precincts into which Statesville township is divided, but does not show which of the voters live inside the city of Statesville and which live outside. There is no permanent roll of registered voters kept by the authorities of Statesville. The only permanent roll is the one kept by the clerk of the court as above stated. Statesville township covers a larger territory than the city of Statesville, and a number of voters on the permanent roll live outside of the city limits. But the 250 voters above mentioned all live within the city. There were 329 voters registered on the new registration books, and of these 223 voted for graded school bonds and 224 voted for water, sewerage, and electric light bonds. The plaintiff contends that the names of the 250 voters registered on the permanent roll, who were also on the old registration books of the city, but who failed to register their names on the books of the new registration ordered by the city, ought to be added to the 329 names on the new registration books in order to ascertain the number of qualified voters at the election. If this is done, the total number of qualified voters was 329+250=579, and neither of the class of bonds voted for received a majority of the qualified votes. There is no question that the act authorizing the bonds to be submitted to a vote of the people was passed in accordance with the constitutional requirements, or that the election was regularly called, or that due notice was given of the election and also of the new registration; nor is there any objection made to the election or to the issuing of the bonds, except that herein specified. As stated by the plaintiff's counsel in his brief, the only question involved in this appeal is this: Were the 250 persons whose names were registered on the permanent roll and also on the old registration books of the city, but not on the books of the new registration ordered by the city, qualified voters at the election? After the election was held, and the finding and determination of the duly authorized canvassers that a majority of the qualified voters had cast their votes in favor of issuing bonds, and when the authorities of the city, who were charged with the duty of issuing the bonds, had declared their purpose to do so, the plaintiff, a taxpayer of the city, brought this action in behalf of himself and all other taxpayers to declare the election void and to enjoin the issue of the bonds. The matter came on to be heard on the complaint and answer, the foregoing facts taken therefrom having been admitted, and it was

adjudged upon due consideration that the election was valid, and that the bonds, when issued, will be valid obligations of the city. The temporary restraining order theretofore issued was accordingly dissolved, and the prayer for an injunction denied, with costs. The plaintiff excepted and appealed.

J. B. Armfield, for appellant. Armfield & Turner and Geo. B. Nicholson, for appellee.

WALKER, J. (after stating the case). The decision of this case must turn upon the construction of article 6 of the Constitution, and especially of section 4 thereof; it being the one which prescribes a certain educational qualification for a voter and the payment of his poll tax before he shall be entitled to vote, and provides for the registration of all who are entitled to vote without having successfully undergone the educational test therein required, and for the making of a permanent record of such registration. It is now contended by the learned counsel for the plaintiff in this case that this registration of voters who have not submitted to the educational test was intended to be permanent, in the sense that the voter can register once for all time and for all elections, the permanent record required to be made answering as a registration, not only for the next, but for all subsequent elections, such a voter not being required ever to register anew. We are unable to take this view, though it has been ably argued by counsel and presented to us with great plausibility. A consideration of article 6 of the Constitution, and of the system of conducting elections in this state established under its provisions, leads us without any hesitation to the conclusion that such a construction would defeat the main purpose of our election laws, constitutional and statutory, and produce grave and serious results in their operation. The meaning of this section of the Constitution is to our minds unmistakable, and we think the framers of it have selected words most apt and adequate to express that meaning. After prescribing, in sections 1 and 2, certain qualifications for a voter, it is provided in section 3 that "every person offering to vote shall be, at the time, a legally registered voter as herein prescribed and in the manner hereafter provided by law, and the General Assembly shall enact general registration laws to carry into effect the provisions of this article." In section 4 we find that every person presenting himself for registration shall be able to read and write any section of the Constitution in our language, and before he shall be entitled to vote he must show that he has paid his poll tax for the previous year on or before the 1st day of May of the year in which he proposes to vote; but no male person who was on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any one of the United States wherein he then resided, and no lineal de-

scendant of any such person, shall be denied the right to register and vote at any election in this state by reason of his failure to possess the educational qualifications therein prescribed. Provision is then made, in the same section, for a registration of all voters of the latter class and the making of a permanent roll or record of their names. This was intended to be done most clearly for the sole purpose of furnishing convenient and easily available evidence of the fact that those whose names appear on the list thus made are not required to have the educational qualification. The educational test did not apply to any persons who themselves were, or whose ancestors were, voters on January 1, 1867, and to ascertain and record who such persons were the roll was required to be made. The registration and permanent roll were intended to be a substitute for the educational test or qualification—nothing more, and nothing less. This appears from the language that no person thus registered "shall be denied the right to register and vote at any election in this state by reason of his failure to possess the educational qualifications herein prescribed." In all other respects the two classes of voters, those who are educationally qualified and those otherwise qualified under said section, are to remain on the same footing and to be subject alike to the same laws regulating the exercise of the elective franchise. The context plainly shows that this was the intention and should be the construction of the section, and good and valid reasons can be urged in its support and in favor of the policy adopted. It cannot be doubted that it was the purpose to arrange the voters of this state into two classes, one with the educational qualification and the other without it, but with another qualification deemed to be sufficient in the place of it. But, when they are thus classified and brought to a position of equality of privilege in the exercise of the right to vote, why discriminate against the former class by requiring them to register at each successive election, if so provided by statute, in favor of the latter, by relieving them of this burden. Is it not more reasonable to suppose that the "registration and permanent record" were merely intended to preserve the evidence as to who had thus qualified themselves under the second of the provisions of that section?

But the construction may well be sustained by either of two other reasons. There is a condition annexed in section 4 to the right of persons thus registered on the permanent roll to vote "in all elections by the people of this state," namely, "unless disqualified under section 2 of this article and provided that such person shall have paid his poll tax as above required." Now, section 2 requires, as a qualification for voting, a residence in the state for two years, in the county six months, and in the precinct or ward or other election district four months, next preceding the elec-

tion, with a proviso that removal from one voting precinct to another shall, after four months from the time of such removal, deprive the voter of the right to vote in his former precinct, and he cannot vote, of course, without registration in his new precinct; and it also provides that conviction of a felony punishable by imprisonment in the penitentiary shall disqualify him as a voter until restored to citizenship in the manner prescribed by law. It is evident from this reference in section 4 to section 2 that it was not intended to do more for the one class than for the other. They must all comply with the general provisions of the election laws, enacted for the purpose of securing regularity and certainty in the methods of holding elections and of protecting the ballot box against fraudulent voting. There is no reason why this class of voters, those who are to be on the permanent roll, should be exempt from the operation of those laws, which do not equally apply to the other class. The object of the lawmakers can be well and fully accomplished without such discrimination as between different classes of voters. But we think the very words of section 4 exclude any other conclusion as to the meaning of the organic law upon this subject. The language is that no such person who could vote, or whose ancestor could vote, on January 1, 1867, "shall be denied the right to register and vote at any election in this state by reason of his failure to possess the prescribed educational qualifications, provided he shall have registered in accordance with the terms of this section prior to December 1, 1908." He shall not be denied, not the right to vote, we observe, but the right "to register and vote," provided he complies with the section by registering on the permanent roll or record. Transposing terms, the result will clearly be this: that, if he registers for the permanent roll, he shall not be denied "the right to register and vote" in any future election by reason of his failure to possess the educational qualification. This is too plain, we think, to admit of the likelihood of any misapprehension as to the true meaning. He must register before he can vote. The construction which we have settled upon is the one which has received the full sanction and approval of the Legislature, as is evidenced by the language of section 9 of chapter 550 of the Acts of 1901, being the act providing for permanent registration of all persons entitled to vote under section 4 of article 6 of the Constitution, and that section of chapter 550 of the act of 1901 is especially a legislative interpretation of the meaning of section 4 of article 6 of the Constitution in this respect, that the requirement of registration for the "permanent record," in lieu of the test of reading and writing any section of the Constitution, is only a superadded qualification, and does not dispense with any of the qualifications a voter ordinarily required. This can readily be inferred from the language of

said section, which is as follows: "Any person holding a certificate of registration as herein provided for shall be entitled to register in any county of this state, notwithstanding his inability to read and write, provided that he shall be otherwise qualified as an elector."

We have not adverted specially, in this connection, to section 3 of article 6 of the Constitution, by which it is required that every person offering to vote shall be at the time legally registered, as prescribed in that instrument and in the manner thereafter provided by law, and by which it is further directed that the Legislature shall enact "general" registration laws, as distinguished from any special registration laws, to carry into effect the provisions of that article. This manifests clearly the intent that while the person duly registered on the "permanent record" should have the general right forever thereafter to vote in all elections, it being the same right precisely he would have had if the amendment had not been adopted, yet he shall enjoy and exercise this right subject to the other provisions of law concerning elections and to the same extent as they affect other voters who can read and write. The mere fact that he or his ancestor had voted in 1867 was surely not intended to lift him to a higher plane of citizenship, or to accord to him greater privileges or immunities as a voter, than the educated man. Some were freed from the disability of illiteracy, and others permitted to vote if they or their ancestors had voted in 1867. That is all. They were not, therefore, exempt from the full operation of all other laws intended to safeguard the ballot box, and there is no sound reason why they should be. Any other provision might well have been challenged and opposed by the people as unwieldy and inexpedient. This construction preserves and secures unimpaired to the voter on the permanent record the very right which it was the purpose that he should enjoy under the Constitution, and to its fullest extent. Anything more than that would be an unfair discrimination against other voters, and we should not for a moment suppose the people intended that any such result should follow the adoption of the amendment.

We take it to be now thoroughly settled that, contrary to some earlier adjudications, registration is necessary to qualifications as a voter, so that, when the law requires that a majority of the qualified voters should have cast their votes for a given proposition before it becomes the law, it means a majority of the registered voters. *Norment v. Charlotte*, 85 N. C. 387; *Southerland v. Goldsboro*, 96 N. C. 49, 1 S. E. 760; *Duke v. Brown*, 96 N. C. 127, 1 S. E. 873; *McDowell v. Construction Co.*, 96 N. C. 514, 2 S. E. 351; *Wood v. Oxford*, 97 N. C. 227, 2 S. E. 653. These cases reversed the former rulings on the subject in *Railroad v. Commissioners*, 72 N. C. 486, and *Reiger v. Commissioners*, 70 N. C. 319. The can-

vassers proceeded upon the correct principle in ascertaining that a majority of the qualified voters of Statesville had cast their ballots in favor of issuing the bonds. This results from our construction of the Constitution, when considered in connection with the cases just cited, which define who is a "qualified voter" within the meaning of those words as used in chapter 375, p. 956, of the Private Acts of 1905, under which this election was held, and in other similar acts.

His honor, Judge Long, to whom the matter was submitted for decision, was of opinion, and so adjudged, that as far as appeared the election was in all respects properly conducted and the result correctly declared, and that the bonds will not be invalid for any reason now assigned by the plaintiff. In this opinion and judgment we concur.

Affirmed.

(129 N. C. 402)

BIDWELL v. BIDWELL.

(Supreme Court of North Carolina. Oct. 31, 1906.)

1. HUSBAND AND WIFE — MAINTENANCE — PARTIES—STATUS.

Where plaintiff and defendant had been divorced a vinculo, plaintiff was not entitled to maintain a suit against her husband for maintenance, authorized by Code, § 1292, in the absence of a showing that the divorce was void and that they were husband and wife at the time the suit was brought.

2. DIVORCE—FOREIGN DIVORCE—RES JUDICATA.

After defendant had acquired an absolute divorce from plaintiff in North Dakota, in an action in which plaintiff appeared, plaintiff sued for divorce in Massachusetts, where she was a resident, and her libel was dismissed on the ground that the North Dakota divorce was valid and a bar to the action. *Held* that, plaintiff in a suit for maintenance having made no claim that the Massachusetts decree was fraudulent or invalid, she was bound thereby, and was not entitled to claim that a marriage still existed.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 835.]

3. SAME—ESTOPPEL.

Defendant obtained a divorce from plaintiff in North Dakota, in an action in which she appeared, and was awarded \$10,000 and the care and custody of a minor child. After 6½ years plaintiff instituted suit for divorce in Massachusetts, which was determined against her on the ground that the North Dakota divorce was valid and a bar to further proceedings. *Held*, that plaintiff was thereby estopped, after defendant had married another woman by whom he had had a child, from asserting any further claim against him for pecuniary allowances.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 842.]

Appeal from Superior Court, Wake County; Neal, Judge.

Action by Ella J. Bidwell against George H. Bidwell. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Civil action under section 1292 of the Code to recover for support and maintenance of plaintiff and her minor child. Plaintiff alleged that plaintiff and defendant were man

and wife, that defendant had unlawfully abandoned plaintiff, and failed to provide reasonable subsistence for plaintiff and her minor child, though fully able to do so. Defendant answered, denying that he had wrongfully deserted plaintiff, charged the separation to plaintiff's own conduct, and, further, set up the record, proceedings, and decrees of two courts—one in North Dakota, in which the present defendant was awarded an absolute divorce, and the second a record and decree of Massachusetts, in which the present plaintiff sued the present defendant for absolute divorce, and in which there was a decree that the divorce granted in the North Dakota court was valid and binding, and that plaintiff and defendant did not hold the relationship of man and wife—and set up these two records and decrees as an estoppel in bar of relief. Plaintiff replied to the answer, and averred that the decree of divorce granted by the court in North Dakota was null and void, and should be so held, because at the time of the institution of said suit and proceedings and decree therein neither plaintiff nor defendant had any bona fide domicile in North Dakota, "but that defendant had gone to said state with no intent or purpose of becoming a resident or acquiring a bona fide domicile therein, but with the sole purpose of obtaining, by fraud and secretly, a divorce from plaintiff." Further replying, plaintiff averred that the plaintiff was forced by stress of want and dire necessity, being penniless, friendless, homeless, and in a strange land, either to accept such terms as the present defendant might dictate or go hence in destitution for herself and infant child, and under and by virtue of this hard duress, from a necessity from which there was no escape, she took the money he agreed to give her. There was evidence to the effect that the present plaintiff had appeared and answered in the suit in North Dakota, that the decree of divorce was entered after investigation had, and the plaintiff in this suit had been awarded and paid \$10,000 as a full and reasonable allowance for the care, education, and maintenance of her minor child. It further appeared that at the time of the institution of the suit in Massachusetts by the present plaintiff, and pending the proceedings therein, the said plaintiff was a citizen, resident, and domiciled in Massachusetts, and defendant had appeared and answered to the libel filed in the cause.

The record of findings of fact and conclusions of law in which the decree of absolute divorce was awarded in the North Dakota suit are as follows: "(1) That plaintiff now is, and at all times since more than 90 days preceding the commencement of this action has been, in good faith a resident of North Dakota, and that defendant is a resident of Springfield, Mass., but is now in this state; (2) that plaintiff is now about 26 years of age and defendant is now about 29 years of

age; (3) that on December 9, 1890, plaintiff and defendant were married, and that said marriage has never been annulled or dissolved; (4) that there are two children, living issue of said marriage between plaintiff and defendant herein, to wit, Mary Beulah, a girl four years of age, and Maud, a girl two years of age, the former of which is in the custody of the plaintiff, and the latter in the care and custody of the defendant; (5) that plaintiff and defendant lived together after their said marriage as husband and wife until about the month of December, 1893, at which last-mentioned time they separated, and have lived separate and apart ever since; (6) that this is an action for divorce, and that this court has full jurisdiction of both the parties thereto and of the subject-matter of the action; (7) that defendant, as appears from the proofs herein, has been and is guilty of willful desertion of the plaintiff, and that such desertion, as shown by the proofs herein, is cause for full and absolute divorce under the laws of this state; (8) that the true and best interests of the parties and of the minor children of the parties all require that the custody of said minor child Mary Beulah be awarded to and confirmed in the plaintiff, and the custody of said minor child Maud be awarded to and confirmed in the defendant; (9) that from the proofs as they appear herein the sum of \$10,000 is a fair, reasonable, and just sum to be paid by the plaintiff to the defendant for the support, care, custody, maintenance, and education of said minor child Maud, and that the decree herein should require plaintiff to pay said sum to defendant in that behalf, but, and the decree shall so provide, the payment of said \$10,000 shall be in full discharge of all obligations of the plaintiff to the defendant, including, not only in behalf of said minor child Maud, but also in full discharge of all obligations from him to her or on account of alimony, support, money, rights of dower, if any, and any and all other obligations whatever, except there be reserved to the said defendant her right of dower, if any she have, in a certain farm in the state of North Carolina, called and known as the 'Moore farm,' near Franklin, in the county of Macon, in said state, formerly owned by plaintiff; (10) that justice to the parties require, and that the decree shall so provide, that each of the parties may visit the child in the care and custody of the other at reasonable times and places provided in that behalf, however, that, when defendant desires to visit the said minor child Mary Beulah, she shall not be required to do so at the home of the plaintiff's parents or relatives, but may do so at the house of some disinterested friend, and with such child in the then temporary custody of such disinterested friend or of the plaintiff. Let judgment be entered herein in conformity with the foregoing by the clerk of the district court," etc. Signed by W. S. Lauder, judge, etc., September 20, 1895.

And the proceeding and decree in the libel for divorce entered in Massachusetts are as follows: "Respectfully libels and represents Ella J. Bidwell, of Springfield, Mass., that she was lawfully married to Geo. H. Bidwell, now of Culasaja, in North Carolina, at Walhalla, in South Carolina, on the 9th day of December, 1890, and thereafterwards your libelant and the said Geo. H. Bidwell lived together as husband and wife in this commonwealth, to wit, at Chester, in said county, and that your libelant has lived in this commonwealth for five years last preceding the filing of this libel; that your libelant has always been faithful to her marriage vows and obligations, but the said Geo. H. Bidwell, being wholly regardless of the same at Culasaja, in North Carolina, on Friday, the 1st day of December, 1893, or thereabout, without just cause willfully and utterly deserted your libelant, which desertion has continued for three consecutive years next prior to the filing of this libel. Wherefore your libelant prays that a divorce from the bonds of matrimony may be decreed between your libelant and the said Geo. H. Bidwell, and that the care and custody of Maud Bidwell and Beulah Bidwell, both minor children of said libelant and libelee, may be decreed to her, and that said libelee may be decreed to pay alimony to your libelant in the sum of \$50,000, and for such other orders and decrees as to your honors shall seem meet and as justice may require." Signed by Ella J. Bidwell, February 4, 1902.

The foregoing libel was entered in this court on the 10th day of February, 1902, when the libelant appeared by her attorneys, Bates & Armington, and the libelee appeared by his attorney, E. H. Lathrop, and on the back of said libel is the following acceptance of service: "I accept service of this precept and appear for the libelee, reserving all rights." Signed by E. H. Lathrop, attorney for libelee. February 10, 1902.

And on March 19, 1902, the libelee filed his answer as follows: "The libelee denies each and every allegation in the libel, except said marriage, and that he neither denies nor admits, but leaves the libelant to prove. If the libelant shall prove said alleged marriage, the libelee alleges that he was divorced from the libelant by the district court of Cass county, state of North Dakota, a court of competent jurisdiction and having jurisdiction of the cause and both parties thereto, prior to the beginning of this libel, to wit, September 21, 1895, and which decree of divorce is in full force and effect, and was at the time of bringing this libel. The libelee further says that the libelant has brought two libels against him prior to this one, in which said divorce has been pleaded, all of said proceedings being in this county and of record here; that last proceeding was filed in this county April 12, 1897, and was dismissed January 6, 1902; that said libelee therein pleaded said divorce granted to him as aforesaid in North Dakota, and

your libelee says that the issue in this case has been adjudicated in this court, and the libellant is barred from proceedings in this action thereby, and from being granted divorce as prayed for." Signed by E. H. Lathrop, attorney for libelee.

On March 25th there was a full hearing of the evidence, and on March 26th the following decree was filed in the case in the Massachusetts court: "This case came on to be heard on Tuesday, March 25, 1902, before Mr. Justice Maynard; both parties appearing by their respective counsel [naming them]. Now, it appeared upon the hearing of said cause that prior to the bringing of this libel, to wit, September 20, 1895, the said libelee in the above-entitled action, the said Geo. H. Bidwell, was divorced from the said libellant, the said Ella J. Bidwell, by the district court for the Third judicial district of North Dakota, for a cause of divorce recognized in said North Dakota and in this commonwealth, said district court having had jurisdiction of both cause and parties, both parties appearing therein personally and by counsel, and the libelee having filed an answer to said libel, and it further appeared that neither before nor since the filing of this libel was the said Geo. H. Bidwell an inhabitant of this commonwealth. It is hereby decreed and determined that this libel is hereby dismissed, and that said decree of divorce granted by said district court of North Dakota and pleaded herein is a good and valid divorce in this commonwealth, and that the parties are concluded thereby. We hereby assent to this decree." Signed by counsel of both parties and certified by the clerk of the court.

The jury having been impaneled, and the above records presented, further proceedings were had as follows: "This cause coming on to be heard after the introduction of the exemplified copies of the records and decrees in the case of Geo. H. Bidwell against Ella Bidwell, rendered in the court of North Dakota, as alleged in the answer, and the records and decrees in the case of Ella J. Bidwell against Geo. H. Bidwell, rendered in the superior court of Hampden county, Massachusetts, the plaintiff offered testimony tending to prove that the defendant went to North Dakota, not intending to become a resident of that state, and testimony tending to prove the other matters alleged in the replication. Thereupon the court intimated to the counsel for plaintiff that he would charge the jury that the plaintiff was estopped by the Massachusetts decree, notwithstanding the matters alleged in the replication touching the validity of the North Dakota decree, and in deference to that intimation the plaintiff submitted to a judgment of nonsuit and appealed."

Argo & Shaffer and Douglass & Simms, for appellant. Busbee & Busbee, Shepherd & Shepherd, and Jones & Johnston, for appellee.

HOKE, J. (after stating the case). On the facts presented for our consideration, the right of the plaintiff to the relief demanded depends on whether the plaintiff and defendant are now husband and wife. Skittleharpe v. Skittleharpe, 130 N. C. 72, 40 S. E. 851. It will be noted that the plaintiff in her reply assails the validity of the North Dakota decree, first, for lack of jurisdiction, and, second, for that the same was obtained by fraud and duress. But no such impeaching allegations are made against the proceedings and decree of the court of Massachusetts. This being true, we are of opinion that the latter decree conclusively determines that the plaintiff and defendant are no longer husband and wife, and that the plaintiff has therefore no right to further support from the defendant.

It is accepted doctrine that, so far as the subject-matter of the controversy is concerned, actions for divorce deal with the status of the parties, and that jurisdiction in such actions is dependent upon the domicile of the parties at the time the decrees are rendered. Where neither party has a domicile in the state of the forum, such court having no jurisdiction of the subject-matter of the controversy, a decree of divorce is void, though both parties may have appeared and voluntarily submitted themselves to the jurisdiction of the court. Where the plaintiff only is domiciled in the state of the forum, and has obtained a decree of divorce for a cause recognized as valid in such state, after constructive service of process on the defendant, according to the course and practice of the court, there has heretofore been diversity of opinion as to the extent and binding force of such a decree in other jurisdictions. North Carolina has heretofore held against the validity of such a decree by the courts of other states as affecting the status of her own citizens. The better doctrine, however, now seems to be that where the domicile of the plaintiff has been acquired in good faith, and not in fraud or violation of some law of a former domicile, a divorce of this kind should be recognized as binding everywhere—certainly within the jurisdiction of the United States or any one of them. Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366. The case of Atherton v. Atherton does not establish the proposition here stated on precisely similar facts to the case before us, or it would be controlling; but the general tenor of the decision would seem to favor this conclusion. Where, however, the action is instituted and the decree obtained in the state of the plaintiff's domicile, and the defendant has been served with process within the jurisdiction of the forum or has voluntarily appeared and answered, all the decisions are agreed that a decree in such case is valid, both in rem and in personam, and will bind and conclude the parties everywhere. Jones

v. Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200. The proceedings and decree of the court of Massachusetts are of the latter character.

It is admitted or established that the plaintiff in that suit, as she is in this, was at the time and still is resident and domiciled in the state of Massachusetts. Her libel was for the purpose of obtaining an absolute divorce from the defendant. He appeared and answered, and set up the proceedings and decree of the North Dakota court in bar of the plaintiff's demand. The Massachusetts court, after full hearing, dismissed the libel on the ground that the North Dakota decree was valid and that the status of the parties was not that of husband and wife. There is here no allegation or claim that the Massachusetts court was without jurisdiction, or that the decree of such court was procured by fraud. The investigation and decree necessarily passed upon and determined the very questions involved here. The court had jurisdiction both of the cause and the parties, and the conclusion is not open to further investigation. True, the case on appeal states that the plaintiff was ready to produce testimony that the defendant never had any domicile in North Dakota, and that such court was without jurisdiction, and that the decree of the Dakota court was obtained by fraud and duress. The answer is that the validity of the divorce has been established by a decree of a competent court having full jurisdiction in the cause, where the very questions she now seeks to raise had been, or could have been, passed upon and determined, and that the plaintiff is thereby estopped from further question concerning them. *Jenkins v. Johnston*, 57 N. C. 149; *Tuttle v. Harrill*, 85 N. C. 456; *McElwee v. Blackwell*, 101 N. C. 192, 7 S. E. 893; *Thurston v. Thurston*, 99 Mass. 39; *Hood v. Hood*, 110 Mass. 463; *Bradley v. Bradley*, 160 Mass. 258, 35 N. E. 482; *Cromwell v. County Sac*, 94 U. S. 351, 24 L. Ed. 195.

It is suggested that the decree of the Massachusetts court is a consent decree, and for that reason is not binding or conclusive between the parties in actions of this character. The question, however, does not arise on this record; for we are clearly of opinion that this is not a decree by consent. The entire record discloses that the case was conducted throughout as an adversary proceeding, and judgment was entered after full and due inquiry into the facts. Our decision of the cause is in accord with the general equities of the case, as indicated by the course of events and the conduct and present status of the parties. The plaintiff, having appeared and answered in the suit in North Dakota, receives \$10,000 awarded her in that case for the care and custody of her minor child. After a delay of 6½ years she institutes her own suit for divorce in Massachusetts, which is determined against her,

and in which she is awarded ——— thousand dollars by way of allowance. Again, after considerable delay, in apparent acquiescence, she brings this suit, seeking further allowance for support. The defendant, in the meanwhile, in reliance on the decrees of two courts—one of them certainly having full jurisdiction of both cause and parties—has married another woman and had a child born to him by this marriage.

Apart from the estoppel by record on the principal question, there is strong authority for holding that the plaintiff is estopped by conduct in pais from asserting any further claim for pecuniary allowance against the defendant. *Nichols v. Nichols*, 25 N. J. Eq. 60; *Mohler v. Shank's Estate*, 93 Iowa, 273, 61 N. W. 981, 34 L. R. A. 161, 57 Am. St. Rep. 274; *Baily v. Baily*, 44 Pa. 274, 84 Am. Dec. 439. There should be an end to this litigation. The defendant may well invoke for his protection the maxim, "Nemo debet bis vexari pro una et eadem causa." We hold that there was no error in the ruling of the court below.

No error.

(129 N. C. 412)

GLENN v. MOORE COUNTY COM'RS et al.
(Supreme Court of North Carolina. Oct. 31, 1905.)

1. BRIDGES—POWER TO CONTROL.

Where the owner of land on both sides of a river built a bridge at that point and opened public roads over his lands, the county paying a portion of the expense and contracting with the landowner to thereafter maintain the bridge as a public bridge, the contract was one that it was not competent for the county commissioners to make, and the bridge was subject to the control of the commissioners as all other county bridges, and the board had authority to discontinue the same at any time.

2. MANDAMUS—TO COUNTY COMMISSIONERS.

Code, c. 17, § 707, subsec. 15, makes it the duty of the commissioners of each county to open and to discontinue highways and bridges. By section 1090 a willful failure to discharge such duty is a misdemeanor, and by section 711 commissioners failing to discharge any duty imposed by law may be sued for a penalty. *Held*, that a taxpayer of the county could not maintain mandamus to compel the board of commissioners to repair a certain bridge.

3. INJUNCTION—ERECTION OF BRIDGE.

Code, c. 17, § 707, subsec. 15, makes it the duty of the commissioners of each county to open and to discontinue highways and bridges. By section 1090 a willful failure to discharge such duty is a misdemeanor, and by section 711 commissioners failing to discharge any duty imposed by law may be sued for a penalty. Section 2034 provides that, when a bridge is necessary, the town supervisors, with the concurrence of the county commissioners, shall contract for the building and maintenance thereof at the cost of the county. *Held*, that where the board of commissioners had in contemplation the opening of a public road to a point on a stream and the erection of a bridge there, and the commissioners had acted honestly and in good faith, a taxpayer could not maintain a suit for injunction to restrain the erection of the bridge.

Appeal from Superior Court, Moore County; Neal, Judge.

Action by E. F. Glenn for a mandamus to compel the board of commissioners of Moore county and others to repair a public bridge, and for an injunction restraining them from erecting another bridge. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Action, prosecuted by plaintiff in his individual right and as a taxpayer of Moore county, for the purpose of having a mandamus directed to the defendant board of commissioners commanding it to repair a public bridge over Deep river and an injunction restraining said defendant from erecting another bridge over said river some distance below the present one. The cause coming on to be heard before Judge Neal upon an order to show cause, he found the following facts: "That about the year of 1882 or 1883 a bridge was constructed over Deep river, in Moore county, at Glenn's Mill. That Dr. R. W. Glenn, the father of the plaintiff, constructed the said bridge at a cost of about \$4,000. That after the construction of the said bridge the board of commissioners made an order in favor of the said Dr. R. W. Glenn on the treasurer of the said county for the sum of \$1,250 toward the amount expended for the erection of the said bridge. That at the time of the building of the bridge aforesaid and the issuing of the order aforesaid the said Dr. R. W. Glenn was the owner of the lands on both sides of the river at the place where the said bridge was constructed. That at the time of the construction of the said bridge and the issue of the said order, or shortly before or after said times, the said Dr. R. W. Glenn opened up the public roads over his said lands leading to the bridge on both sides of the said river, and the said board accepted said roads as public roads, and have used and worked the same as public roads ever since. That since the said time the public has used the said bridge. That the plaintiff is now the owner of the lands referred to as owned by Dr. R. W. Glenn on both sides of the river, having acquired ownership as one of the heirs of Dr. R. W. Glenn and by purchase from the other heirs. That the plaintiff is a freeholder of the county of Moore, and a taxpayer therein. That the proposed new bridge contracted for by the defendant board is about one-half mile from the old bridge at Glenn's Mill. That after the building of the said bridge, and after it had been received as a public bridge by the board of commissioners of Moore county, the said Dr. R. W. Glenn, the plaintiff, and the co-owners of the property, as set forth in the complaint, constructed the buildings on their real property on both sides of the river at Glenn's Mill, and made the improvements alleged in the complaint, or some of them. That the buildings were constructed and the improvements made with reference to the said contract and the bridge at Glenn's Mill. That a failure to

keep the bridge in repair at Glenn's Mill will damage the plaintiff in his property. That the bridge so constructed at Glenn's Mill in 1882 or 1883 became the property of the county. That the board of commissioners since that time made frequent repairs on said bridge. That the board of commissioners of Moore county, upon complaint made as to the condition of said bridge, appointed a special committee to examine said bridge and report to the board, and that said committee made the report attached to the answer of said board marked 'Exhibit A,' and made a part thereof. That thereafter the commissioners of said county made personal examination of the site of the old bridge, and the site of the proposed new bridge, and the other sites, and thereafter, on the 3d day of July, 1905, made the order attached to the complaint marked 'Exhibit B.' That on the 3d day of July, 1905, the defendant entered into the contract attached to the answer, 'Exhibit C.' That the board of commissioners of Moore county has found the facts: (1) That the construction of a bridge over Deep river, at a point near Glendon, in Moore county, is a public necessity; (2) that the proper site for said bridge is at the Hancock old bridge site near the Tyson place. That the old bridge at Glenn's Mill is out of repair. That it is not the intention of the board of commissioners to discontinue the public roads leading to Glenn's Mill. That there is no public road in use leading to the site which has been selected for said bridge, but said board has in contemplation the opening of public roads to and from said bridge; that the owner of the property on the north side of said bridge has agreed with said board to donate to the county sufficient land for the construction of a road to said bridge; and that arrangements have been made for the construction of said road without expense to the county. That on the south side of the river there is a distance of perhaps 150 yards between the site selected and the public road; that a petition has been filed before the board of commissioners praying that a public road be opened over the plaintiff's land, so as to connect the site of said bridge with said public road; and that said petition is now pending before the board, and the board has in contemplation the construction of a public road leading to the proposed bridge. That the proposed new bridge contracted for by the defendant board is about one-half mile from the old bridge at Glenn's Mill. That the said defendant board of county commissioners acted honestly and for what they conceived to be the best interest of the people of Moore county." Plaintiff requested the court to find certain other facts not necessary to be set out. His honor upon the findings dissolved the restraining order and refused to grant an injunction to the hearing. Thereupon the defendants demurred ore tenus, and moved the court to dismiss the action because the complaint did

not set forth facts sufficient to constitute a cause of action. Motion allowed, and plaintiff appealed.

U. L. Spence and Seawell & McIver, for appellant. W. J. Adams, for appellees.

CONNOR, J. (after stating the facts). Two causes of action are set forth in the complaint, although not stated separately as directed by the Code. The plaintiff first relies upon the contract made with his ancestor during the year 1882, by which he insists that the county of Moore is obligated to maintain and keep in repair the public bridge across Deep river, which was, pursuant to said contract, built by his father, who then owned the land upon which he erected a public mill, and that performance of this contract may be specifically enforced by the writ of mandamus. This claim is entirely independent of the demand that the defendant be enjoined from erecting a second bridge one-half mile below the present bridge. It is very doubtful whether the two causes of action—one to enforce a contractual right having no connection with his right as a taxpayer in common with all other citizens of the county, and the other dependent entirely upon such relation to enforce the performance of a public duty—can be joined. As his honor disposed of the cause upon a broader ground, we prefer not to pass upon this question of pleading. We do not think it competent for a board of commissioners to enter into a contract with a citizen to perpetually maintain and keep in repair a public road or bridge, giving to such citizen a cause of action against the county whenever, in the exercise of its discretion in the interest of the public, the same or another board shall deem it proper to discontinue such road or bridge. The power vested in and duly imposed upon boards of commissioners to open and maintain roads and erect and keep in repair public bridges is for the benefit of the public, and they have no power to exercise it for any other purpose, or to bind their successors in that respect. The Legislature and the commissioners are but its agents and cannot do so. In *Bridge Co. v. Commissioners*, 81 N. C. 491, this court held that "the essential powers of government, conferred for wise and useful purposes, should remain undiminished and unimpaired in the legislative body itself, and pass in full force to its successors. When a contract undertakes to alienate any of these, it is inoperative; and, as no right vests, so no obligation is created under it." The exact question is settled by *Smith, C. J.*, citing with approval *Greenleaf's Cruise*, in which it is said: "It is therefore deemed not competent for a Legislature to covenant that it will not, under any circumstances, open another avenue to the public travel within certain limits or a certain term of time; such being an alienation of sovereign powers and a violation

of public duty." It does not very clearly appear that the contract made in 1882 by the commissioners with plaintiff's ancestor, constituted a covenant running with the land or that it extended beyond his own life. In no point of view can the plaintiff maintain his first alleged cause of action. The bridge, considered either upon the averments of the complaint or the findings of fact by his honor, became upon its completion a part of the public highway, subject to the control of the commissioners, as all other bridges in the county. The fact that the commissioners paid only a part of the cost of its construction did not change its character. *Stratford v. Greensboro*, 124 N. C. 181, 32 S. E. 394; *Trustees v. Realty Co.*, 184 N. C. 41, 46 S. E. 723.

For a second cause of action, plaintiff sues in his right as a taxpayer to enforce the performance of a public duty. While the right to enforce by mandamus the discharge of a ministerial duty by a public officer is well settled and often exercised, it is equally well settled that, when any discretion is vested in such officer in regard to the manner of performance, the courts will not order a mandamus. The duty to open and to discontinue highways and bridges is vested in the commissioners of each county. Code, § 707, subsec. 15, c. 17. The willful failure to discharge this or any other public duty is a misdemeanor, and, upon conviction, removal from office follows. Code, § 1090. A commissioner failing to discharge any duty imposed upon him by law may also be sued for a penalty of \$200. Code, § 711; *Turner v. McKee*, 137 N. C. 251, 49 S. E. 330. In *Brodnax v. Groom*, 64 N. C. 244, *Pearson, C. J.*, discussing the power of the court to regulate the manner in which county commissioners discharge the duty of building public bridges, says: "Who is to decide what are the necessary expenses of a county? The county commissioners, to whom are confided the trust of regulating all county matters. Repairing and building is a part of the necessary expenses of a county, as much as keeping the roads in order or making new roads. So the case before us is within the power of the county commissioners. How can this court undertake to control its exercise? Can we say such a bridge does not need repairs, or that, in building a new bridge near the site of an old bridge, it should be erected, as heretofore, upon posts, so as to be cheap, but warranted to last for some years, or that it is better policy to locate it a mile or so above, where the banks are good abutments, etc. * * * In short, this court is not capable of controlling the exercise of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so, etc." To the same effect is *Buckman v. Com'rs*, 80 N. C. 121; *Vaughan v. Com'rs*, 117 N. C. 429, 23 S. E. 354; *Black v. Com'rs*, 129 N. C. 121, 39 S. E. 818.

The power of the court to direct a man-

damus to a board of commissioners, when discretion is vested in it in respect to the manner of discharging a public duty, is fully discussed by Mr. Justice Walker in *Barnes v. Com'rs*, 135 N. C. 27, 47 S. E. 737. The authorities are carefully collected, and the principles by which the action of the courts is controlled clearly announced. In *State v. Town, etc.*, 44 Minn. 549, 47 N. W. 163, the power of the courts to mandamus town commissioners to construct a public bridge was denied; the court saying: "It is unnecessary for us to consider under what circumstances, if at all, the courts will assume to control these officers in the exercise of the duties imposed upon them in respect to highways, and which, from their very nature, must be largely discretionary. It is certain that this should not be done, unless the particular act, the performance of which is sought to be enforced, is so plainly and imperatively required that a refusal or neglect to do it cannot be reasonably based upon grounds of discretion." The same conclusion was reached in *State v. County Court*, 33 W. Va. 589, 11 S. E. 72, in which it is said: "It may be that the county court has acted erroneously, and even in disregard of the best interests of the people of the county; but, having a discretionary power, it cannot, while legitimately exercising that power, however erroneously or contrary to the best interests of the county, be controlled by mandamus." In *State v. Com'rs*, 119 Ind. 444, 21 N. E. 1097, it is said: "It appears from the facts found that the board of commissioners, in the exercise of their discretion, refused to order the bridge repaired. The present is, therefore, not a case where the commissioners refused to act, but is one in which they did not act in a manner to suit the relators, who now ask the court to compel them to reverse their former action. This cannot be done by mandamus proceedings." *Smith on Mun. Corp.* § 1564; 19 Am. & Eng. Enc. 813. While we hold, in accordance with the authorities cited, in the light of the facts in this case as developed either by the complaint or the facts found by the judge, that the plaintiff is not entitled to a mandamus commanding the commissioners to repair the bridge, we do not hold that in no case can such relief be granted. If the Legislature had directed a bridge to be built and maintained in proper condition for public travel as a part of a public highway, and provided the money or directed that a special tax be levied for that purpose, we would not hesitate to direct the writ to issue commanding the board to discharge the imposed duty. The county, being an agency of the state, and the commissioners, being in respect to the opening and maintaining of highways state officers, may be compelled by mandamus to discharge such duty when no discretion is vested in them, as in *Tate v. Com'rs*, 122 N. C. 812, 30 S. E. 352. In that case the General Assembly had by special

act directed the commissioners of Haywood county to levy a special tax for the purpose of keeping in repair the public roads. The plaintiff applied to the court for a mandamus as in this appeal. The present Chief Justice, speaking of the status of counties, said: "They are subject to legislative authority, which can direct them to do, as a duty, all such matters as they can empower them to do." Referring to *Brodnax v. Groom*, supra, he says: "It merely holds that, as to those matters which the status has legally committed to the discretion of the county commissioners, the courts cannot interfere to restrain or supervise the exercise of that discretion. But this is no authority that the lawmaking power cannot restrict the authority it confers upon the county commissioners by making the manner of working the roads mandatory in any county." *Jones v. Com'rs*, 137 N. C. 579, 50 S. E. 291; *People v. Supervisors*, 142 N. Y. 271, 36 N. E. 1062. In this case the power and duty of the commissioners being dependent upon the general law by which a discretion is vested in them, there is no power in the courts to interfere by mandamus. *Ewbank v. Turner*, 134 N. C. 85, 46 S. E. 508. The same reason and authorities bring us to the conclusion that his honor properly denied the injunction restraining the defendant from proceeding to erect the bridge across the river, as contracted for with the defendant construction company. It is true that the power to construct bridges is confined to public highways; and, if it were made to appear that the defendant board was threatening to expend the public revenues to construct a bridge over a river at some point to which there was no approach or means of exit by the public, the courts would enjoin it as ultra vires.

The power conferred by section 707, subsec. 15, to build and keep up bridges, refers exclusively to public bridges. This is manifest from the language of section 2034 of the Code. It is also true that his honor finds that at this time there is no public highway leading to the point upon the banks of the river at which the proposed new bridge is to be built; but he also finds that the board has in contemplation the opening of a public road to such point, and that arrangements have been made for that purpose, and that a petition has been filed and is now pending before said board for that purpose. The order in which the work is to be performed is within the sound discretion of the commissioners; and his honor finds that they have exercised this discretion honestly, and in a manner which they conceived to be for the best interests of the people of the county. This finding excludes any interference by the courts. It will be manifest, upon slight consideration, that an attempt on the part of the court to direct or control the exercise of such discretion would lead to confusion and conflict highly injurious to the public

welfare. We find no error in his honor's judgment in that respect, nor do we find any error in the ruling rejecting the testimony proposed to be introduced by plaintiff. We notice that the summons is made returnable in term, and not, as in cases where mandamus, for other than money demand, is prayed before the judge at chambers, as provided by Code, § 623. This was doubtless because of the joinder of a prayer for injunctive relief. We are not quite sure that his honor, upon the hearing at Monroe of the motions for writ of mandamus and injunction, should have dismissed the action. The cause should regularly have been docketed in Moore county at the time the summons was issued. It would have been more orderly for his honor to have transmitted the orders made at Monroe to the clerk to be duly noted, and at the next term judgment dismissing the action, unless the complaint was by leave of court amended, be entered. *Ewbank v. Turner*, 184 N. C. 77, 46 S. E. 508.

We concur with his honor that upon the allegations in the complaint the plaintiff was not upon either cause of action entitled to the relief demanded.

There is no error.

(129 N. C. 395)

WILSON v. DUPLIN TELEPHONE CO.

(Supreme Court of North Carolina. Oct. 31, 1905.)

1. TENDER—SUFFICIENCY.

Where plaintiff, as soon as he had notice of the advertisement of his stock in defendant company for sale for nonpayment of a call made thereon, tendered to defendant's secretary \$15 in cash, which was more than the amount due, and told the secretary that he would tender more if that was not enough, which he was prepared to do, and demanded the stock, the tender was sufficient.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tender, § 24.]

2. CORPORATIONS—STOCK—CALLS—NONPAYMENTS—SALE.

Where the secretary of defendant corporation declined to accept a sufficient tender of a call made on plaintiff's stock before sale, a subsequent sale of the stock for nonpayment of the call was void.

3. SAME—RIGHTS OF OWNER.

Where plaintiff's stock in defendant's corporation was wrongfully sold at public sale for nonpayment of a call, he was entitled to treat the sale as invalid, and compel the corporation to issue similar stock to him, on payment of the amount of the call, with interest to the date of the tender and cost of advertisement to that date.

Appeal from Superior Court, Duplin County; Council, Judge.

Action by J. P. Wilson against the Duplin Telephone Company. From a judgment

in favor of plaintiff, defendant appeals. Affirmed.

Stevens, Beasley & Weeks and Shepherd & Shepherd, for appellant. F. R. Cooper and G. E. Butler, for appellee.

CLARK, C. J. The court below finds as facts: That the plaintiff had subscribed for a \$25 share of stock in the defendant company, and paid thereon \$12.50. That on 16th June, 1905, the balance due, with interest, was \$14.78, which the plaintiff did not pay when called for, whereupon on said day, by a resolution of the board of directors, the stock was advertised for sale. As soon as the plaintiff had notice of such advertisement, he tendered the secretary of the defendant company \$15 in cash, and told him he would tender more if that was not enough, and that he had plenty of money with him to pay it, and demanded the share of stock. The secretary did not allege that any more was due, but simply declined to accept payment. Upon this, his honor held properly that there was a legal tender (*Smith v. B. & L. Ass'n*, 119 N. C. 260, 26 S. E. 40; *Blalock v. Clark*, 133 N. C. 308, 45 S. E. 642), and that the subsequent sale of the stock was void. It seems that the president of the company was present at the sale, as the court finds that he was not present "in that capacity." The purchaser afterwards transferred the share of stock to the president individually for full value.

It is true that the plaintiff might have bought this stock at the sale, and avoided the necessity of this action, as any surplus of his bid over the amount due by him on the stock would have gone to himself; and it is true that he might have brought suit for damages, but he could elect to treat the sale as a nullity, and ask that the company be directed to issue the certificate of stock to him upon payment of the balance due by him for balance due on stock (\$12.50), with interest to the date of tender, and cost of advertisement to that day (but not cost of sale), as asked in his complaint, which avers his readiness to pay said sum.

There was evidence tending to show tender, and the finding of fact is conclusive. The sale thereafter was wrongful, and no title passed to the purchaser. The company having issued to him a share of stock without authority, his remedy would be against the company to recover back the purchase money and interest; but, as he has since sold said unauthorized certificate to the president of the company, the rights of the latter can doubtless be adjusted between him and the company without suit.

The plaintiff is entitled to a mandamus for the issue to him of his certificate of stock upon payment of the amount above stated.

No error.

(139 N. C. 599)

STATE v. MCINTYRE.

(Supreme Court of North Carolina. Nov. 7, 1905.)

1. INTOXICATING LIQUORS — OFFENSES — POSSESSION OF LIQUOR.

Laws 1903, p. 144, c. 125, and Laws 1905, p. 987, c. 800, which declare it unlawful to rectify, manufacture, sell, or otherwise dispose of intoxicating liquors, establish minute regulations for the sale of whisky by druggists for medicinal purposes, and impose specific duties on various officers, do not make it an indictable offense to have in one's possession whisky with intent to sell the same.

2. SAME.

Under Laws 1905, p. 991, c. 800, § 20, declaring it unlawful for any person to have in his possession more than two gallons of spirituous liquors at any one time, and providing that the possession of a greater quantity shall be prima facie evidence that such person is engaged in the illegal sale of liquor, the possession of more than the specified quantity of liquor is not of itself a distinct and substantive offense, but is merely an evidential fact in a prosecution for an illegal sale of liquor under other sections of the act.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 150, 251.]

Appeal from Superior Court, Cumberland County; Moore, Judge.

William McIntyre was convicted of a violation of the liquor law, and appeals. Judgment arrested.

Thos. H. Sutton and N. A. Sinclair, for appellant. The Attorney General, for the State.

HOKE, J. The defendant was indicted, under the law regulating the sale of intoxicating liquors in Cumberland county, for having in his possession and under his control more than two gallons of whisky at one time with intent to sell the same. The statutes under which the defendant was convicted (Laws 1903, p. 144, c. 125, and Laws 1905, p. 987, c. 800) contain no such offense as that specifically charged in the bill of indictment. They make it unlawful to rectify, manufacture, sell, or otherwise dispose of, for gain, intoxicating liquors, etc., establish minute regulations for the sale of whisky by druggists for medicinal purposes, and impose specific duties on various officers in enforcement of the acts, but nowhere, so far as we can discover, make it indictable to have in possession whisky with intent to sell.

It is argued that under section 20, c. 800, p. 991, Laws 1905, "the having in possession more than two gallons of spirituous liquors" is unlawful, and, rejecting the concluding words of the charge, "with intent to sell," as surplusage, the indictment would contain a distinct and substantive offense, made criminal by the law. We do not think, however, that this was the intent of the Legislature, nor is it a correct interpretation of the section. The statute had already clearly defined the acts, made criminal so far as individuals were concerned, imposing specific and severe punishment for its violation,

and is here dealing with the administrative features of the law. The entire section reads: "That it shall be unlawful for any person to have in his or her possession, or under his or her control, more than two gallons of spirituous liquors or more than five gallons of malt liquors at any one time, and the possession of a greater quantity shall be prima facie evidence that such person is engaged in the illegal sale of liquor." This is all in one sentence, and the latter part of it, "shall be prima facie evidence," gives clear indication that it was the only effect contemplated as the result of forbidden possession contained in the first part of the sentence; the correct interpretation being that the Legislature only intended to give the possession of more than two gallons of whisky evidential force on the charge of illegal sale, and did not intend to create a distinct and substantive offense. We are confirmed in this conclusion by the consideration that there is grave doubt if it is in the power of the Legislature to make the mere ownership or possession of a given amount of whisky in itself a crime. The right to own property is ordinarily one of the rights regarded as fundamental, which may not be forbidden, forfeited, or interfered with by legislation, except in the assertion of eminent domain or in the exercise of the police power. Only in the rarest instances can the police power be called on to regulate or control the conduct of individuals in the privacy of their own homes, or when not involving any relationship to others or the public.

It is true that the Supreme Court of the United States, in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, and in several cases since that time, has given decided intimation that the police power can lawfully be extended to almost any phase of the use of spirituous liquors, and that the Legislature must determine the extent of its exercise. And this is certainly the general trend of the modern decisions on the subject. At the same time, no legislation, so far as we recall, has as yet gone to the extent of making the mere ownership or possession of whisky a crime, except, perhaps, in furtherance of a state monopoly, when in aid of the state's revenue. "They have all stopped short of dealing with private consumption of whisky," says a recent writer on the subject. The only one we have discovered which approaches the extent claimed for the present law was one in the state of West Virginia, making it a crime to keep in possession spirituous liquors for another; and this was declared unconstitutional by the Supreme Court of that state. *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847. The court does not desire or intend to express an opinion on this very important question. The comments are only made in support of the position that the act in question, from the context and the casual and incidental way in which it is expressed, does not, and does not

intend to, make the possession of whisky in itself a crime, but that such possession of the prohibited quantity was only evidential in prosecution for the illegal sale of spirituous liquors, made criminal by other sections of the act.

We hold that no crime is charged against the defendant in the bill of indictment, and the judgment against him must be arrested. Judgment arrested.

(139 N. C. 446)

BERNARD v. SHEMWELL et al.

(Supreme Court of North Carolina. Nov. 7, 1905.)

1. APPEAL—DECISIONS APPEALABLE—INTERLOCUTORY ORDERS.

An order sustaining a demurrer to a complaint in foreclosure proceedings, on the ground that the mortgagor is not made a party, is not appealable; but, in order to obtain a review of the same, plaintiff should decline to bring the mortgagor in as a party and submit to a dismissal, or take an exception and bring the matter up on appeal from a final judgment against him, if judgment is so rendered.

2. APPEAL—DISCRETION OF COURT—AMENDMENT AS TO PARTIES.

Under Code, § 273, authorizing the court, in furtherance of justice, to amend pleadings or proceedings by adding or striking out the name of a party, an order bringing in an additional party is usually discretionary, and not reviewable.

3. MORTGAGES—FORECLOSURE—PARTIES DEFENDANT—ORIGINAL MORTGAGOR.

A mortgagor who has conveyed his equity of redemption has no interest in an action to foreclose the mortgage and is not a necessary party defendant.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1280.]

Appeal from Superior Court, Davidson County; Bryan, Judge.

Action by George Bernard against Baxter Shemwell and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Dismissed.

Walser & Walser, for appellant. McCrary & Ruark and E. E. Raper, for appellees.

PER CURIAM. This was a demurrer in a proceeding for foreclosure, upon the ground that the mortgagor, who had assigned his equity of redemption, was not made a party. The judge sustained the demurrer, but did not make any order directing him to be made

a party or dismissing the action for failure to do so. Had the plaintiff declined to make the additional party and the action had then been dismissed, an appeal would lie. But the plaintiff should either have taken that course or have had his exception noted, and making the additional party should have brought the interlocutory order up for review, if it proved prejudicial and the final judgment were against him. If the final judgment should be in his favor, or the interlocutory order should not prove injurious, a review thereof would not be desired. The court does not entertain fragmentary appeals. It can very rarely happen that making an additional party will be a serious prejudice, and hence such orders are usually discretionary and not reviewable. Code, § 273; Tillery v. Candler, 118 N. C. 889, 24 S. E. 709, and cases cited.

But, should it be contended that such order is prejudicial, no appeal lies at this stage. Lane v. Richardson, 101 N. C. 181, 7 S. E. 710; Emry v. Parker, 111 N. C. 261, 16 S. E. 236; Bennett v. Shelton, 117 N. C. 105, 23 S. E. 95; Gammon v. Johnson, 126 N. C. 67, 35 S. E. 185. The appellant should have noted his exception, and have presented it for review upon appeal from the final judgment, should it be adverse to him. Even if the mortgagor had been made a party, no probable injury to the plaintiff thereby is shown. The appeal must be dismissed because premature; but it is not amiss to say that the mortgagor could have no possible interest in this action, since he had conveyed his equity of redemption. "It is well settled that a mortgagor, who since the execution of the mortgage has parted with his interest in the premises by an absolute conveyance, retaining no longer the equity of redemption, is not a necessary defendant in foreclosing the mortgage. Neither are the heirs of such person necessary parties, nor are his personal representatives or his wife." 9 Enc. Pl. & Pr. 332, and numerous cases there cited; Jones on Mortgages (3d Ed.) § 1402.

The court having sustained the demurrer, the plaintiff should be allowed to make the mortgagor a party, or, if (as suggested) this is impossible, the judge may allow the complaint to be amended so as to set up that allegation.

Appeal dismissed.

(124 Ga. 185)

FRICKER v. AMERICUS MFG. & IMP. CO.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. WRIT OF ERROR—PARTIES—AMENDMENTS.

If a necessary party to a bill of exceptions was omitted therefrom, it could be added by amendment at its own instance and that of the plaintiff in error, not changing the record or raising new points, but simply joining the new party in the bill of exceptions already filed by the other.

2. SAME—RECORD—INCORPORATION OF EVIDENCE.

Where an auditor filed as a part of the brief of evidence accompanying his report a stenographic report of the testimony, it became a part of the record, and it can be specified and brought to this court as such; and the bill of exceptions will not be dismissed because there is no condensed and narrative brief.

3. SAME—TRANSCRIPT—DELAY IN TRANSMITTING.

Where the clerk of the superior court certified that when he went into office on January 2, 1905, he found the bill of exceptions filed on December 31, 1904, that it had been impossible to transcribe the record within 10 days, and that he forwarded it at once upon completing a copy on January 20, 1905, and where it does not appear that the plaintiff in error or his counsel caused or contributed to the delay or were in any way at fault, a motion to dismiss the bill of exceptions will be overruled.

4. SAME—AUDITOR'S REPORT—EXCEPTIONS.

Where, in an action of an equitable nature, exceptions are filed to an auditor's report, mere general exceptions that such ruling and findings were erroneous under the pleadings and evidence will furnish no ground for reversal.

5. CORPORATIONS—ACTION AGAINST OFFICERS—NECESSITY OF TENDER.

Where an equitable petition alleged that the defendant, who was a director, and its secretary and treasurer, had been acting for the petitioner and was still purporting to do so, and occupied a fiduciary relation to it; that he purchased its property at sheriff's sale and took a deed in his own name; that he incumbered it with a mortgage to secure a loan, the amount of which was used in paying the purchase money at the sheriff's sale, and another to certain loan brokers who aided in the transaction; that he was a man of small means and unable to respond in damages; that he had taken possession of all of the plaintiff's property and had received rents, issues, and profits therefrom; that an accounting was necessary to ascertain what, if anything, should be paid to him; and that until such accounting it was impossible to determine definitely the status—and where the plaintiff offered to do equity and to pay what should be found justly due, if anything, and sought to have the defendant declared to hold the property in trust for it, and that the decree be so molded as to do equity and to return the property to the plaintiff, the petition was not demurrable for want of a tender to the defendant.

6. EQUITY—PLEADING—PETITION.

None of the other grounds of the demurrer were well taken.

7. REFERENCE—INSUFFICIENT REPORT—PROCEDURE.

If the auditor failed to report with sufficient fullness on any issue, a motion for a reference, not an exception to his report, was the proper remedy.

8. NONSUIT.

There was no error in refusing to dismiss the case, in the nature of a nonsuit.

9. TRIAL—EXCEPTIONS.

Where a number of letters were admitted in evidence, and an exception was taken to their admission as a whole, and some of them were admissible, the exception cannot be sustained.

10. USE AND OCCUPATION—AMOUNT OF RECOVERY.

If an agent or person occupying a fiduciary relation towards an owner of property bought it in at sheriff's sale, and took title in his own name, and occupied it in part and in part received rents from it, and upon an equitable proceeding it was determined that the owner was entitled to recover the property and have an accounting for rents, issues, and profits, the liability of the defendant was not necessarily limited to the amount of rents actually collected by him while in possession, but would include what he should have received on that account by proper diligence; that is, the reasonable rental value of the property.

11. CORPORATIONS—OFFICERS—DISLOYALTY.

A director of a corporation, who is also its secretary and treasurer and its agent to procure a loan for it to save its property from sheriff's sale, occupies a fiduciary relation towards it, and cannot acquire interests in the property adverse to the company.

12. SAME—UNAUTHORIZED SERVICES—COMPENSATION.

If a person occupying a fiduciary relation to a corporation, and who was purporting to act for it in procuring a loan to prevent the loss of its property at sheriff's sale, procured a loan and bought the property in his own name, upon a proceeding by equitable petition to recover the property and have an accounting, brought by the company against him, he was not entitled, in addition to his reasonable expenses in procuring the loan, to be credited also with expenses incurred by him in an effort to effect a reorganization of the company without its knowledge or consent; there being no agreement as to the amount for procuring the loan separately.

13. SAME—RATIFICATION.

The bringing of an equitable action for the purpose of recovering the property and having an accounting did not operate to ratify the effort to effect a reorganization of the company without its consent.

14. INTEREST—USE AND OCCUPATION.

Mesne profits, or rental value, does not ordinarily bear interest, at least until it becomes a liquidated sum.

15. TRUSTS—ACCOUNTING.

The auditor reported how the balance between the parties stood on March 1, 1901, and that the amount due by the defendant since March 1, 1901, should be credited with all sums paid out by the defendant for interest on the \$35,000 loan procured by him at 7 per cent. per annum, and for taxes, insurance, and caring for the property; said credits to be ascertained by the court on the trial of the case. *Held*, that this finding contemplated the determination by the court, at the trial, of the balance since March 1, 1901; and this could not be properly done in entering up a decree by merely taking the amount which the auditor had found to be the rental value of the property up to March 1, 1901, charging defendant with the same rate per month after that date, and allowing no credits, without further investigation to ascertain the correct balance at the date of the decree.

16. ACCOUNT—PARTIES.

Where, in a litigation of the character indicated in the preceding headnote, the defendant claimed credit on account of an amount which he had agreed to pay to certain loan brokers, and an amendment was offered by the plaintiff, charging collusion between the defendant and such brokers, and that he had

given to them a mortgage on the property involved in the controversy, which included not only legitimate charges, but also certain charges which were attacked as unlawful, and praying that the brokers be made parties, they being residents, that full relief be granted with respect to the matter, and that their mortgage be canceled, such amendment was proper, and should have been allowed, and the brokers should have been made parties defendant.

17. SAME.

In determining between the parties whether the defendant should be allowed credit for certain payments made by him, a corporation to whom the payments were made is not a necessary party, and its absence will not furnish ground for demurrer by the defendant.

18. SAME—INDEMNITY.

In decreeing that possession of the property involved in the controversy should be taken from the defendant and delivered to the plaintiff, there being an outstanding mortgage, the court did not err in the equitable terms which were placed upon the plaintiff, or in requiring it to indemnify the defendant against the mortgage, under the facts of this case.

19. COSTS—EQUITABLE ACTION—DISCRETION OF COURT.

In an equitable action it is the province of the judge to determine upon whom costs shall fall; and this determination will not be reversed, unless the discretion of the presiding judge is abused.

20. WRIT OF ERROR—REVERSAL.

The judgment of the trial court is reversed, and the case remanded, with directions as to its further progress.

(Syllabus by the Court.)

Error from Superior Court, Sumter County;

Z. A. Littlejohn, Judge.

Action by the Americus Manufacturing & Improvement Company against Charles A. Fricker. There was judgment for plaintiff and both parties bring error. Reversed in part, and affirmed in part.

On April 12, 1900, the Americus Manufacturing & Improvement Company filed its equitable petition against Charles A. Fricker. Briefly stated, it contended as follows: The plaintiff owned a hotel, of the value of \$75,000 and of the rental value of \$500 per month. It was incumbered with a mortgage for \$35,000, which was foreclosed. It was seeking to procure a loan to prevent the sale or save itself from loss of its property. Fricker was a director and its secretary and treasurer, and was engaged in assisting to procure a loan for it. While so acting in company with its vice president, he went to New York for that purpose. Instead of procuring a loan for it, he procured one in his own name, and bought in the property at sheriff's sale, and, though purporting to be acting for the plaintiff, took the title in his own name, paying for the purchase price the money received from the loan referred to above, and \$5,000 borrowed from Weyman & Connors, loan brokers, because the amount of the bid was in excess of the loan obtained in New York. He agreed to pay that firm as brokers \$5,000 for services in procuring the loan and in seeking to effect a reorganization. He placed mortgages on the property for this loan from the company and to se-

cure the amount claimed to be due Weyman & Connors. A charter was obtained by the defendant, and an offer made to the old stockholders to take stock in the new company by paying \$15 per share, but the proposed new company never became active or received the property. Fraud, collusion, etc., were charged. It was alleged that defendant had taken possession of the property and enjoyed its rents, issues, and profits, and was liable therefor; that the amounts of commissions and expenses claimed by him to be due were not correct; that an accounting was necessary before it could be determined how much, if anything, plaintiff should pay him; and that he was a man of small means and unable to respond in damages. Plaintiff at first alleged a tender, but by amendment alleged that the defendant had taken possession of all of its property and rendered it unable to make one, and that certain stockholders had made a tender, offering to pay what he had expended, but requiring him to account for what he had received. Plaintiff offered to do equity and sought to recover the property and have an accounting. Defendant denied the substantial allegations, especially those as to fraud, collusion, and misuse of his position in the company. He contended, in brief, as follows: He went to New York to assist in obtaining a loan for the company. It was found to be impossible. It was suggested to him that a reorganization might be had; that he might take the loan temporarily in his own name, buy in the property, obtain a new charter, and effect a reorganization on terms just and equitable to the original stockholders. In the emergency he proceeded, but in the utmost good faith and to save the property for the stockholders. He had expended the rents and profits, not for his own individual benefit, but to keep up the property. He admitted that he did not inform the company or its stockholders, on returning from New York before the sale, what had been done, for fear that certain persons who were antagonistic to the plan might thwart it. After he bought in the property he offered to reorganize by allowing each of the stockholders to take the same amount of stock in the new company as they held in the old one, paying \$15 per share, \$10,000 of which was to be used to pay Weyman & Connors, and \$5,000 for improving the property. As this was not accepted, he was left with the property and debts on his hands. Plaintiff has waived its right to have a conveyance; but he is willing to convey the property to it if it will take up the \$35,000 loan and the indebtedness to Weyman & Connors, and pay his reasonable attorney's fees and reasonable compensation for his time and trouble. He denied any tender. The case was referred to an auditor. He found that the defendant occupied the position of a fiduciary agent of the plaintiff; that he could not lawfully buy the property and hold the title adversely to it; that the

defendant in an accounting was not entitled to credit for the amount agreed to be paid Weyman & Connors for aiding in making the loan and in connection with the attempted reorganization, but only for reasonable compensation for their services in connection with making the loan; that as between the plaintiff and defendant the defendant was chargeable with the rental value of the property while in his possession, and should be credited with the lawful expenses paid by him, including the amount properly chargeable to the company of Weyman & Connors, and any amounts paid by him for interest on the \$35,000 loaned, and for taxes; and that the plaintiff should recover the property upon assuming the loan and indemnifying the defendant against liability on account thereof. Both sides excepted to the report. All the exceptions were overruled, except certain ones which resulted in the correction of special items, and a decree was entered. The defendant filed a bill of exceptions, and the plaintiff a cross-bill.

J. H. Lumpkin and Smith, Hammond & Smith, for plaintiff in error. W. P. Wallis and G. R. Ellis, for defendant in error.

LUMPKIN, J. (after stating the facts). This case was referred to an auditor. To his report the defendant filed 19 exceptions of law and 7 exceptions of fact. The plaintiff was also dissatisfied, but contended itself with 9 exceptions of law and 1 of fact. The defendant filed a bill of exceptions, and the plaintiff filed a cross-bill. The record brought up by the main bill of exceptions contained 678 typewritten pages. In view of the size of the record and the number of the exceptions taken by the parties, it might be said that, relatively to the result of the trial, both were in a state of elaborate dissatisfaction.

1. A motion was made to dismiss the writ of error on several grounds. One was that there was a "misjoinder (?) of parties plaintiff in error," the surety on the bond given by the defendant not being joined, and also that such surety could not "make itself a party and set up matters not of record in the lower court." On the hearing of the application for the appointment of a receiver, which was prayed for in the petition, the presiding judge refused it on condition that the defendant would give bond with surety to pay to the plaintiff such sums as he might be chargeable with for the use of the property, in case the plaintiff should prevail. The bond was given, the plaintiff did prevail, and a decree was entered, which included a judgment on the bond against the surety. The defendant excepted. In this court the surety asked to be made a party plaintiff in error, and the original plaintiff in error concurred in the motion. The motion to dismiss on this ground is not well taken. The surety was interested with the principal in reversing the

judgment. If it was in fact a necessary party to the bill of exceptions, which we understand to be the point intended to be raised by the motion to dismiss, it could be added by amendment from the record, not changing the record or raising new points, but simply joining in the bill of exceptions already filed by its principal. In this instance the surety moved to be made a party plaintiff in error, and the original plaintiff in error concurred in the motion. *Epping v. Aiken*, 71 Ga. 682; *Western Union Tel. Co. v. Griffith*, 111 Ga. 552, 36 S. E. 859; *Ramey v. O'Byrne*, 121 Ga. 516, 49 S. E. 595. The decisions cited by counsel to the effect that all parties interested in sustaining a judgment must be served with the bill of exceptions are not applicable to a case like this, where the party not served is not interested in sustaining the judgment of the trial court, but is interested, along with the plaintiff in error, in seeking to reverse it. The motion to amend is allowed.

2. Another ground of the motion to dismiss was because the evidence was not reduced to a brief, or narrative, form, but consisted of the stenographic report written out. The auditor states in his report that "counsel for plaintiff and defendant agreed that the auditor should not make a brief of the oral or documentary evidence submitted, but should file with his report the original documents introduced in evidence and the stenographic report of the oral evidence as taken on the hearing, all of which, in accordance with said consent, are made a part of this report and submitted herewith." Where the auditor filed as a part of the brief of evidence a stenographic report of the testimony, it became a part of the record and could be specified and brought to this court as such; and the bill of exceptions will not be dismissed on the ground that there is no such condensed and narrative brief. *Arendale v. Smith*, 107 Ga. 494, 33 S. E. 669; *Schmidt v. Mitchell*, 117 Ga. 6, 43 S. E. 371. Whether the evidence is in such a condition as to furnish ground for a reversal based on it is a different question.

3. It is contended that the record was not transmitted within the time prescribed by law. The clerk of the superior court certified that when he went into office on January 2, 1905, he found the bill of exceptions filed on December 31, 1904, that it had been impossible to transcribe the record within 10 days, and that he forwarded it at once upon completing such copy, on January 20, 1905. It does not appear that the plaintiff in error or his counsel caused or contributed to the delay, but that it resulted from an inability on the part of the clerk to prepare so large a record in so short a time. *Civ. Code 1895, § 5555*.

4. It would be of little utility to discuss separately each of the numerous exceptions to the auditor's report. A number of them

allege in substance merely that certain rulings and findings are erroneous under the pleadings and evidence. General exceptions of this class furnish no ground for reversal. It is difficult, if not impracticable, for a court to successfully search through a brief of evidence containing hundreds of pages to find some particular piece of evidence affecting or bearing on a ruling of the auditor. *Armstrong v. Winter*, 122 Ga. 869, 50 S. E. 997; *First State Bank v. Avera*, 123 Ga. 598, 51 S. E. 665.

5. There was no error in overruling the demurrer to the petition as amended. It set out a good cause for equitable relief. One objection made was that the alleged tender was insufficient; and it was so. It was neither by the plaintiff itself, nor for a definite amount. But tender was not necessary as a condition precedent to the filing of this petition. It showed that the defendant, who was the plaintiff's secretary and treasurer, and also a director, and who had been acting for it and was still purporting to do so, and occupied a fiduciary relation to it, purchased its property at sheriff's sale and took a deed in his own name; that he incumbered it with a mortgage to the British & American Mortgage Company to secure a loan, the amount of which was used in paying the purchase money at the sheriff's sale, and one to Weyman & Connors; that he had received rents, issues, and profits from the property; that he took possession of all of the plaintiff's property, and was a man of small means and unable to respond in damages; and that an accounting was necessary to ascertain what, if anything, it should pay to him, and until such accounting it was impossible to determine definitely the status. Plaintiff offered to do equity and to pay what should be found to be justly due, if anything. *Johnson v. Giles*, 69 Ga. 852; *Deichmann v. Deichmann*, 49 Mo. 107-110; *Irvin v. Gregory*, 13 Gray (Mass.) 215; *Kerr v. Hammond*, 97 Ga. 567, 570, 25 S. E. 337.

6. None of the other grounds of the demurrer were well taken. The stockholders of the plaintiff were not necessary parties to the proceeding between the plaintiff and the defendant, nor were Weyman & Connors or the loan company necessary parties to determine the rights of the plaintiff as against the defendant. Weyman & Connors may have been proper parties, but they were not necessary parties in this proceeding, so that their omission would furnish a ground of demurrer by the defendant. The loan company, moreover, appears to have been a nonresident of the state.

7. If the auditor failed to report with sufficient fullness on any issue, a motion for a re-reference, not an exception to his report, was the proper remedy. *Jones v. Nolan*, 120 Ga. 588, 48 S. E. 166; *Weldon v. Hudson*, 120 Ga. 699, 48 S. E. 130; *Collinsville Granite Co. v. Phillips*, 123 Ga. 830, 51 S. E. 666.

8. There was no error in refusing to dis-

miss the case in the nature of a nonsuit. The auditor's report stated that "it was also admitted on the trial that the defendant was a director of the plaintiff corporation, and its secretary and treasurer, in the years 1898 and 1899, and prior to that time, and that he was a member of a committee in 1898 and 1899 to procure a loan upon said hotel property, the purpose of which was to pay off the loan thereon known as the 'Dederick loan,' and that he acted in the three capacities." The evidence shows that he went to New York to aid in obtaining a loan for the plaintiff shortly before the sheriff's sale of this property; that he in fact obtained a loan in his own name, purchased the property at the sheriff's sale, took the deed in his own name and went into possession. He contended that he and the vice president of the company and the loan broker found it impossible to procure the loan in the name of the company, that the plan to make the loan and take the title in his own name and secure the loan by a mortgage on the property was necessary in an emergency, and that all he did was in the utmost good faith and for the benefit of the stockholders, and not for his individual benefit. His answer to the petition admits that on his return from New York to Americus, after determining upon his plan of operations and making an agreement to obtain the loan in his own name, he made no statements to the president of the company or to its stockholders as to what he had done, lest others who might be antagonistic to this plan should raise the bidding on the property to a sum beyond his reach. He agreed upon the arrangement in New York some two weeks before the sale and returned to Americus, but made no disclosure of what he had done to his principal or its stockholders. After he bought the property and took the deed to himself, he proposed a scheme of reorganization. The circular letter which he issued to the stockholders began with the statement: "You are doubtless aware that I purchased the Windsor Hotel at sheriff's sale on Tuesday, September 5, 1899, but in doing so I had in mind a plan of reorganization," etc. He then outlined the intended formation of the new company, and offered to allow stockholders of the original company to become stockholders in the contemplated new one, but required a payment of \$15 per share to be made, and that acceptance should be signified within ten days or he would find it necessary to realize on the remainder of the new stock "from outside parties." In his answer he says he has cared for the property as if he were the bona fide owner, "as in fact he is." Without going further, we think this will suffice to indicate that the principal showed good ground for equitable action against its agent, director, and secretary and treasurer who thus acted. The dismissal of the case would have been erroneous.

9. A number of letters were admitted in

evidence, and one exception includes the whole. Some of them, at least—for instance, letters between the defendant and Weyman & Connors—were admissible; and, this being so, the exception to all the letters in bulk must fail.

10. If an agent or person occupying a position of trust or a fiduciary relation towards the plaintiff bought in its property at sheriff's sale, and took title in his own name, and occupied and used it, or received rents from it, and the owner was entitled to recover from him in equity, upon an accounting for rents, issues, and profits, his liability was not necessarily limited to the amount of rent actually collected by him while in possession, but might include what he should have received on that account, or, in other words, the fair rental value of the property. Proof of the amount actually received would be for consideration along with the evidence bearing on the subject of good faith and diligence in determining the sum for which he was liable; but the actual receipts do not conclusively limit his liability. In the present case there was evidence as to what the property in controversy had brought for rent before the sale, what the defendant represented was its rent-producing capacity when he was seeking to obtain a loan upon the faith of it, what rents he had actually collected, and whether this was all that could have been collected. Evidence was also introduced to show the rental value of the property; that the defendant, some time after making the purchase, had occupied it himself and conducted a hotel there; and that when he rented it to others he had the use of a room and received his own board, and at a later date had rooms for the use of himself and wife and received their board. The auditor found that he was liable for the rental value of the property, and under the evidence we cannot say that he erred. In 3 *Thompson on Corporations*, after referring to certain breaches of duty on the part of officers and directors of corporations, among them being dealing with themselves in regard to the corporate property, the author says (section 4051): "In respect of the measure of damages or liability on the part of corporate directors and officers for such breaches of trust as those considered in this chapter, the general rule is that equity aims at compensation to those who are beneficially interested in the trust fund, the corporation, the stockholders or the creditors; and the court will mould its decree so as to reach this result according to the varying circumstances of each case." In *Rogers v. Dickey*, 117 Ga. 819, 822, 45 S. E. 71, 72, referring to the strict accountability to which trustees are held, Mr. Justice Lamar said: "If, as a result of following the law, the profits are small, he cannot be held liable for what he might otherwise have made; but if, for the purpose of increasing the profits, he departs from the law, he can expect no protection from it when loss and disaster follow." In

Dowling v. Feeley, 72 Ga. 557, it was said: "A trustee can make no profit for himself out of the trust estate. If he risk the trust funds and lose, he is compelled to account for their full value; if he is successful, he is required to pay what he gains to the beneficiary of the fund embarked in the enterprise. This rule applies not only to trustees *eo nomine*, but to all persons sustaining confidential relations to others, such as executors and administrators, guardians, agents, officers, partners," etc. This refers to the corpus of the estate. But the principle would seem to apply to its rental value, if it be found that the amount actually collected by the defendant was less than the property should reasonably have produced. See, also, *Pettyjohn v. Liebscher*, 92 Ga. 149, 17 S. E. 1007; *Bell v. Bell*, 20 Ga. 250; *Simmons v. Camp*, 71 Ga. 54 (5); 28 Am. & Eng. Enc. L. (2d Ed.), 1062. See notes to *Selleck v. French*, 6 Am. Dec. 196, 197.

11. The defendant contended that there was no fiduciary or confidential relation between it and the plaintiff which would affect his right to purchase at the sale. But unquestionably one who was found by the auditor to be an officer and director of the company and an agent to procure a loan for it to save its property from a sheriff's sale occupied a fiduciary and confidential relation towards it. Civ. Code 1895, § 4080; 13 Am. & Eng. Enc. L. (2d Ed.) 10; *Atlanta Real Estate Co. v. Atlanta National Bank*, 75 Ga. 40; 1 Pom. Eq. Jur. § 157. As such he could not acquire interests in the property adverse to the person for whom he was acting. Civ. Code 1895, § 4031; 1 Am. & Eng. Enc. L. (2d Ed.) 1085; *Sessions v. Payne*, 118 Ga. 955, 89 S. E. 325; *Larey v. Baker*, 86 Ga. 468, 12 S. E. 684; 6 *Thomp. Corp.* § 7866; *Kreitzer v. Orvatt*, 94 Ga. 694, 21 S. E. 525; *Vallette v. Tedens*, 122 Ill. 607, 14 N. E. 52, 8 Am. St. Rep. 502; *Wardell v. R. R. Co.*, 103 U. S. 651, 26 L. Ed. 509; *Newcomb v. Brooks*, 16 W. Va. 32; *Bisph. Pr. Eq.* (6th Ed.) 144, 145. A purchase by a trustee at his own sale is voidable at the option of the person for whom he was acting in a fiduciary capacity, whether he acted *bona fide* or not, or whether actual gain resulted to him or not, if such election be exercised within a reasonable time. *Shine v. Redwine*, 30 Ga. 780; *Lowery v. Idleson*, 117 Ga. 778, 45 S. E. 51 (2); *Tobin Canning Co. v. Frasier*, 81 Tex. 407, 17 S. W. 25; 1 *Story, Eq. Jur.* (13th Ed.) § 822; *Word v. Davis*, 107 Ga. 780, 33 S. E. 691. Under the facts disclosed by the evidence in this case, an implied trust arose in favor of the plaintiff, and it had a right to equitable relief against the defendant. Civ. Code 1895, §§ 3159, 3196. See, also, authorities cited above. Nor does it appear that there was such laches on the part of the plaintiff as prevented it from enforcing its rights in equity. *Word v. Davis*, 107 Ga. 780, 33 S. E. 691, and authorities cited; *Darling v. Potts*, 118 Mo. 506, 24 S. W. 461 (5).

12. The defendant contended that he was entitled to credit for \$5,000 on account of the charge of Weyman & Connors for services. This charge included, not only their services in procuring the loan, but also services to be rendered by them in the effort to effect a reorganization under the arrangement with the defendant. He contended that the plaintiff was liable for the whole of this sum, and should credit him accordingly in the accounting, because he insisted that he contracted for it in good faith. As between the plaintiff and defendant, we do not think the company should be charged with that part of the expenses which applied to an effort to reorganize it without its knowledge or consent. To allow the defendant in an accounting a reasonable amount on account of expenses in procuring the loan was as much as he could ask in equity, there being no agreement as to compensation for procuring the loan, separate from the reorganization plan.

13. The bringing of this action did not operate to ratify the conduct of the defendant in regard to an effort to reorganize the company without its consent. In so far as the sheriff's sale is concerned, however, the plaintiff does not seek to set it aside. Neither the plaintiffs in the mortgage *fi. fa.* nor the sheriff are made parties, nor is there any prayer to annul the sale or to reinstate the status as it existed prior thereto. The plaintiff seeks to obtain possession of the property, not by setting aside the sheriff's sale, but by taking the results of such sale and charging the title obtained by the defendant under that sale with an implied trust in its favor. Indeed, as will appear later, the plaintiff in its pleadings conceded the necessity of assuming the loan of \$35,000, under which the title was procured by the defendant and the mortgage *fi. fa.* was in part satisfied.

14. The auditor was appointed at the November term of the court, 1900. He struck a balance as of March 1, 1901. His report (apparently for reasons satisfactory to all parties, as no point was made on the delay) was not filed until November 21, 1903. Exceptions were filed, and were heard in October, 1904, and a decree rendered on November 8, 1904. The presiding judge, after correcting certain items in the report of the auditor, rendered a decree in which was included a judgment against the defendant for rents and profits from March 1, 1901, to the date of the decree, at the rate of \$500 per month. He deducted from this the balance found to be due the defendant on March 1, 1901, and added interest to the balance thus found in favor of the plaintiff. We are of the opinion that the court should not have found both rents and profits extending from the time when the auditor struck the balance of accounts to the date of the decree, and also interest on the amount of them, or the balance arising from them. *Mesne profits*, or rental

value, does not ordinarily bear interest, at least until it becomes a liquidated sum.

15. The presiding judge also erred in arriving at the amount included in his decree. The auditor reported how the balance stood on March 1, 1901, and that "the amount due by the defendant since March 1, 1901, should be credited with all sums paid out by the defendant for interest on the \$35,000, at 7 per cent. per annum, and for taxes, insurance, and caring for the property; said credits to be ascertained by the court on the trial of the case." The presiding judge in fact allowed no credits to the defendant on account of the items suggested by the auditor, but in entering up the decree continued the charge for the rents and profits, at the rate found by the auditor, from the time when the balance was struck to the date of the decree. Exception was taken to this, and it was contended that the presiding judge, having overruled the exceptions with a slight correction of the report, should have confirmed the report and entered a decree upon it without increasing the charge against the defendant by the addition of rents and profits as just stated; that, if he could assume the continuance of the amount of the rents and profits found by the auditor, he should also have assumed that the fixed charges which the auditor had found the defendant was paying continued; or that, if he desired to carry out the auditor's recommendation of striking a new balance at the time of the trial, he should have proceeded in some appropriate manner to have ascertained such balance. The presiding judge added to the bill of exceptions the following note on this subject: "Upon the overruling of the defendant's exceptions November 18, 1904, his counsel was immediately notified, and on November 3d he was notified that the entering of a final decree would come up at a chambers court to be held on Saturday, November 5th, and for him to be present and that he would be heard on such questions as he desired to make. Neither he nor his client appeared at such time. Plaintiff's counsel appeared and presented the court with a decree to be signed, but same was held by the court until November 8th before signing it. Neither during the argument of exceptions nor at any other time was it ever made known or intimated to the court by defendant or his counsel that he had incurred any expenses in the way of interest, taxes, insurance, or caring for the property, or that he had any claim or demand of any character he desired set off against or credited upon the rents due plaintiff. The auditor found and fixed the rental value of the property to be recovered by plaintiff after March 1, 1901, and there was no exception to this finding of the auditor."

Perhaps the auditor may have intended to find a continuing charge against the defendant at a given rate up to the time of the

decree. His actual finding on this subject was in the following language: "The auditor finds that defendant is liable to the plaintiff for the rent of said property from September 5, 1899, to March 1, 1901, at the rate of \$500 per month, and that the amount due plaintiff by defendant March 1, 1901, was \$9,000, and that he is liable to plaintiff for the rent of said property since said date at the same rate, to wit, \$500 per month. As already stated, this report was filed November 21, 1903. The auditor left the court to ascertain something in addition to his report. The finding of additional facts or amounts, and increasing or diminishing the amounts found by the auditor, is not strictly a part of the proceeding of passing on the auditor's report and entering a decree upon it. Something more was contemplated, we think—something in the nature of a supplemental accounting to bring the balancing of accounts down to the date of the decree. The desire to bring the accounting for rents and profits down to the date of the final decree was not an improper one. After an auditor's report is filed, the defendant has 20 days to except, remaining in possession. Then most likely follows some delay, in this case a year; the defendant still remaining in possession and enjoyment. And thus he can always have some time for enjoyment between the date of the report and that of the decree. If the plaintiff is entitled to recover, it is not compelled to lose this rental. It is not contemplated by the law that one entitled to a final decree on an accounting must, by reason of the unavoidable delay incident to legal procedure, get less than he is entitled to. In some cases, no doubt, an auditor's report might cover this interval, if it has fixed data to work upon. But in the present case there is an element of uncertainty. The auditor evidently contemplated the ascertainment of additional facts and the striking of a further balance at the trial. Doubtless it would have been better for counsel to have appeared and made claim for further expenditures if he so desired; but the mere notice of an intention to enter a final decree did not put him on due notice that the additional facts would be found by the presiding judge, or call on him with sufficient distinctness to present any claim for the making of a new balance. Under the special facts of this case, we think the proper disposition is to return it to the superior court with direction to allow a reasonable time for an issue to be made as to this particular point, giving notice by rule, order, or other appropriate method to the respective sides, and to have the balance between the parties brought down to date, either by a re-reference of that issue or a direct trial. It is not necessary that the entire case should be reopened, but only that the accounting should be extended from the time when the auditor struck a balance to the time of the trial.

16. While Weyman & Connors are not necessary parties to the original action seeking equitable relief against the defendant, so that their nonjoinder would furnish a ground for demurrer, still, when the plaintiff sought to make them parties defendant, alleging them to be residents of Georgia, charging collusion between them and the defendant, and seeking relief against them along with him in respect to the claim of commissions chargeable against the plaintiff, and praying that the mortgage on the property given to them by the defendant for the amount of \$5,000 advanced by them and also covering their claim for commissions should be canceled, there seems to be no sound reason why it should not be allowed, and we think the court erred in rejecting it. Of course, we decide nothing as to the merits of the case, either upon the pleadings or the evidence, in regard to them, except that the plaintiff should be allowed to make them parties if it so desires.

17. The defendant has no cause for complaint that the equities between him and the plaintiff are dealt with in the absence of the loan company. In determining whether, between the parties, the defendant should be allowed credit for certain payments made, the person to whom the payments were made is not a necessary party. Moreover, the loan company seems to be a nonresident and is not shown to have any resident agent.

18. In decreeing that possession of the property should be taken from the defendant and delivered to the plaintiff, there was no error in providing that the plaintiff should indemnify the defendant against the mortgage of the loan company and should assume said loan. The money of the company was used to pay off the purchase money at the sheriff's sale. It would be inequitable to allow the plaintiff to ask a court of equity to let it take the property free from the loan and leave the defendant charged from the debt. Invoking the aid of a court of conscience, the plaintiff cannot take the benefit of the loan, treat the sheriff's sale as passing title and discharging the execution under which it took place, recover its property, leave the defendant as the debtor, and neither pay off the mortgage nor indemnify him against it. The defendant contends that the plaintiff ought to pay off the mortgage debt before recovering the property. But apparently it was not due. The plaintiff claims that it should have an opportunity to plead any set-off or counterclaim which it may have against the foreclosure of the mortgage, and not have its rights relatively to the mortgage fixed in the absence of the latter. This complaint, however, is in direct conflict with the plaintiff's own allegations and prayers. In the petition it was said: "Your petitioner is ready to do equity, * * * and offers to take said property charged with the debt which he has placed thereon." The plaintiff prayed "that said defendant be decreed

to execute to your petitioner good and sufficient title to said property, subject to the aforesaid loan heretofore placed thereon by him." Again, in an amendment the plaintiff alleged "that petitioner stands ready to assume these obligations by or for indemnifying the said Fricker against any loss on account thereof. Petitioner has always expressed its willingness and desire to fully protect the said Ericker, and is still willing to do so as may be finally decreed in the premises."

19. In an equitable case it is the province of the judge to determine upon whom costs shall fall, and this determination will not be reversed, unless the discretion of the presiding judge is abused. Civ. Code 1895, § 4850. None of the other exceptions which were in proper shape to be considered present any ground for reversal.

20. Under the authority conferred upon us by law (Civ. Code 1895, § 5586), we reverse the judgment on the points indicated in this opinion, and return the case to the superior court, with direction that the presiding judge by order, or other appropriate method, give the parties an opportunity to form an issue for the purpose of bringing down the account from March 1, 1901, to the date of the trial, and that by re-reference or trial in court the final balance be determined. We also direct that the plaintiff be allowed to make Weyman & Connors parties, if it so desires, so that a determination of the issues made in the pleadings with regard to them and their claims may be had.

Judgment on each bill of exceptions reversed in part and affirmed in part. Let the defendant in error in each case pay the costs therein. All the Justices concur, except BECK, J., not presiding.

(124 Ga. 21)

RAWLS v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE—HARMLESS ERROR.

In a prosecution for assault with intent to murder, where the defendant is convicted of the offense of unlawfully shooting at another, and by his own statement is guilty of that offense, he cannot justly complain of the admission of evidence offered to show malice on his part, even though the evidence admitted was inadmissible for that purpose.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3143; vol. 26, Cent. Dig. Homicide, § 713.]

2. SAME—INSTRUCTIONS.

Nor, in such a case, would it be error requiring the grant of a new trial to charge the jury as to the law of voluntary manslaughter.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3161; vol. 26, Cent. Dig. Homicide, § 720.]

3. SAME—SELF-DEFENSE.

An instruction touching the law of self-defense, though not strictly accurate, will not be ground for a new trial, where, from the defendant's statement, the shooting was not justifiable.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

W. C. Rawls was convicted of unlawfully shooting at another, and brings error. Affirmed.

E. B. Baxter, for plaintiff in error. J. S. Reynolds, Sol. Gen., for the State.

EVANS, J. Rawls was indicted for the offense of assault with intent to murder, and was convicted of the offense of unlawfully shooting at another. In his motion for a new trial he complains of the admission of certain evidence, and assigns error on various instructions which the court gave in charge to the jury. Exception is taken to the overruling of his motion.

1. Bull, the person alleged to have been assaulted, was the brother-in-law of the defendant, and the evidence submitted by the state made out a clear case of assault with intent to murder, without the slightest provocation. The defendant offered certain evidence tending to sustain the facts which he narrated to the jury in his statement. That statement was substantially as follows: Bull was the brother of defendant's wife. Prior to the difficulty he and Bull got along all right, living in the same house, until he had a quarrel with his wife, when Bull loaded his gun for him. This occurred two days before the difficulty under investigation, during which time the defendant had not visited his wife. He had sent his brother to his wife to get some clean clothes, and his brother returned with a message from Bull to the effect that if he came there again Bull would kill him. Bull sent to the defendant for the key to the house which he had, and defendant sent it to him. Defendant was a constable, and it was a common thing with him to borrow a pistol when it was necessary for him to go out at night upon official business. On the night of the difficulty, he entered the barroom where Bull worked and said to him: "Buddie, give me the key to the front door." Bull said, "I can't do that," and when asked the reason, replied, "Because I don't want to." The entrance of some customers interrupted the conversation, and defendant walked up to the proprietor of the bar and spoke to him about Bull's refusal to give him the key. Defendant then went around to the door of the house and rang the door bell; but the family was upstairs, it was late at night, and there was no response. He went back into the barroom and had another conversation with the proprietor, and then approached Bull in a pleasant manner, and said to him: "Buddie, set down here and let's have a talk. This is child's play. Let's talk this over like men." Bull replied, "I have no talk for you," and turned and walked to the front door and out into the street. Defendant sat down on a box until Bull came back in, and then said: "Don't you know all I have in the world is up there in that house—my wife

and my children, and my clothes and everything? I want to see them and give them some money and get some clothes." Bull said: "Well, you can't go." Somebody came in, and defendant said no more at that time; the matter being a family affair which he did not wish to discuss in public. He waited till everybody had gone out, and as Bull came back from the front door, defendant got off the box on which he had been sitting, started towards him, and said: "I suppose you won't allow me to see Ella and the children?" Bull replied, "No, you can't see nobody here," and defendant then said, "I am going to make a trial for it," and started out of the door. Bull said, "If you do, I'll kill you," and started to get his gun. Defendant knew the gun was there, and jerked out his pistol and fired; did not even turn to fire, but fired just as he was. At the third or fourth shot, Bull fell, and one or two shots came after defendant "took the pistol off of him." In this connection, the defendant stated: "I never would have thought of the pistol if he hadn't said that. Just as he said that, and I started out of the door, these threats came to me. I never moved from where I was standing to do that shooting. It was all done like that [snapping his fingers rapidly]. I stood in one track. After the last shot, I backed out of the door and gave myself up to the officer."

The circumstances of the shooting, as narrated by the defendant himself in his statement, fully warranted the verdict which the jury returned. There is nothing in his statement which could have justified the fears of a reasonable man, either that Bull intended to commit a felony upon his person, or to take his life, unless he undertook to carry into execution his determination to effect an entrance into the house. When, according to the defendant's version of what occurred, he announced his purpose to do so, Bull said, "If you do, I'll kill you," and started to get his gun, which the evidence disclosed was back of the bar counter. But there was no immediate necessity for the defendant to shoot in self-defense, nor were the circumstances such as to justify the belief that Bull intended to use the gun, save to prevent the defendant from making a forcible entrance into the house. The defendant says that, upon the prosecutor making this threat, he fired his pistol without moving from where he was standing, and continued to shoot even after Bull fell. Certainly the shooting was not justifiable; and, if the defendant's statement did not warrant a finding that he was guilty of assault with intent to murder, it at least demanded a finding that he had committed the offense of unlawfully shooting at another. In this connection, it may be said that, even though the evidence which was admitted to show malice on the part of the defendant should have been excluded, its admission worked no harm

to him, since the jury found that he was guilty of unlawfully shooting at another, and acquitted him of the graver offense of assault with intent to murder, which involves malice.

2. Nor, under such circumstances, should the defendant be granted a new trial because the court improperly charged the jury on the law of voluntary manslaughter, which had no bearing upon the facts of the case. The effect of the verdict was to acquit him of the higher crime, viz., the one charged in the indictment; and, as he was not entitled, even upon his own presentation of the facts of the case, to a verdict of not guilty, the shooting not being justifiable, the instruction on the subject of voluntary manslaughter could not have operated to his prejudice.

3. Exception is taken to the following charge of the court: "I charge you that parents and children may mutually protect each other and justify the defense of the person and reputation of each other, and the relation of brother and sister stands upon the same footing of reason and justice. If Rawls failed to support and care for his wife, if he deserted her and maltreated her, she would have the right to seek the care and protection of her brother, Mr. Bull, and Mr. Bull would have the right to give her such care and protection; and it would have been his further right, for this purpose, to prevent Rawls from entering the house, and his refusal to give up the key of the house, or to allow Rawls to see his sister, could afford Rawls no excuse for attacking him on that account." This charge is excepted to because it was unauthorized by the evidence and was calculated to divert the minds of the jury from the true issue in the case, and because it amounted to an expression of opinion by the court that Bull, in refusing to deliver the key, was acting in defense of his sister. It appears that Bull was shot because of his opposition to defendant's entering his home; but there was nothing to suggest that it was the purpose of defendant to abuse or maltreat his wife. So much of the charge of the court as related to Bull's refusal to surrender the key, as affording no excuse for attacking him, was pertinent to the case. The intrusion in the charge of the defendant's failure to support his wife, or having deserted or maltreated her, as a reason why she might seek the protection of her brother, was hardly pertinent to the issue before the court. However, the defendant has no just complaint that the charge of the court upon this subject was not adjusted to the facts of the case, because his own version of the occurrence shows that the shooting was unjustifiable, and that in no view of the case would the jury have been warranted in returning a verdict of not guilty.

Judgment affirmed. All the Justices concurring.

(124 Ga. 15)

BANKS v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. STATUTES—TITLE—MATTERS INCLUDED.

Provisions germane to the general subject-matter embraced in the title of an act, and which are designed to carry into effect the purposes for which it was passed, may be constitutionally enacted therein, though not referred to in the title otherwise than by the use of the words "and for other purposes."

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 136, 137.]

2. SAME—SUFFICIENCY OF TITLE.

The act of 1903, entitled "An act to make it illegal for any person to procure money, or other thing of value, on a contract to perform services with intent to defraud, and to fix the punishment therefor, and for other purposes" (Laws 1903, p. 90), is not unconstitutional as containing matter in its body different from what is expressed in its title.

3. SAME—SUBJECT-MATTER.

The act referred to is not unconstitutional as containing more than one subject-matter.

4. CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT.

The purpose of the act of 1903, as indicated on its face, is to make criminal and punish certain fraudulent practices, not to enforce imprisonment for debt; and it is not in conflict with the provision of the Constitution which declares that there shall be no imprisonment for debt.

5. CONSTITUTIONAL LAW—STATUTORY RULES OF EVIDENCE.

The Legislature has power to establish rules of evidence, where not in conflict with the Constitution or rights guaranteed by it.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 59.]

6. SAME.

A provision of the act of 1903 to the effect that proof of the contract of hiring, the procuring thereon of money or other thing of value, the failure to perform service so contracted for, or to return the money so advanced with interest thereon to the time the labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, shall be presumptive evidence of a fraudulent intent in the procurement of the advances, is not an assumption of judicial functions by the Legislature.

7. INDICTMENT — DEMURRER — QUESTIONS RAISED.

A ground of demurrer to an accusation, "because there is no legal contract set out in said accusation, and no payment or advances made are set out," only raises the question as to whether such contract and such payment are set out in the accusation at all, and not whether they are stated with sufficient particularity.

8. MASTER AND SERVANT — FRAUDULENT BREACH OF CONTRACT.

An accusation which charged that the accused procured from the hirer "money, shoes, and clothes of the value of \$13, with intent not to perform such service, to the loss and damage of the hirer in the sum of \$4," was not sufficiently sustained to authorize a conviction by evidence that the hirer advanced to the accused "in money, clothes, etc., \$13.50," and that the accused owed the hirer \$4 on account of advancements.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Richard Banks was convicted of crime, and brings error. Reversed.

Richard Banks was tried in the city court of Griffin under an accusation which charged that, after having contracted with E. M. Flint to perform services for hire as a common laborer on certain terms stated, he procured from the hirer money, shoes, and clothes, of the value of \$13, with intent not to perform such services, and did not in fact perform the services contracted for, or return the money so advanced, to the loss and damage of the hirer in the sum of \$4. He filed a demurrer to the accusation, which was overruled, and on the trial he was convicted. He moved for a new trial, and after the overruling of the motion excepted.

Thos. W. Kurman, for plaintiff in error.
L. E. Patterson, Sol., for the State.

LUMPKIN, J. (after stating the facts).

1, 2. This case arose upon the accusation in a city court, under the act of 1903 (Acts 1903, p. 90) entitled "An act to make it illegal for any person to procure money, or other thing of value, on a contract to perform services with intent to defraud, and to fix the punishment therefor, and for other purposes." The act is attacked as unconstitutional on the ground that it contains two subject-matters, and also contains matter different from what is expressed in its title. Civ. Code, § 5771. "Provisions germane to the general subject-matter embraced in the title of an act, and which are designed to carry into effect the purpose for which it was passed, may be constitutionally enacted therein, though not referred to in the title otherwise than by the use of the words, 'and for other purposes.'" It is not essential that the title to the act should recite in minute detail all of its provisions; otherwise, the act itself would be but a copy of its title. The title should state in a brief and comprehensive form the purpose of the act and the subject-matter to be dealt with. The words "and for other purposes," in the title, are sufficient to cover provisions in the body of the act germane to the general subject-matter. *Black v. Cohen*, 52 Ga. 621; *Hope v. Mayor of Gainesville*, 72 Ga. 246; *McGruder v. State*, 83 Ga. 616, 10 S. E. 281; *McCommons v. English*, 100 Ga. 653, 28 S. E. 386; *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181; *Mayor of Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247; *Hart v. State*, 113 Ga. 939, 39 S. E. 321; *Stapleton v. Perry*, 117 Ga. 561, 43 S. E. 996; *Oglesby v. State*, 121 Ga. 602, 49 S. E. 706.

3. The act is not unconstitutional on the ground that it contains more than one subject-matter. The subject-matter is the fraudulent procurement of money, or other thing of value, on a contract to perform services. There is nothing in the act which is not germane to this subject-matter, or which is so distinct from it as to constitute a different subject-matter. See the author-

ities cited above, and also *Howell v. State*, 71 Ga. 224, 51 Am. Rep. 259; *Clay v. Central R. Co.*, 84 Ga. 345, 10 S. E. 967; *Peed v. McCrary*, 94 Ga. 487, 21 S. E. 232; *Central Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518; *Welborne v. State*, 114 Ga. 793 (6), 40 S. E. 857.

4. The contention that this act is unconstitutional on the ground that it is an attempt to enforce imprisonment for debt is settled by the decision in *Lamar v. State*, 120 Ga. 312, 47 S. E. 958. On the face of it, the purpose of the act is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional; otherwise, it would not be so. And we will not presume an unconstitutional purpose on the part of the Legislature, where the act is readily capable of a construction harmonizing with the Constitution.

5, 6. It is further insisted that the act under consideration is violative of that clause of the Constitution which declares that the legislative, judicial, and executive powers shall forever remain separate and distinct. Civ. Code, § 5720. This contention is based on the second section of the act, which declares that satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, shall be presumptive evidence of the fraudulent intent. This is not an assumption of judicial functions by the Legislature. It declares a rule of evidence under which certain acts are deemed presumptive evidence of a fraudulent intent in committing them. The Legislature has power to establish rules of evidence. Familiar illustrations of the exercise of this power are to be found in a statute which declares that recitals in administrators' deeds of compliance with legal provisions shall be prima facie evidence of the facts recited (Civ. Code, § 3454); and in one which removes the common-law disqualification of a witness by reason of interest and allows parties to actions to testify (Civ. Code, § 5269); and in one which makes the protest of a promissory note evidence of the facts therein stated (Civ. Code, § 5235). Section 2321 of the Code declares that upon proof of damage done by the running of the locomotive or cars or machinery of a railroad company, or by any person in the employment and service of such company, a presumption of negligence arises against the company. This rule, however, though not embodied in the Code, is not entirely of statutory origin. *Southern Railway Co. v. Cunningham*, 123 Ga. 90, 51 S. E. 979. Judge Cooley, speaking of the legislative power in this respect, says: "As to what shall be evidence, and which party shall assume the burden of proof in

civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights." *Cooley's Con. Lim.* (5th Ed.) 452, 453. See, also, *Small v. Slocumb*, 112 Ga. 279, 37 S. E. 481, 53 L. R. A. 130, 81 Am. St. Rep. 50. The power of the Legislature on this subject is not so extensive in regard to criminal cases as in regard to those of a civil character. Thus, to illustrate, in the former the accused must be confronted with the witnesses. But the power to make rules of evidence, where not conflicting with any constitutional provision or right exists in respect to both classes of cases. An act quite similar to that under consideration will be found in Pen. Code, § 206, which provides that every insolvency of a chartered bank, or refusal or failure to redeem its bills on demand, shall be deemed prima facie fraudulent; but the president or any director who may be prosecuted may repel the presumption of fraud. It will be noted that the act of 1903 does not declare that the proof of the acts referred to shall be conclusive evidence of intention, or prevent the defendant from rebutting its presumptive effect. Had it done so, a much more serious question would have been raised.

7. Another ground of the demurrer is: "Because there is no legal contract set out in said accusation, and no payments or advances made are set out." This may have been intended to raise some question as to whether there was a want of sufficient fullness or specification in regard to the matters mentioned, but it does not in fact do so. It denies that there was any such contract or making of advances alleged. A reference to the accusation shows that in fact it alleged the making of a contract to perform services for hire, and that the accused obtained from the hirer money, shoes, and clothes of the value of \$13. Nor is there any greater merit in the suggestion that the act of 1903 is in violation of that provision of the Constitution which declares that protection to persons and property is the paramount duty of the government, and shall be impartial and complete. The demurrer, therefore, was properly overruled.

8. We find it necessary to reverse the judgment refusing a new trial on the ground that it was not supported by the evidence. The accusation alleged that the defendant procured "from the hirer money, shoes, and clothes of the value of \$13, with intent not to perform such services, to the loss and damage of the hirer in the sum of \$4." The evidence of the prosecutor, who was the only witness introduced, was that "during the time I advanced him in money, clothes, etc., \$13.50. He owes me now \$4 on account

of advancements." It will thus be seen that nowhere does it appear how much of the \$13.50 was in money and how much in clothes, and how much fell within the designation of "etc." As neither the accusation nor the evidence indicated a loss or damage to the hirer exceeding \$4, it is quite possible that the entire loss was included in the advances covered by the indefinite description "etc.," which did not accord with the accusation, and was too vague to authorize a conviction. There is nothing else, either in the demurrer or in the motion for a new trial, which requires a reversal.

Judgment reversed. All the Justices concurring.

(124 Ga. 1)

THROWER v. CITY OF ATLANTA.

JONES v. SAME.

(Supreme Court of Georgia. Nov. 8, 1905.)

MUNICIPAL CORPORATIONS—ORDINANCES.

To maintain a "place" of any character where persons are allowed to bet, offer to bet, place an order for a bet, or telegraph or telephone bets on races of any sort, is an act prohibited by Pen. Code 1895, § 398, and such an act cannot, in the absence of express legislative authority, properly be made penal by a municipal ordinance.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

M. Thrower and L. F. Jones were convicted in the recorder's court of Atlanta of violating an ordinance of the city of Atlanta. Their petitions for certiorari were denied in the superior court of Fulton county, and they bring error. Reversed.

R. R. Arnold and Harvey Hill, for plaintiffs in error. J. L. Mayson and W. P. Hill, for defendant in error.

CANDLER, J. The plaintiffs in error, Thrower and Jones, were tried in the recorder's court of the city of Atlanta for the alleged violation of a municipal ordinance of which the following is a copy: "It shall be unlawful for any person, firm or corporation, agent or employé thereof, to maintain or carry on any office or place of business, or to have a space or portion of the office, store, or place of business of another, or to maintain a place or point of meeting, in or at which any person or persons is or are allowed to bet, or offer to bet, or place an order for a bet, or telegraph or telephone bets on horse races, boat races, bicycle races, or any kind or description of race, whether such race is to be run in the city of Atlanta or any place outside of said city." They were adjudged guilty and fined by the recorder, whereupon they presented to the judge of the superior court of Fulton county their petitions for certiorari, which were denied, and they excepted. As the evidence in the two cases was identical, and both are governed by the

same principles of law, they will be considered together.

In the view that we take of this case it is not necessary to consider the question whether the evidence introduced on the trial was sufficient to show a violation of the ordinance which has been quoted. We are confronted by the broader question whether the ordinance was invalid, in that it undertook to make penal that which was already prohibited by the state law making penal the keeping of a gaming house; and this question we feel constrained to decide in the affirmative. The very evident purpose of the ordinance was to prevent the maintenance of a "place" of any sort, whether on premises owned by another, on the public streets, or elsewhere, where betting of the character designated was permitted. That this is fully covered by the statute against keeping a gaming house (Pen. Code 1895, § 398) has been distinctly held by this court. In *Thrower v. State*, 117 Ga. 756, 45 S. E. 126, which was an indictment under Pen. Code 1895, § 398, for keeping a gaming house, Mr. Justice Lamar, speaking for the court said: "In prohibiting a gaming house it is intended to prevent the maintenance of a place at which persons come together for the purpose of hazarding and betting money." Clearly, then, if the plaintiffs in error in the present cases were guilty of a violation of the municipal ordinance which has been quoted, they are guilty of a violation of the state law against keeping a gaming house; and the familiar principle that a municipality may not prohibit by ordinance that which is already made penal by state statute, unless there is express and specific legislative authority for the same, will apply.

The case of *Penniston v. Newnan*, 117 Ga. 700, 45 S. E. 65, is closely in point. There an ordinance of the city of Newnan provided that it should be unlawful for any person to keep an open business house on the Sabbath day, or to trade or traffic on that day, or to work or cause work to be done on the Sabbath; the ordinance containing a proviso that it should not prevent the sale of drugs or the carrying on of works of necessity on the Sabbath day. The accused, who was the proprietor of a drug store, kept open his place of business on the Sabbath day, and his clerks therein sold tobacco and cigars. He was convicted in the police court, his petition for certiorari was overruled, and he brought the case to this court, where the judgment was reversed, on the ground that the offense proved against him was punishable under Pen. Code 1895, § 422, making it penal for any person to pursue his business or the work of his ordinary calling on the Lord's day, and that it could not be punished by the municipality. The case of *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564, relied on by counsel for the city, and the more recent one of *Littlejohn v. Stells*, 123 Ga. 427, 51 S. E. 390, are not in point, for the

reason that in those cases the municipal ordinances which were attacked had been authorized by express legislative enactment, while it is not claimed that the city in this case had any such legislative authority. Nor is the case of *Odell v. Atlanta*, 97 Ga. 670, 25 S. E. 173, in conflict with what is here held. The dictum of Mr. Justice Lumpkin in the *Odell* Case, to the effect that the city, under the "general welfare" clause of its charter, had the right to break up the "business" of selling pools on horse races, was fully explained in the case of *Thrower v. State*, 117 Ga. 758, 45 S. E. 126, on the ground that the court in the case first mentioned was dealing solely with the legality of the alleged business or occupation, and did not have before it the question whether the city could make penal acts which were already prohibited by the state law against keeping gaming houses.

From what has been said, it follows that the court erred in refusing to sanction the petition for certiorari.

Judgment reversed. All the Justices concur, except BECK, J., not participating.

(124 Ga. 4)

PATTERSON v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

HOMICIDE—MURDER—EVIDENCE.

The evidence, although conflicting, was sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Mac Patterson was convicted of murder, and brings error. Affirmed.

Burrell Patterson and Mac Patterson were jointly indicted for the offense of murder. They elected to be tried separately, and Mac Patterson was tried and convicted. His motion for a new trial, based on the general grounds only, having been overruled, he excepted. The evidence introduced by the state tended to show the following facts: On the 20th day of April, 1904, Burrell Patterson, son of the accused, had a difficulty with William Stewart. This resulted at the time in nothing serious, and the two separated. A short while afterward, from a half hour to an hour and a half, Stewart was shot by Burrell Patterson and killed. There was evidence of two witnesses that the accused gave his son a pistol, telling him to go and kill Stewart, and that he (Burrell Patterson) would never land in jail, as he (Mac Patterson) had money to keep him out. Burrell Patterson, accompanied by his father (two or three steps apart according to one witness,

ten steps apart, according to another), went in search of Stewart, and, having met him, Burrell threw a brick at him, and then fired two shots from a pistol, from the effects of which Stewart died. Mac Patterson was present, within five to ten steps of Burrell when he fired, and immediately after the killing the two walked away together. The evidence introduced by the accused was in conflict with that of the state as to the presence of the accused at the time of the killing, and as to the accused having given Burrell a pistol with instructions to kill Stewart, and in other particulars.

Hamrick & Smith, for plaintiff in error. W. H. Daniel, J. R. Terrell, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, P. J. The indictment charged each of the accused as principal in the first degree. Under such indictment, evidence that one of them was the actual perpetrator, and the other was present, aiding and abetting in the commission of the offense, would be sufficient to authorize the conviction of the latter. One charged as principal in the first degree may be convicted on evidence showing him guilty as principal in the second degree. *Morgan v. State*, 120 Ga. 294, 48 S. E. 9, and cases cited.

The only question in the case is whether the evidence is sufficient to show that Mac Patterson was present at the time of the killing, aiding and abetting his son in the commission of the crime. The evidence is voluminous, and is conflicting on many material points; but there was evidence which would authorize a finding that only a short time before the killing Mac Patterson had given his son a pistol, with directions to find Stewart and kill him, and that, when the son went in search of Stewart, the father followed him, and at the time of the killing was within a few feet of the son. If one advise and counsel another to commit a crime, and then immediately go with that other to the place where the crime is committed, and is actually present, seeing the crime committed and does nothing to prevent its perpetration, he may be lawfully convicted as a principal in the second degree, although no distinct act by him is shown to have occurred at the time of the perpetration of the offense. See *Thornton v. State*, 119 Ga. 440, 46 S. E. 640. In the case of *Walker v. State*, 118 Ga. 10, 43 S. E. 856, there was no evidence of a conspiracy, nor was there any evidence that the person present at the time of the killing had advised or counseled the commission of the crime.

Judgment affirmed. All the Justices concurring.

(124 Ga. 5)

GAINES v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

LARCENY—EVIDENCE.

The prosecutor, who was a merchant, closed his store for the day and went to his home. After he had retired for the night, the defendant called at his house and induced him to return to his store in order that the defendant might buy cloth for a shroud for the dead child of his sister. Upon arriving at the store, where they were met by three of the defendant's brothers, the defendant confessed that the reason assigned for urging the prosecutor to open the store was a mere pretext, and that he and his companions really wanted to buy something to eat. The evidence warranted a finding that the defendant, in pursuance of a previous understanding with his brothers, joined with two of them in engaging the attention of the prosecutor and keeping him in the rear of the store, while the other embraced the opportunity thus afforded to steal a box of tobacco, with the larceny of which they were subsequently jointly charged. Accordingly, the trial judge did not err in charging the jury as to the law bearing upon this theory of the case, nor did he abuse his discretion in refusing to set aside the verdict of guilty returned by the jury.

(Syllabus by the Court.)

Error from City Court of Hartwell; W. L. Hodges, Judge.

Dillard Gaines was convicted of larceny, and brings error. Affirmed.

Sam. L. Olive, for plaintiff in error. Jas. H. S. Kelton, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 24)

MASSEY v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. CRIMINAL LAW—NEW TRIAL—DISQUALIFICATION OF JUROR.

When, in a felony case, the name of one of the grand jury who returned the bill appears as "N. J. White," and the name of a juror upon the panel put upon the prisoner as "Neal J. White," due diligence demands an inquiry as to whether it is the same person. The fact that such is the case is not sufficient reason for granting a new trial, when no inquiry was made before accepting the juror.

2. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE.

The verdict was amply supported, and it was not error to refuse to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Hart County; H. M. Holden, Judge.

Marion Massey was convicted of shooting at another, and brings error. Affirmed.

Massey was indicted for assault with intent to murder, and was convicted of the offense of shooting at another. A motion for a new trial was filed, which, besides the general grounds, contained a special ground alleging that one of the jurors who rendered the verdict was one of the grand jurors who found the indictment; the juror's name appearing in the indictment as N. J.

White, and upon the jury list, from which the jury was stricken, as Neal J. White.

A. G. & Julian McCurry, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

COBB, P. J. The name of the juror upon the list as furnished the prisoner was Neal J. White. The name appearing in the indictment was N. J. White. With the indictment and the list both before the counsel for the accused, the fact that a juror appeared in each whose initials were the same was sufficient to put him upon inquiry as to whether it was the same person in each list. By the exercise of the very slightest diligence this fact could have been ascertained before the juror was accepted. That the prisoner and his counsel did not know the fact until after the verdict is no sufficient reason for granting a new trial, unless it appears that they could not have discovered the existence of the fact by the exercise of ordinary diligence. *Burns v. State*, 80 Ga. 544, 7 S. E. 88; *Jones v. State*, 95 Ga. 497, 20 S. E. 211.

2. The evidence authorized, even if it did not demand the verdict, and it was not error to refuse to grant a new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 28)

EARL v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. SHERIFFS—DEPUTY SHERIFFS—POWER TO ARREST—EVIDENCE OF APPOINTMENT.

Under the act of December 8, 1899 (*Van Epps' Code Supp.* §§ 6097-6103), an inspector of roads and bridges who had been sworn in as a deputy sheriff may arrest for the violation of the criminal laws of this state as other deputy sheriffs. His appointment and qualification as a deputy sheriff may be shown by proof that he acts as such, without production of the written appointment.

2. HOMICIDE—ASSAULT WITH INTENT TO KILL.

The jury were authorized to infer from the evidence that the accused shot, with intent to kill, an officer engaged in making an arrest for a crime committed in his view; and the verdict of guilty of assault with intent to murder will not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

George Earl was convicted of assault with intent to kill, and brings error. Affirmed.

S. O. Crane, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

EVANS, J. W. H. Oshshire was a deputy sheriff of Fulton county, under and by virtue of the act of December 8, 1899 (*Acts* 1899, p. 89). In company with other officers he entered a dwelling house where the defendant and others were gambling with cards. The officers attempted to arrest the

participants in the game, among whom was the defendant, George Earl, who shot Mr. Cheshire while the arrest of the others was being accomplished, and inflicted a very serious wound. The defendant was indicted and convicted of the offense of assault with intent to murder. In his motion for a new trial, in addition to the usual formal grounds, he complains that the court erred in allowing Cheshire to testify, "I am a member of the county police force, and was acting in that capacity," over objection that there was no such office or officer created by law, and in allowing J. W. Maddox to testify, "I am one of the county force, and was sworn in as a deputy sheriff," over the objection that no such office as a county police was created by law, and there was a better way to prove the right to act as a deputy sheriff.

1. Under the act of December 8, 1890 (Acts 1899, p. 89), the commissioners of roads and revenues of all counties in this state having a population of more than 75,000 people, according to the census of the United States, have the power to employ one or more persons, to be known as "inspectors of roads and bridges." These officials may be sworn in as deputy sheriffs, and are given power to make arrests for the violation of the criminal laws of this state as other deputy sheriffs. The population of Fulton county, by the last United States census, exceeds 75,000 people, and the act just referred to is operative in that county. The appointment and qualification of such inspectors as deputy sheriffs may be shown by proof that they act as such. "It is not, in general, necessary to prove the written appointments of public officers. Proof that a person acts as a public officer is, *prima facie*, sufficient to show that he is such officer." *Allen v. State*, 21 Ga. 217, 68 Am. Dec. 457.

2. The jury was authorized to believe, from the evidence, that the defendant and others were in a house engaged in gambling with cards, when the prosecutor and the other officers attempted to encompass their arrest. The officers observed through a window that the offense of gambling was being committed, and it was not only their right, but their duty, to enter the house and arrest the parties engaged in this violation of the penal laws. An arrest may be made for a crime by an officer, either under or without a warrant, if committed in his presence. Pen. Code 1895, § 896. The accused made no contention in his statement that he shot the officer to prevent an illegal arrest. His statement was neither lucid nor exhaustive. Evidently, however, he intended the jury to draw the inference that some other person did the shooting. While he admitted that he shot one time, he denied that he fired at the officer. The evidence clearly demonstrated that the officers, while in pursuance of their rights and duties un-

der the law, were attempting to arrest persons engaged in the commission of a criminal act, and that, pending their attempt to make the arrest, the accused fired upon the prosecutor with a deadly weapon. The jury were authorized to infer that the accused shot with intent to kill the officer, and to find that the guilt of the accused was established beyond a reasonable doubt.

Judgment affirmed. All the Justices concurring.

(124 Ga. 19)

VINSON v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. MASTER AND SERVANT — CONTRACT FOR SERVICES—FRAUD—CROPPER.

A "cropper," who is himself to perform services and labor in making the crop, is within the provisions of the act of 1903, "to make it illegal for any person to procure money, or other thing of value, on a contract to perform services with intent to defraud."

2. INFANTS—LIABILITY FOR CRIME.

A minor who has arrived at the age of criminal responsibility may be convicted under the act of 1903 of the fraudulent practices made penal by that act, although a contract of service made by him may not be civilly enforceable.

3. CRIMINAL LAW—NEW TRIAL—REVIEW.

A ground of a motion for a new trial alleging error in the admission of the testimony of a named witness "as to the damage sustained by him on account of the breach of contract," and also "as to the intent" of the accused, without setting out the evidence objected to, cannot be considered.

4. SAME.

None of the other grounds urged require a reversal.

(Syllabus by the Court.)

Error from City Court of Sylvania; J. W. Overstreet, Judge.

Henry Vinson was convicted of procuring money on a contract to perform services with intent to defraud, and brings error. Affirmed.

An accusation was brought in the city court of Sylvania against Henry Vinson, charging him with procuring money and other articles of value on a contract to perform services, with intent to defraud the hirer, under the act of 1903 (Acts 1903, p. 90). He filed a demurrer to the accusation, and, upon its being overruled, filed a bill of exceptions *pendente lite*. He was convicted, moved for a new trial, and upon the overruling of the motion excepted.

H. S. White, for plaintiff in error. H. A. Boykin, Sol. Gen., for the State.

LUMPKIN, J. (after stating the facts).

1. One ground of the demurrer was that the defendant was not a laborer, but "a share cropper," during the year 1905, and therefore did not fall within the act of 1903. Civ. Code 1895, § 3131, declares: "Where one is employed to work for a part of the crop, the relation of landlord and tenant does not arise. The title to the crop, subject to the interest of the cropper therein,

and the possession of the land remain in the owner." A cropper does not occupy the position of a partner. *Padgett v. Ford*, 117 Ga. 508, 43 S. E. 1002; *De Loach v. Delk*, 119 Ga. 884, 47 S. E. 204. If the agreement is, not that he shall perform services himself, but shall procure and furnish labor, he is not a servant, but a contractor. *Barron v. Collins*, 49 Ga. 580; *Duncan v. Anderson*, 56 Ga. 398. If he is to work himself, he is a laborer. It has been held that part of the crop to which the cropper is entitled is in the nature of wages, and that, if the owner of the land wrongfully refuses to comply with his obligation, the cropper may assert a laborer's lien on the crop grown by him. *McElmurray v. Turner*, 86 Ga. 215, 12 S. E. 359; *De Loach v. Delk*, 119 Ga. 884, 47 S. E. 204. It was held in *Hoyt v. Glenn*, 54 Ga. 571, that "the affidavit for the enforcement of a laborer's lien under the act of 1869 must allege that the work was done by the plaintiff claiming such lien." See, also, *Mabry v. Judkins*, 66 Ga. 782; *Hinton v. Goode*, 73 Ga. 233 (2); *Cochran v. Swann*, 53 Ga. 39. In *McElmurray v. Turner*, however, it was held: "Part of the labor furnished by her [the cropper] being that of her two minor children, she being a widow, she was entitled to the lien for that part, as well as for the labor she did in person." Whatever may be the case as to minor children, it is quite clear that under these decisions a cropper, who is himself to perform services and labor, relatively to the provisions of the act of 1903, occupies the position of one who contracts to perform services, and who is to be compensated by receiving a share of the crop raised. The act of 1903 declares that "if any person shall contract with another to perform for him services of any kind with intent to procure money, or other thing of value thereby, and not to perform the services contracted for, to the loss and damage of the hirer; or having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such services," etc. Acts 1903, p. 80. The accusation charges that the accused, "after having contracted with the said H. D. Lee, to perform for said H. D. Lee services as a share cropper during the year 1906, did with force and arms, and after he had made said contract, and with intent not to perform said services, and with intent to defraud the said H. D. Lee," etc. We think this alleges that the accused was a cropper who was himself to perform services, and that he therefore fell within the terms of the act of 1903. *Ward v. State*, 70 Miss. 245, 12 South. 249; *McCutchin v. Taylor*, 11 Lea, 259.

2. It was made a ground of the motion for a new trial that the accused should not have been convicted, because he was a minor, and could not lawfully contract, and that any contract made by him to perform services

was voidable. If the act of 1903 declared it to be a criminal offense to violate a contract, not only would the position above stated be sound, but the act would be unconstitutional. The offense created by that act is not merely a breach of contract, but the fraudulent procurement of money, or other thing of value, on a contract to perform services. The gist of the offense is such fraudulent procurement. The contract of a minor is voidable; but, unless he is under the age at which he is declared by statute to be capable of committing a crime, he is subject to prosecution and conviction. A minor who has arrived at the age of criminal responsibility is as capable of committing a fraud as one of full age. If a voidable contract was used as a means of perpetrating a fraud and committing a criminal offense, the person making the contract would be none the less criminally responsible. The right to enforce a contract civilly, and the power to punish a minor who violates a criminal law, are two distinct things. The act makes no exceptions as to minors. In *People v. Kendall*, 25 Wend. 399, 37 Am. Dec. 240, it was held that an infant may be convicted of obtaining goods by false pretenses, where he purchases such goods on a credit by falsely representing himself to be a joint owner with his father of certain property. In the opinion it is said: "The legal effect of any contract that may have been formally entered into in the course of committing the offense; in other words, the question in respect to any civil remedy the party defrauded might have against the prisoner is not at all material in defining the crime. They are wholly distinct and disconnected, and depend upon the application of a different set of principles. Suppose a minor, in entering into a contract not binding upon him on account of his privilege, should commit a forgery, or pass counterfeit money, can there be a doubt that he would be punishable for the offense, though the contract itself, of which the act is perhaps but in part execution, was void or voidable?" It appeared that the defendant was about eighteen years of age when the offense was committed. He was, therefore, of an age when he was responsible for a crime. Pen. Code 1895, §§ 33, 34.

3. It is alleged in one ground of the motion for a new trial that the court erred "in admitting the testimony of Henry D. Lee, the prosecutor, as to the damage sustained by him on account of the breach of contract alleged to have been made by Henry Vinson with him; also his testimony as to the intent Henry Vinson had in abandoning his contract, for the reason," etc. This did not set out what was the testimony objected to, the admission of which was claimed to be error. It cannot, therefore, be considered.

4. None of the other grounds urged require a reversal.

Judgment affirmed. All the Justices concurring.

(124 Ga. 30)

MOORE v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. JURY—WAIVER.

A defendant in a misdemeanor case can waive trial by jury, whether the same be upon an accusation or upon an indictment. *Logan v. State*, 12 S. E. 406, 86 Ga. 266.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jur., § 199.]

2. GRAND JURY — MISDEMEANORS — INDICTMENT.

It is competent for the General Assembly, in creating a city court, to provide that persons arraigned in that court for misdemeanors shall not have the right to demand an indictment by the grand jury of the county (*Daughtry v. State*, 42 S. E. 248, 115 Ga. 819; *Foster v. Jackson*, 57 Ga. 206); and an act amending an act establishing the city court of Macon denies to defendants in all criminal cases within the jurisdiction of that court the right to demand an indictment by the grand jury. Acts 1900, p. 144.

3. SAME.

The foregoing disposes of all the questions of law raised in the motion for a new trial, the evidence warranted the verdict, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Romey Moore was convicted of stabbing, and brings error. Affirmed.

Upon being convicted of the offense of stabbing, Romey Moore made a motion for a new trial upon the general grounds and because the prisoner had not had a legal trial, as guaranteed to him by the Constitution of the state and the Constitution of the United States; he having waived his right to a trial by jury, which he could not do under the federal Constitution, and been tried and convicted by the judge. Error is also alleged "because the defendant was tried on an accusation framed against him in the city court of Macon, and without a bill of indictment against him found by the grand jury of Bibb county." The motion being overruled he excepted.

Jno. R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., and Roland Ellis, for the State.

BECK, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 30)

WILSON v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. WRIT OF ERROR—DELAY IN FILING EXCEPTIONS—DISMISSAL.

Whenever it appears that the clerk of a trial court has failed to transmit to the Supreme Court, within the time prescribed by law, a bill of exceptions and transcript, and that the plaintiff in error or his attorney "has been the cause of the delay * * * by consent, direction, or procurement of any kind," the writ of error will be dismissed. Civ. Code 1895, §§ 5571, 5572; *Budden v. Brooks*, 123 Ga. 882, 51 S. E. 727.

2. SAME—RESPONSIBILITY FOR DELAY.

The bill of exceptions in this case was certified by the trial judge on June 30, 1905, and was filed in the clerk's office July 10, 1905. The transcript of the record was certified by the clerk on August 4, 1905, and reached the Supreme Court the next day thereafter. It appears from an affidavit of a notary public, sent up by the clerk to explain the delay, that the notary "received the bill of exceptions * * * on the 8th day of July, 1905, to have filed in the clerk's office * * * and to secure the plaintiff's affidavits thereto; that upon filing said record he took it to have the affidavits made, and failed to return the record to said clerk's office in time for transmission to the Supreme Court within the time required." The notary was evidently acting for the plaintiff in error or her counsel, and the facts place her or her counsel in the attitude of consenting to, directing, or procuring the delay of the clerk in making out, certifying, and transmitting to this court the transcript of the record within the time prescribed by the statute, and therefore the writ of error must be dismissed.

(Syllabus by the Court.)

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Lizzie Wilson was convicted of crime, and brings error. Writ dismissed.

Jno. T. Myers, for plaintiff in error. Jno. W. Bennett, Sol. Gen., and Lankford & Dickerson, for the State.

FISH, C. J. Writ of error dismissed. All the Justices concurring.

(124 Ga. 62)

LEWIS v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

CRIMINAL LAW—VENUE—EVIDENCE.

As the city court of Tifton has jurisdiction, civil and criminal, in and over the city of Tifton (Acts 1902, p. 174), proof that an offense was committed in a church located "in the edge of Tifton" sufficiently establishes the venue, and authorizes that court to exercise its jurisdiction in the premises.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Lela Lewis was convicted of disturbing public worship, and from denial of new trial on certiorari she brings error. Affirmed.

Murrow & Pate, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

EVANS, J. Lela Lewis was tried and convicted in the city court of Tifton of the offense of disturbing a congregation of persons assembled for divine worship at a certain church in the 1,314th district, G. M., of Berrien county. The evidence disclosed that Shiloh Church, the place where the crime was alleged to have been committed, "was a colored church in the edge of Tifton, in Berrien county, about a half a mile from the courtroom" where the trial was being conducted. She carried the case by certiorari to the superior court, and the judgment of the city court of Tifton was upheld, and a new trial was refused. She sued out a writ

of error to this court, assigning as error the refusal to sustain her certiorari. The case was submitted by brief, and the only question argued by counsel for the plaintiff in error was the sufficiency of the proof of venue.

The city court of Tifton was established in 1902 (Acts 1902, p. 174), and was given jurisdiction, civil and criminal, in and over the city of Tifton, and all that portion of Berrien county lying in the 1,314th district, G. M., of that county. The testimony established that the disturbance occurred at a church located "in the edge of Tifton." This was a sufficient designation that the church was included within the limits of the city of Tifton, and therefore the act complained of was within the jurisdiction of the court. There was no error in overruling the petition for certiorari.

Judgment affirmed. All the Justices concur.

(124 Ga. 63)

KOLMAN v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

CRIMINAL LAW—PROOF OF VENUE.

A motion for a new trial, made upon the ground, amongst others, that the verdict was contrary to law and the evidence, should be sustained, and a new trial granted, if the evidence fails to show in what county the alleged offense was committed.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

M., alias Philip, Kolman was convicted of a misdemeanor, and brings error. Reversed.

Simon N. Gazan, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

BECK, J. The defendant was tried in the city court of Savannah, charged with the offense of a misdemeanor, and after conviction moved for a new trial, which motion the court overruled, and the defendant excepted.

The defendant's motion was based upon the general grounds that the verdict was contrary to law and the evidence and without evidence to support it. The evidence upon the main question in the case—that is, as to whether the defendant was guilty of the specific offense charged, to wit, that he "did instigate the cruel treatment of a domestic animal"—is conflicting, but the motion for a new trial should have been sustained upon the general ground that the verdict was contrary to law and the evidence, inasmuch as the record does not disclose that there was any evidence whatever to show that the crime was committed in Chatham county, as alleged in the indictment; the only evidence tending to locate the scene of the alleged offense being to the effect that it was committed at the corner of "Farm and Bryan," without even naming the city in which Farm and Bryan

are situated, and courts do not take judicial cognizance of such facts. *Alexander v. State*, 105 Ga. 834, 31 S. E. 754; *Carter v. State*, 48 Ga. 43.

Judgment reversed. All the Justices concurring.

(124 Ga. 63)

ROSENTHAL v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

The evidence warranted the verdict, and no errors of law are complained of.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Julius Rosenthal was convicted of crime, and brings error. Affirmed.

Twiggs & Oliver and Edmund H. Abrahams, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 22)

WILSON v. STATE.

(Supreme Court of Georgia. Nov. 8, 1905.)

MASTER AND SERVANT—VIOLATION OF CONTRACT—ACCUSATION.

An accusation in a city court, charging one with the offense of violating the provision of the act approved August 15, 1903 (Acts 1903, p. 90), should set forth, at least in substance, a contract definite and certain as to its terms and duration; and an accusation wholly failing to meet this requirement is fatally defective, and a special demurrer thereto, on the ground that "said accusation failed to set forth any contract, not stating when said contract was to begin nor end," should be sustained.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. S. Humphreys, Judge.

Paul Wilson was convicted of cheating, and brings error. Reversed.

J. D. McKenzie and L. L. Moore, for plaintiff in error.

BECK, J. Paul Wilson demurred to an accusation charging him with cheating and swindling under the provisions of the act of August 15, 1903 (Acts 1903, p. 90), upon the ground that the accusation did not set out with definite certainty the contract for services, or the failure on the part of the accused to perform his part thereof, and because the act itself violates the Constitution of the United States as well as that of Georgia. After his demurrer was overruled, the case proceeded to trial, and he was convicted. He made a motion for a new trial upon the general grounds, which was denied by the court, and he now excepts to the ruling of the judge in not granting his motion, and also urges the exceptions which he filed pendente lite to the overruling of his demurrer.

The language of the accusation is as follows: "Said defendant did, on the 20th day of July, 1905, in county aforesaid, unlawfully and with force and arms did contract with Lindsey Ball to perform services as a laborer for the said Lindsey Ball, and by reason of said contract did obtain advances from the said Lindsey Ball in the sum of six dollars in money, * * * and after having so contracted and procured said advances the said defendant Paul Wilson did fail to comply with said contract or return to said Lindsey Ball said advances." It will be readily seen from a cursory reading of this accusation that it is fatally defective. "Before one can be lawfully convicted of a violation of this statute, several things essential to constitute the offense defined must be shown. Among them is that there was a distinct and definite contract for services, and another is that the person contracting to perform this service has, without good and sufficient cause, failed and refused to carry out his contract by performing the service. An implied contract will not do, but there must be an express contract, clear and definite in its terms." *Glenn v. State*, 123 Ga. 585, 51 S. E. 605. The ruling in the headnote is supported by the authority cited, and by the reasoning in the case from which the quotation is made.

Having reversed the judgment of the court below upon the ground that the special demurrer should have been sustained, it is unnecessary to discuss the grounds of the motion for new trial; but, had it been necessary for us to pass upon the grounds of the motion, we should unhesitatingly have held that the verdict was without evidence to support it. It is true that the prosecutor testified in general terms that the accused did contract with him about the 1st day of July, 1905, to cut wood for him near Moultrie, and "on the strength of this contract he advanced to the defendant \$6 in money, and one ax and handle, of the value of \$1.21, and one saw, worth \$1.15." But there is absolutely no proof in the record as to the duration of the alleged contract, or within what time it was to have been performed; and, beyond the mere claim of the prosecutor that there was "a contract," there was nothing to show with definiteness or precision what that contract was.

Judgment reversed. All the Justices concurring.

(124 Ga. 65)

WEATHERSBY v. JORDAN.

(Supreme Court of Georgia. Nov. 8, 1905.)

1. CERTIORARI—APPEAL—REVIEW—DISCRETION OF COURT.

A judge of the superior court, in passing on a certiorari, where questions of fact are involved and the evidence is conflicting, has a discretion to sustain the certiorari similar to the discretion allowed him in passing upon a first new trial, and the discretion will not be controlled, unless it has been manifestly abused.

Savannah Ry. v. Fennell, 23 S. E. 437, 100 Ga. 474; *Buice v. Buice*, 36 S. E. 909, 111 Ga. 887; *Ferry v. Mattox*, 44 S. E. 1005, 118 Ga. 146.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 205.]

2. HABEAS CORPUS—DETERMINATION—CUSTODY OF CHILDREN.

In passing upon the questions raised by the petition and answer in a habeas corpus case for the possession of minor children, the discretion given by the law is to the trial judge, who sees and hears the parties, the witnesses, and the children, and who necessarily has superior opportunities for determining correctly the issues involved, chief of which is the material interest of the children. *Smith v. Bragg*, 68 Ga. 650.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 84.]

3. CERTIORARI—PROCEEDING—JUDGMENT.

While, in accordance with the ruling announced in the first headnote, the discretion of the judge of the superior court in reversing the ordinary's finding on the facts presented by the petition for certiorari will not be controlled, it was error for him to render final judgment, and for this reason the case must go back for another hearing.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, § 191.]

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Habeas corpus between Sallie Weathersby and Annie Jordan. From a judgment of the superior court, reversing the findings of the ordinary, Weathersby brings error. Reversed.

Doyle Campbell and Greene F. Johnson, for plaintiff in error. Fleming Jordan, for defendant in error.

CANDLER, J. Judgment reversed. All the Justices concurring.

(124 Ga. 108)

HOUSTON et al. v. POLK.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. PARTNERSHIP—ACCOUNTING—DEPRECIATION IN FIRM PROPERTY.

In the absence of an agreement to that effect in the contract of partnership, a partner is not liable, upon an accounting subsequently to the dissolution of the firm, for depreciation in the value of the manufacturing plant which is the subject of the partnership; but the loss caused by such depreciation must be borne by the partnership.

2. SAME.

A partner is not liable to his copartners for losses caused by his lack of judgment or discretion unaccompanied by actual negligence or bad faith.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Partnership, §§ 135, 136.]

3. SAME—SUIT FOR ACCOUNTING—PLEADING—AMENDMENT.

In a suit by a partner against two surviving partners, for an accounting and for judgment for his proportionate share of the net profits of the concern, where it appeared that the plaintiff's interest in the firm had been purchased by one of the other partners, subject to such an accounting, it was not error to allow an amendment setting up that the remaining

partner, while not a party to the contract of sale referred to, knew of its existence and acquiesced in its execution.

4. EQUITY—AUDITOR'S REPORT—EXCEPTIONS.

The present case was an equitable action, and it was not error to refuse to refer to a jury the exceptions of fact to the auditor's report.

5. COSTS—DISCRETION OF TRIAL COURT.

It does not appear that the trial judge erred in taxing one-half of the costs against the plaintiff in the court below.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by W. R. Polk, Jr., against W. J. Houston and others. Judgment for plaintiff, and defendants bring error, and plaintiff prosecutes a cross-bill of exceptions. Affirmed.

The plaintiff's petition alleged, in substance, that on March 29, 1902, he entered into a contract of copartnership with the defendants, W. J. Houston, Sr., and W. J. Houston, Jr., for the construction and operation of an electric light and power plant near Decatur, Ga.; that this contract remained in force until April 10, 1903, "when petitioner sold out his interest in the same to W. J. Houston, Sr., but reserved in said sale his interest in the net profits of the business up to the date of the sale, which were afterwards to be adjusted"; that the operation of the business from March 29, 1902, to April 10, 1903, had resulted in net profits, or excess of income over operating expenses, of \$618.05, of which plaintiff's share was \$309.02; that plaintiff was indebted to the partnership \$84.80, leaving as the balance due him by the defendants \$266.62; that he has made frequent and earnest efforts to adjust with the defendants the amount due to him under their agreement, but has been unable to do so; and that they have ignored his demand for payment of the amount due him. Waiving discovery, he prayed for an accounting between himself and the defendants, and for judgment for \$266.62, besides interest. Copies of the contract of partnership and of dissolution were attached to the petition as exhibits, as well as a statement of accounts which it was alleged the plaintiff had rendered the defendants, showing the balance claimed to be due him. The contract of dissolution was as follows:

"Georgia, Fulton County: Whereas, W. R. Polk, Jr., W. J. Houston, and W. J. Houston, Jr., entered into a contract of copartnership on the 29th day of March, 1902, for the purpose of constructing and operating an electric lighting plant in the town of Decatur, De Kalb county, Ga.; and whereas, differences have arisen between said parties as to the operation and conducting of the business of said partnership, and it is desired by said Polk and the other parties to said contract that their differences be adjusted and compromise reached without re-

sorting to the courts: It is therefore mutually agreed between the said W. J. Houston and the said W. R. Polk, Jr., that the said W. R. Polk, Jr., will sell to the said W. J. Houston all his right, title, and interest in and to the plant erected by said parties; also all stock that he may claim to own in the Decatur Electric Light, Power & Water Company, which is referred to in said contract of partnership, and that he will cancel said articles of partnership; that he is to convey to said W. J. Houston, free from incumbrance, the one-half undivided interest heretofore conveyed by said Houston to said Polk in and to the land upon which said plant is constructed, known as the 'Houston Mill Place,' in De Kalb county; also all right, title, and interest that he may have or claim in and to the franchise granted by the town of Decatur to W. J. Houston and W. J. Houston, Jr., for the purpose of constructing said plant. The said W. J. Houston, in consideration of the performance of the above stipulations by said Polk, is to pay said Polk the sum of two thousand and thirty-three and 31/100 dollars (\$2,033.31), and is to pay the unpaid bills for construction, which [it is] hereby agreed by the parties hereto amount to the sum of fourteen hundred thirty-five and 53/100 dollars (\$1,485.53); this being the balance ascertained by the parties hereto, after a careful calculation, as due various parties for material and supplies furnished in the construction of said plant. Said Houston is also to pay the note of fifteen hundred dollars (\$1,500.00) given by said Polk to Atlanta National Bank, same being jointly signed by the said Houston. Said Houston is also to surrender to said Polk two notes, one for one thousand dollars and one for fifteen hundred dollars, given by said Polk to said Houston as purchase money for half interest in above described land. Said Houston is also to surrender to said Polk the four hundred dollar Durham note.

"[Signed] W. J. Houston.

"[Signed] W. R. Polk, Jr."

"The above contract has been fully complied with. Apr. 14, 1903.

"The above contract is understood by the parties hereto as not in any manner applying to any net profits that may have accrued from the operation of said plant, but only to the plant, land, franchises, and partnership dissolution; the question of profits up to April 10, 1903, remaining open for adjustment. April 10, 1903.

"[Signed] W. J. Houston.

"[Signed] W. R. Polk, Jr."

By amendment the plaintiff alleged that W. J. Houston, Jr., was the son of W. J. Houston, Sr.; that Houston, Jr., was fully cognizant of the contract of dissolution between the plaintiff and Houston, Sr., was present at various conferences at which

the terms and conditions of the contract of dissolution were discussed, actively advised and consulted with Houston, Sr., in regard thereto, and agreed to the terms and conditions of the contract. The amendment also made certain changes in the account sued on, which it is not necessary to set out now.

The defendants filed an answer, in which they admitted the contract of partnership and that of dissolution, but denied that they were indebted to the plaintiff. They denied that the business had yielded any net profits up to April 10, 1903, and averred that, on the contrary, it had sustained losses, for a proportionate share of which the plaintiff was liable. They claimed that certain items of expense were chargeable against the receipts of the business which more than offset the amount claimed by the plaintiff, to wit: (a) Ten per cent per annum on the cost of construction of the plant necessary to be set aside out of the receipts of the business for the purpose of rebuilding the plant when it is worn out, amounting in the present case to \$246.58 for the time the plant had been in operation up to the dissolution of the partnership; (b) the cost of installing a new water wheel in the plant, amounting to \$416.67, made necessary by the fact that the plaintiff, who was relied upon as a skilled mechanic, installed in the plant a water wheel which was not adequate for the purpose of the business; (c) the cost of replacing incandescent electric lamps in the plant, amounting to \$44.95, immediately after April 10, 1903; (d) the cost of replacing a flour and corn mill (amounting to \$67.50), which the plaintiff had dismantled in the construction of the electric plant, and which he had never replaced, though agreeing so to do; (e) the amount of \$103.11 collected from the town of Decatur for the partnership for lighting the town, and for which he had never accounted. By amendment the defendants set out other items of expense, which it is not necessary to enumerate here, which they claimed should be charged against the receipts of the partnership.

The case was submitted to an auditor, and at the hearing before him the plaintiff demurred to so much of the answer as sought to set off against his claim a proportionate part of the cost of construction of the plant, of installing a new water wheel, of replacing incandescent electric lamps, and of replacing the flour and corn mill; the grounds of demurrer being that they furnished no basis for a recovery by the defendants against the plaintiff, that they were contemplated and adjusted by the contract of dissolution of the partnership, and that the averments were insufficient in law. This demurrer was sustained by the auditor and the paragraphs which they attacked were stricken from the answer. The auditor in his report set out a detailed statement of the accounts between the plaintiff and the defendants as found by him from the evidence, and concluded that

"the defendants are indebted to the plaintiff in the sum of \$225.22, with legal interest thereon from April 10, 1903." The defendants filed exceptions of law and of fact to the report of the auditor. These exceptions were overruled, and the auditor's report was made the judgment of the superior court, with direction that the plaintiff should pay half of the costs of the suit. The defendants excepted to the overruling of their exceptions of law to the auditor's report, and to the refusal of the judge to submit to a jury their exceptions of fact; and the plaintiff filed a cross-bill of exceptions, in which he assigned error upon the judgment requiring him to pay half the costs.

Green, Tilson & McKinney, for plaintiffs in error. H. A. Alexander, for defendant in error.

EVANS, J. 1. In the brief of counsel for the plaintiffs in error in the main bill of exceptions it is urged that the demurrer to the answer should have been overruled because, being in the nature of a special demurrer, it could not be filed after the first term. It appears, however, that no such point was raised in the exceptions to the auditor's report, which assigned error upon the sustaining of the demurrer, it being contended merely that the paragraphs of the answer attacked were legally sufficient to withstand the demurrer; and the question as to whether the demurrer was properly sustained must be decided on the points made in the exceptions to the auditor's report and passed upon by the court below. We have no hesitancy in holding that the Houstons were not entitled to charge against the share of the net profits due Polk any proportion of the amount estimated as representing the depreciation in value of the plant and machinery of the partnership. Conceding that an electric lighting and power plant will, as contended, wear itself out in ten years, we fail to see how it can be said to follow, where such a plant is owned and operated by a partnership, that the burden of this depreciation should be borne by one partner to the exclusion of the others. If this item of depreciation was a legitimate charge against Polk, it was an equally legitimate charge against the Houstons, and the account between them on this score stood balanced. It is not contended that this claim grew out of any special agreement between the partners made when the partnership was formed, or that any such agreement existed. The case of *Tutt v. Land*, 50 Ga. 339 (4), is directly in point; and while counsel for the plaintiffs in error made a provisional request that this case be reviewed, we cannot see any good reason why it should be disturbed, as it seems to us to be founded on sound reason and unanswerable logic. It was there held that where a mercantile partnership was formed, one partner furnishing the stock of goods and the other his skill

and services, on a dissolution of the partnership the former was not entitled to claim for the ordinary, natural depreciation of the goods and fixtures of the store. The case of *Park v. Tennille*, 20 Ga. 118, with which it is contended that *Tutt v. Land* is in conflict, is not in point. No question of the settlement of partnership accounts was even remotely involved. It was merely decided that where, by the terms of a marriage settlement, the husband had a title to the "annual increase or profits" of a plantation, without the power to dispose of the corpus of the estate, the phrase quoted, in order to give effect to the evident intention of the instrument, should be construed to mean the net, rather than the gross, profits, and that the creditors of the husband could not levy upon crops which constituted the gross profits of the plantation. We fail to see how this decision in any manner stands in the way of the decision in *Tutt v. Land*, supra, or what possible bearing it has upon the case now under consideration.

2. The portion of the answer in which it was sought to set off against the plaintiff's demand a claim for the cost of installing a water wheel after the partnership had been dissolved was in the following language: "That it had been necessary for defendants to install a new water wheel in said plant since the construction of the same by said Polk, at a cost of \$416.67, which is a proper charge against the said Polk and against said receipts, because defendants * * * relied on said Polk as a skilled mechanic for the proper construction of said plant; but, instead of using the proper skill and judgment in the construction of said plant, which defendants expected of said Polk, said Polk installed a water wheel over the protest of defendants in said plant which was entirely too large for the power of the stream, and did not yield for consumption by the machinery the amount of power that should be obtained from a stream carrying the volume of water carried by the stream in question. The placing of this wheel in said plant, and the consequent necessity of replacing it by a new one in so short a time after the construction of said plant, was due entirely to the negligence and want of skill in said Polk, who represented to defendants that he was entirely competent to properly construct the plant in question, and the cost of said wheel is a proper charge against said Polk, as the same is a direct damage to defendants." It will be observed that there is no charge that Polk was guilty of bad faith in the part that he took in the installation of the original water wheel. Indeed, the averments distinctly negative the idea of fraud or bad faith, and place the entire blame for the alleged damage done upon the lack of judgment and skill of the plaintiff. It is well settled that for such damage occasioned by the act of a partner the firm itself is liable, and the individual partner cannot be

held to respond. See 22 Am. & Eng. Enc. L. (2d Ed.) 128 (10b), where the principle is announced that "a partner is not solely liable for losses caused merely by his lack of discretion or good judgment, but amounting to negligence or bad faith, but the loss in such cases must fall upon the partners as a firm." While, in the present case, the answer averred in general terms that the plaintiff had been negligent in installing the original water wheel, the other averments in the same paragraph distinctly negative this idea; for it affirmatively appears that the expediency of installing a wheel of the size described was called in question at the time of its installation, that the plaintiff and the defendants differed on the subject, that the defendants relied upon the supposed superior skill of the plaintiff, and that whatever error he committed was one purely of discretion and judgment. Indeed, it was not claimed that there was any negligence in installing the wheel, but merely that through a mistake of judgment the plaintiff installed one that was too large for the purposes for which it was intended. We are clear that there was no error in striking this paragraph of the answer.

3. It is contended by counsel for the Houstons that the amendment to the plaintiff's petition, in which it was alleged that W. J. Houston, Jr. was cognizant of the contract of dissolution between the plaintiff and Houston, Sr., and agreed to the terms of the contract, should not have been allowed, because its effect was to bind Houston, Jr., by the terms of a contract to which he was not a party. In view of all the allegations of the petition, as well as the contract which was made an exhibit thereto, we do not think this contention is well founded. On its face the contract was merely one whereby Houston, Sr., purchased from Polk the interest of the latter in the partnership. Apparently, Houston, Jr., parted with nothing and acquired nothing by this instrument; but, in a suit by Polk against the surviving partners for his share of the net profits under the terms of the original partnership agreement, it was certainly not amiss to allow him to allege and prove that his withdrawal from the firm was with the full consent and acquiescence of all the partners—not for the purpose of holding Houston, Jr., as a party to the contract, or of binding him to perform any of its terms, but to show the entire mutuality of all the parties to the dissolution, and to negative the idea that by reason of any concealment from Houston, Jr., of the existence of the contract, he was not bound to account to Polk for his share of the net profits of the concern.

4. There was no error in refusing to submit to a jury the exceptions of fact to the auditor's report. While an accounting may be had at law, as well as in equity, an accounting between partners, such as the one in the present suit, where various demands

and cross-demands are set up between the parties, is peculiarly a subject for equity jurisdiction. Civ. Code 1895, § 3989; Hogan v. Walsh, 122 Ga. 285, 50 S. E. 84.

5. This being an equity case, the question raised by counsel for Polk in the cross-bill of exceptions, whether the court erred in taxing one-half the costs against him, depends solely upon whether the trial judge abused the discretion vested in him. Clearly this does not appear, and we therefore hold that the assignment of error in the cross-bill is without merit. Civ. Code 1895, § 4850; Guernsey v. Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270.

While numerous questions were raised by the exceptions to the report of the auditor which have not been discussed, they were not argued in the brief of counsel, and under the uniform practice of this court these contentions must be treated as having been abandoned. We find no error requiring a reversal of the judgment on either bill of exceptions.

Judgment on both bills affirmed. All the Justices concur.

(124 Ga. 111)

POLHILL v. BATTLE et al.

(Supreme Court of Georgia. Nov. 9, 1905.)

INSURANCE—BENEFIT CERTIFICATE—BENEFICIARIES.

A member of a mutual benefit society named as the beneficiaries of a certificate held by him his wife, S., and three sisters, in designated proportions. S. died intestate, leaving the insured as her sole heir at law. Subsequently the insured married J., who survived him. After the death of S. the insured made no provision for the disposition of the amount payable to her under the certificate. A law of the society provided that "in the event of the death, before the decease of a member, of one or more of the beneficiaries designated by him, * * * if he shall have made no other or further disposition thereof, * * * upon his death that part of the benefit made payable to the deceased beneficiary or beneficiaries shall be paid to the surviving beneficiary or beneficiaries equally." *Held*, that upon the death of the insured his three sisters were entitled to take equally the share which would have gone to S., had she lived, and that J. was not entitled to participate in the distribution of the benefit.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; H. M. Holden, Judge.

Action by Josie E. Polhill against Julia Battle and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Phillips & Phillips and Jas. K. Hines, for plaintiff in error. R. L. Gamble and J. M. Pace, for defendants in error.

CANDLER, J. The Supreme Council Royal Arcanum filed in the superior court of Jefferson county a petition for interpleader, the object of which was to have adjudicated conflicting claims to a sum of money due by it on a benefit certificate issued by John Joseph Polhill, deceased. The case was decided by the judge, without a jury, on an agreed statement of facts, from which it

appeared that the certificate was issued on January 19, 1901, and bound the Supreme Council Royal Arcanum (which for convenience will be called the insurance order), upon satisfactory evidence of the death of the insured and upon the compliance with certain stipulated conditions, to pay out of its "widows' and orphans' benefit fund," to Sarah Polhill, wife of the insured, three-sixths, and to Julia Battle, Ella Douglas, and Cornelia Polhill, sisters of the insured, each one-sixth, of an amount not exceeding \$3,000. Sarah Polhill died, and the insured subsequently married Josie Polhill, who, together with the three sisters named as beneficiaries of the certificate, survived him. Josie Polhill was never designated by the insured as a beneficiary under the certificate issued by the insurance order. Numerous by-laws of the order were set out in the statement of facts, but many of these have no material bearing on the question at issue. It was provided that "each applicant [for a benefit certificate] shall enter upon his application the name or names, residence, and relationship or the dependence of the person or persons * * * to whom he desires his benefit paid, and the same shall be entered in the benefit certificate according to said directions." It was also provided that benefits might be made payable to any one or more persons of certain classes only, which it is not necessary to enumerate here. We quote from the laws of the order the following:

"Sec. 330. If at the time of the death of a member, if the designated beneficiary is his wife, and they shall be divorced upon the application of either party, or if any designation shall fall for illegality or otherwise, then the benefit shall be payable to the person or persons mentioned in class first (Sec. No. 324), if living, in the shares and order of precedence by grades as therein enumerated; the persons living of each precedent grade taking in equal shares per capita, to the exclusion of all persons living of subsequently enumerated grades.

"Sec. 331. In the event of the death before the decease of a member of one or more of the beneficiaries designated by him in accordance with the laws of the order, if he shall have made no other or further disposition thereof as provided in the laws of the order, upon his death that part of the benefit made payable to the deceased beneficiary or beneficiaries shall be paid to the surviving beneficiary or the surviving beneficiaries equally."

It was also agreed that "one of the objects of the Supreme Council Royal Arcanum, as declared in its constitution, is 'to establish a widows' and orphans' fund, from which, on the satisfactory evidence of the death of a member of the order, who has complied with all its lawful requirements, a sum not exceeding three thousand dollars shall be paid to the wife, children, relatives of, or persons dependent upon, said member, as limited

and described in said order relating to benefit certificates, as he may direct in accordance with said laws.' Upon this statement of facts, the judge, after hearing argument, ruled that the three sisters of the deceased, as surviving beneficiaries, were entitled to that part of the fund made payable by the certificate to Sarah Polhill, the deceased wife of the insured, and that Josie Polhill, his wife at the time of his death, was not entitled to any portion of the amount due by the certificate. Josie Polhill excepted.

Great stress is laid by counsel for the plaintiff in error upon the favor shown by the law to widows, and upon the fact that one of the prime objects of the beneficial order in the present case was to provide a fund for the protection and relief of widows and orphans; and it is urged that, although there was no designation of Mrs. Josie Polhill as a beneficiary of the certificate, she should, in view of the spirit of the law, both of the state and of the order, be held to be entitled to the amount due on the death of the insured. It will be observed, however, that the widows' and orphans' fund was expressly declared to be for the benefit of the surviving wife, children, relatives, or dependents of the insured, according to his preference. While a certain order of precedence was established, for guidance in the event of nondesignation or failure of designation, there was no restriction upon the member as to which of his relatives or dependents might be named as beneficiaries. So far as the purposes of the order are concerned, the sisters of a member occupied as favored a position as his surviving wife. To arrive at a proper determination of this case, therefore, we must get away from the idea that as between the different claimants for this fund there are any favorites of the law, and consider solely the right of the parties as defined by the benefit certificate and the laws of the insurance order. Provision was made for a method by which the holder of a benefit certificate might change the person designated by him as a beneficiary. This method was not pursued in this case. By section 830, it was provided that where the designated beneficiary is the wife of the member and they shall be divorced, or if any designation shall fall for illegality or otherwise, the benefit shall be payable in a described manner; and it is contended by counsel for the plaintiff in error that the words emphasized are broad enough to include the present case. A careful reading of the section in question, however, leads to the belief that this section was intended to apply only where the member's wife is the sole beneficiary named; for any other construction would give rise to a hopeless conflict between that section and the succeeding one, which seems to have been framed especially to meet just such a case as the present one. Certainly, the specific language of section 331 should prevail over the vague and general term "or otherwise" contained in section 830.

We do not lose sight of the principle invoked by counsel for the plaintiff in error that the rules of benefit societies should be construed liberally to effect their beneficent purposes; but we must decline to go to the length of construing out of existence a section of the laws of the benefit society which absolutely controls the present case. There was no error in the ruling of the trial judge.

Judgment affirmed. All the Justices concur.

(124 Ga. 114)

GEORGIA CO-OPERATIVE FIRE ASS'N v. HARRIS.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. INSURANCE—ACTION ON POLICY—VERDICT.

Where suit is brought on a policy of fire insurance covering, in different amounts, a dwelling house and the furniture therein located, the verdict, if the defendant be found liable, need not specify separately the amounts found for loss of the house and of the furniture, but may be a lump sum covering the entire amount of the loss.

2. SAME—OTHER INSURANCE.

While it appeared that at the time of the fire the property covered by the policy was insured in another company, and that the plaintiff had accepted from that company a small sum in satisfaction of his policy therein, there was evidence authorizing the jury to find that this sum did not represent a pro rata share of the loss as claimed by the plaintiff, and that it was accepted by him only because he realized that that company was not liable to him in any amount.

3. SAME—EVIDENCE.

The evidence authorized a finding that the plaintiff did not consent to a restriction of his right to insure in any other company, and also that the loss sustained by the plaintiff was greater than the amount of the verdict.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Ewe, Judge.

Action by Grandison Harris against the Georgia Co-operative Fire Association. Judgment for plaintiff, and defendant brings error. Affirmed.

F. W. Capers and F. L. McElmurray, for plaintiff in error. Henry C. Roney, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(38 W. Va. 227)

NUTTER v. BROWN et al.

(Supreme Court of Appeals of West Virginia. Nov. 7, 1905.)

1. APPEAL AND ERROR—DECREE FOR COSTS.

Ordinarily an appeal does not lie from a decree for costs only in a chancery suit, but there are exceptions to the rule, turning on the question of the discretionary power of the trial court respecting costs. A decree for such costs as are discretionary is not appealable, but one for costs not in the discretion of the court is appealable, provided the amount thereof is more than \$100.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 596, 611, 823.]

2. SAME—EXTRAORDINARY COSTS.

Extraordinary costs, such as allowances of expenses and compensation of receivers, either as between the receiver and the fund in court and parties, or as between party and party, are not discretionary, and a decree respecting such costs is appealable.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 833.]

3. SAME—PROVISIONAL ALLOWANCE.

Such costs may, in a proper case, be provisionally allowed to the officer out of the fund, and ultimately decreed to be paid to the party entitled to the fund by his adversary; but in either case a decree of such character is appealable.

4. RECEIVERS—COMPENSATION—IRREGULARITY IN APPOINTMENT.

Mere irregularities in the appointment of a special receiver, acquiesced in by the parties, will neither deprive such receiver of his compensation, nor the successful party of a decree over against his adversary for the amount thereof, when it has been allowed out of a fund belonging to the party so prevailing.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 94, 400.]

5. SAME—SALE OF PERISHABLE PROPERTY.

When, in a suit in equity, the title to personal property of such character as renders sale thereof necessary for the adequate protection of the rights of the parties interested is involved, the court in which such suit is pending may properly appoint a receiver to take charge of it and make sale thereof.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 21.]

6. APPEAL—REVIEW—DISCRETION OF COURT—COSTS.

When, in such case, one defendant claimed four-fifths of the property in dispute, and two others jointly claimed the remaining interest, and the court adjudged the property to belong to the plaintiff, and gave the ordinary costs against all the defendants, reserving its judgment as to the extraordinary costs, and afterwards decreed that the defendant who had claimed the four-fifths interest pay the same, the decree as to the extraordinary costs will not be disturbed on appeal, unless the court can see that such defendant has been required to pay more than his due proportion of the entire cost.

Brannon, P., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County.

Action by Cordelia Nutter against Beeson H. Brown and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. Scott and Wm. T. George, for appellants. E. G. Smith, E. A. Brannon, and Millard F. Snyder, for appellee.

POFFENBARGER, J. This is a third appeal in the case of Nutter v. Brown, the history of which may be obtained by reference to 51 W. Va. 598, 42 S. E. 661, and 46 S. E. 375, where the dispositions made of the first and second appeals are reported. The decree from which the second appeal was taken directed the special receiver to pay over and deliver the proceeds of the property in controversy to the plaintiff, Cordelia Nutter, and the defendants C. T. Arnett and J. M. Garrett in the proportions in which they were entitled, one-half to Cordelia Nutter, and one-fourth to each of the other two

parties, and required the defendants Beeson H. Brown, Henry R. Smith, and Gertrude Duncan to pay to the plaintiff, Cordelia Nutter, her costs. But that decree reserved for future adjudication all questions relating to the compensation of the receiver and his costs and expenses, and also the question whether such costs and expenses should be taxed against the defendants as part of the costs in the cause. After the affirmation of said decree by this court, the receiver filed his report in the court below, showing that he had received on account of the oil \$14,052.42, had paid out on account of taxes \$404.04, had paid a fee of \$25 to the attorney of the receiver, and had retained his commission of 5 per cent., amounting to \$702.62, making a total of \$1127.66, which, deducted from the total receipts, left \$12,924.76, which he had distributed to the parties entitled under the decree aforesaid; and the court confirmed his report and discharged him. Later, May 28, 1904, Cordelia Nutter, James M. Garrett, and O. T. Arnett, out of whose funds said attorney's fee and receiver's compensation had been retained, applied to the court for a decree against Beeson H. Brown, one of the defendants, for said sums as part of their costs in the prosecution of their suit, and such decree was entered for the sum of \$723.62. From it Brown has obtained the present appeal.

The appeal is resisted on the ground that the decree is for costs only, as to which no appeal lies. The appellate jurisdiction of this court in cases pecuniary in their nature is limited by the Constitution to those in which the matter in controversy, exclusive of costs, is of greater value or amount than \$100. Const. art. 8, § 8. This expressly excludes the addition of costs to the value or amount in controversy for the purpose of making it more than \$100. It does not prevent costs, when a subject of independent adjudication, from reaching the appellate court. Taney v. Woodmansee, 23 W. Va. 709, in which an appeal was entertained from a decree overruling a motion to quash an execution, although the amount in controversy was composed wholly of costs. It only inhibits addition of costs to the matter in controversy on the merits, in order to bring the amount up to the jurisdictional point, a sum in excess of \$100, and has nothing to do with the question whether an appeal from a decree for costs only may be entertained. In this view of the constitutional limitation my associates do not concur. However, the general rule is, and always has been, both in England and in this country, that, independently of any constitutional limitation, a decree for costs only is not ordinarily appealable. Pritchard v. Evans, 31 W. Va. 137, 5 S. E. 461; Long v. Perine, 41 W. Va. 314, 23 S. E. 611; Graham v. Bank, 45 W. Va. 702, 32 S. E. 245; Cowles v. Whitman, 10 Conn. 121, 25 Am.

Dec. 60; *Smith v. Shaffer*, 50 Md. 132; *Lake v. Shumate*, 20 S. C. 23; *Temple v. Lawson*, 19 Ark. 148; *Howe v. Hutchison*, 105 Ill. 501; *Shields v. Bogilolo*, 7 Mo. 136; *Sanborn v. Kittredge*, 20 Vt. 632, 50 Am. Dec. 58; *Elastic Fabrics Co. v. Smith*, 100 U. S. 110, 25 L. Ed. 547; *Wood v. Welmar*, 104 U. S. 786, 26 L. Ed. 779; *Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060; *Paper Bag Cases*, 105 U. S. 766, 26 L. Ed. 959; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193; *Du Bois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895; *Bank v. Hunter*, 152 U. S. 512, 14 Sup. Ct. 675, 38 L. Ed. 534; *Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; *Kittredge v. Race*, 92 U. S. 116, 23 L. Ed. 488; *Canter v. Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688; 3 Eng. *Ruling Cas.* 243; 5 Enc. Pl. & Pr. 319. This is true, however, of those cases only in which the awarding of costs is in the discretion of the court below. In refusing to take jurisdiction, the courts all say the reason for declining is that the case is one in which the trial court has discretion to award or refuse costs. In 3 Eng. *Ruling Cases*, 243, the rule on the subject is stated as follows: "The general rule of the court of chancery, which is now confirmed and made absolute by the Judicature Act 1873, § 49, so far as relates to costs which are in the discretion of the court, that no appeal can be entertained upon a mere question of costs." This is the old rule of equity practice, simply declared or confirmed by statute. The reason given by the authorities in this country, where the judiciary act governing the present English practice has no application, is the discretionary power of the court below. "Whether costs shall be decreed by a court of equity is a question always addressing itself to the discretion of the chancellor, and the authority of an appellate court to correct his decrees is not without doubt." 5 Enc. Pl. & Pr. 218 (*Cowles v. Whitman*, *Sanborn v. Kittredge*, *Howe v. Hutchison*, *Lake v. Shumate*, *Smith v. Shaffer*, and *Temple v. Lawson*, all cited); *Joslyn v. Parlin*, 54 Vt. 670; *Railroad Co. v. Bixby*, 57 Vt. 548; *Hastings v. Perry*, 20 Vt. 272. The opinion in *Temple v. Lawson*, 19 Ark. 148, seems to have been very carefully prepared, and makes the clearest and most exhaustive presentation of the authorities to be found among the American decisions, and the conclusion announced is that costs are not always in the discretion of the chancellor, but that such costs as are in his discretion cannot be the subject of appeal. His conclusion is expressed in the following language: "The discretion which we have said resides in the court to award or give costs must be understood to relate only to those costs in a suit which are denominated 'general,' or properly 'costs in the cause,' and not such as may be said to be extraordinary,

such as directing the costs of the suit to be paid out of a particular fund, or where the court, under special circumstances and a particular state of facts, developed by a proper course of pleading and demanded at the proper time, will direct counsel fees to be paid by a party either generally or out of a particular fund." The principle thus laid down is fully sustained by the English decisions from which the rule in this country was originally deduced, but in the specification of instances it stops short of many of the precedents. The tendency by the courts of this country is to limit, rather than extend, the exception to the general rule; in other words, it is to allow but one exception, namely, a decree for payment of costs out of the fund, on the theory that it is the only exception recognized in the old English practice. Thus, Mr. Justice Bradley, in *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, said: "But it was held by Lord Cottenham in *Angell v. Davis*, 4 Myl. & Craig, 360, that when the case is not one of personal costs, in which the court has ordered one party to pay them, but a case in which the court has directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund. Lord Cottenham, indeed, suggested other cases in which an appeal might lie from a decree for costs, as where the costs are part of the specific relief prayed, and where the whole of the facts distinctly appear upon the face of the proceedings themselves, so that it is not necessary, in determining the question, to enter into any investigation of the merits. But these suggestions have not met with subsequent approval, and in the case of *Taylor v. Dowlen*, Law Rep. 4 Ch. App. 697, the court declared that they were not disposed to extend the case of *Angell v. Davis*, and dismissed an appeal brought by parties ordered to pay costs, which they claimed should be payable out of a fund." In *Taylor v. Dowlen*, referred to by Mr. Justice Bradley as repudiating the suggestion made by Lord Cottenham in *Angell v. Davis*, the court said: "As to another exception, namely, where the facts distinctly appear upon the face of the proceedings, so that the question can be decided without going into the merits, it must be taken to refer to cases where there is some inconsistency in the decree, as there was in *Angell v. Davis*, where the costs of a trustee who had committed a breach of trust were given out of the trust fund." Hence, that decision seems to depend, not alone upon the fact that the costs were decreed out of the trust fund, but also upon the lack of discretion in the court to allow costs to a trustee who had committed a breach of trust; such allowance being contrary to a well-settled principle of equity, not a mere rule relating to costs. In *Taylor v. Dowlen*, the appeal

was sought by a trustee from a decree requiring him to pay the costs of the suit, and the court refused to entertain it, because the act of the chancellor was discretionary. But a number of illustrations of want of such discretion is found in the English decisions. In *Taylor v. Southgate*, 4 Myl. & C. 203, a decree which involved principles of equity relating to the payment of costs was appealed from on the sole question of costs. *Chappell v. Gregory*, 2 De G., J. & S. 111, states the general rule to be that there cannot be a rehearing for costs alone unless some principle is involved in the mode of dealing with them. *Rochester v. Lee*, 2 De G., M. & G. 427, is a case in which the appeal was for costs alone, arising upon two or more trials of an issue out of chancery, and the court entertained it, and reversed the decree, because the error of the chancellor appeared upon the face of the record. In *Chitty's Equity Index* (4th Ed.) 4481, the rule is stated as follows: "The court of appeal refused to inquire into the various causes which may have influenced the decision of the court below in awarding costs, and therefore an appeal for costs will not generally be entertained; but where the judge of the court below placed on record on the face of the decree the reason why he ordered the party to pay the costs, and such reason was founded on the determination of a question of law, the court of appeal allowed the question of law to be argued on the appeal, that it might determine whether the reason embodied in the decree by the judge below was well founded. *Walker v. French*, 21 W. R. 493." The case cited as authority is not found in our library. Where a tenant by elegit had received rents and profits beyond the debt, and he was required to account for the excess and costs decreed against him, he was allowed to appeal as to the costs only. *Owen v. Griffith*, 1 Ves. 249. A decree for costs against an officer of the crown is against law, and an appeal from such a decree was allowed in *Lord Advocate v. Douglass*, 9 C. L. & F. 173. The right of a trustee to his costs, like that of a mortgagee, is a matter of contract, and is not in the discretion of the judge, although he may be deprived of them for misconduct. Therefore, the costs of a trustee are not within section 49 of the Judicature Act of 1873, and an appeal lies from a decision respecting them. *Cotterell v. Stratton*, 8 L. R. Ch. 295; *Farrow v. Austin*, 18 L. R. Ch. D. 58; *Turner v. Hancock*, 20 L. R. Ch. D. 303; *Hill v. Spurgeon*, 29 Ch. D. 348. Whether trustees have been guilty of such unreasonable conduct as to deprive them of costs is a question which the court of appeal will entertain. In *re Sarah Knight's Will*, 26 Ch. D. 82. Where the jurisdiction of the judge to order costs depends on the existence of a breach of an injunction or misconduct, an appeal lies against his finding that there has been such

breach, although he inflicts costs only. *Stevens v. Railway Co.*, 29 Ch. D. 60; *Witt v. Corcoran*, 2 Ch. D. 69.

For the most part, cases in this country illustrating the principle upon which appeals from decrees for costs are entertained are those in which there has been a decree of payment out of a fund in court. Thus, in *Temple v. Lawson* the plaintiff, in an interpleader suit, had obtained a decree for \$200 as counsel fees to be taxed as part of his costs, and the court, on appeal from that part of the decree alone, reversed the action of the lower court. In *Trustees v. Greenough*, 105 U. S. 528, 26 L. Ed. 1157, the appeal was from an allowance of more than \$60,000 to an agent out of a trust fund, which had been secured and preserved for the benefit of the parties who were entitled to it by his labor and expenditures. In *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568, an appeal was entertained from a decree allowing a receiver, for his services and counsel fees paid by him, \$6,500. In *Grant v. Railway Co.*, 116 Cal. 71, 47 Pac. 872, an order fixing the compensation of a receiver, and taxing it as costs in the action against all the parties, and directing him to apply toward its payment the balance of the fund remaining in his hands as such receiver, was held to be appealable; the court saying it was, in legal effect, a final judgment upon a collateral matter, arising out of the action, and appealable by any party interested in the fund. The same principle had been declared in the case of *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604. In *Railway Co. v. Jones*, 38 Mich. 303, an appeal from a decree refusing compensation was allowed to a receiver. The decree from which the appeal was taken was affirmed, but the case nevertheless shows an assertion of jurisdiction by the appellate court. It entertained the case, and affirmed the order of the lower court, refusing compensation.

It is perfectly apparent that cases of this class involve something more than discretion. What is awarded consists not of fees and ordinary court expenses, easily ascertainable by reference to mere rules concerning costs; it involves judicial investigation and determination. The allowance to a receiver for his services, or to an attorney or agent who has a lien upon a fund in court, is to be determined by the value of his services and the amount of his expenses. His right is a strong equity, analogous to an obligation founded upon an implied contract, and is not dependent upon the mere arbitrary discretion of the court, if his appointment was regular, and his conduct has been free from exception; and the ascertainment of the value of his services and the amount of expenses is the exercise of judicial power. To deny him compensation and expenses from some source would be as unjust and indefensible on principle as to refuse to en-

force a contract or to give damages for its breach. There may be discretion as to the mode of compensation, as to how it shall be paid, and as to the amount, but clearly none as to whether any shall be paid. Here another apt English rule, not stated by our courts, but invariably observed by them, sustains this view. When the conduct of the trustee is brought in question in determining whether any compensation shall be allowed him, and the doubt is resolved in his favor and an allowance made, no appeal can be allowed; for if there was no misconduct, the decree is right, and if there was, the court has discretion to allow him costs. *Charles v. Jones*, 83 Ch. D. 80. The import of this is that, when there is no fault in the trustee, he cannot be deprived of his compensation. This is illustrative of the view that, where the appellate court can see that some principle has been violated in the allowance of costs, the decree is held to be not within the discretion of the court. Where an action is dismissed for total want of jurisdiction, the decisions say there is no power in the court to decree costs to the defendant. "Where a circuit court dismisses an appeal for want of jurisdiction it is without power to decree payment of costs and penalties." *Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451. "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket. In that view of the subject, the matter was as much coram non iudice as anything else could be, and the award of costs and execution were consequently void." *Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851. While no case has been found in which an appeal from a decree for costs under such circumstances was taken, it is apprehended that in such case the court would have to say such award was not in the discretion of the court below, because violative of law; and, if in any other case the record should disclose an error in legal principle in the awarding of costs, an appeal ought to lie. Just at this point, *Hamilton v. Du Pre*, 103 Ga. 795, 30 S. E. 248, is applicable. The plaintiff in certain proceedings in which a receiver had been appointed had utterly failed on the merits, but the trial court had decreed payment of all her costs, including the receiver's expenses and compensation, out of the proceeds of the plaintiff's property in the hands of the receiver, and the Supreme Court held the decree appealable, and reversed it, on the ground of an abuse of discretion on the part of the court below, which can only mean that the decree rendered was not a discretionary one. As the reason for immunity from appellate review and control is the discretion vested in the trial court, such immunity must cease when the reason ceases. When costs are not discretionary, an appeal lies. Therefore, it seems clear that, in the statement of the general rule on the subject by practically all of our authorities,

the exception is ignored, though observed in the exercise of the jurisdiction. Accurately stated, it is that no appeal lies from a decree for such costs as are in the discretion of the chancellor. Ordinarily, the costs in equity are in his discretion.

What is here said respecting the want of discretion to disallow compensation to a receiver or trustee when his title is free from infirmity and his conduct from reproach, and he has performed his duties and accounted for the fund, is not to be taken to mean that the chancellor acts wholly without discretion in such cases. As to the amount of such compensation, he is not bound by the strict rules governing contract obligations. It is to be determined upon equitable, not legal, principles. Much latitude is allowed him in the adoption of the rule by which it shall be fixed. It may be by a commission on the amount of the fund, a lump sum, or a salary. Many cases say compensation to a receiver is in the sound discretion of the court, and therefore subject to review. Among them is a decision of this court in the case of *Crumlish's Adm'r v. Railroad Co.*, 40 W. Va. 627, 22 S. E. 90, holding as follows: "There is no fixed rule in this state as to the mode of allowing compensation to a special receiver, whether by way of commission or a fixed sum. Usually when the fund is large, a lump sum is proper. The amount and mode of allowance are within the sound discretion of the court, under the circumstances of the particular case, subject to review on appeal." In the same case the court comes to the same conclusion as to the allowance to a receiver of counsel fees. The principle adopted and applied in that case fully sustains the position here taken as to the discretionary power of the court in such cases. It denies to the trial court the arbitrary discretion allowed in the case of ordinary costs, by saying the allowance is in all such cases subject to review. In that case the parties obtained in this court, upon other grounds than a decree for costs, a *locus standi*, and so much of the decree as related to costs and allowances came up incidentally; in other words, it was not an appeal from a decree for costs only, but the principles applied in the disposition of the questions relating to costs clearly deny to the trial court that broad discretion, from the exercise of which there is no appeal, and make it clear that in such cases an appeal may be entertained. The uniform practice of giving the parties a hearing in fixing the amount of compensation and expenses sustains the view that it is a collateral, rather than an incidental, exercise of judicial power; and the freedom with which appeals respecting such allowances are allowed speaks louder as to the nature of the function than the casual observations made by the courts in disposing of the questions raised.

As to the power of the court to decree the

extraordinary costs in favor of one party against another (not the ordinary costs usually incident to litigation and the basis of its exercise), but little authority has been found. Practically all the cases reported deal with the propriety of the allowance to the receiver, trustee, or agent out of the fund. As to these parties, as has been indicated, there is little room for the exercise of discretion, such as to prevent appellate review. The appellate courts deal with them freely. Some observations made in *Cutter v. Pollock*, 4 N. D. 205, 59 N. W. 1062, 25 L. R. A. 377, 50 Am. St. Rep. 644, are to the effect that a decree of such costs from one party to another may be made; but it may be doubted whether what is said there is to be considered as an adjudication, since the decree was reversed because the court failed to adjudicate anything in respect to such costs. The language referred to is as follows: "If the receiver is allowed to pay and reimburse himself out of the moneys in his hands, the decree should provide whether the owner of such moneys shall be indemnified by the recovery of judgment against some other party to the case for this invasion of his property. Ordinarily, it would seem to us (but we do not decide the point) that the receiver should be protected by being permitted to look to the funds in his hands to save him against loss. This appears to have been done in this case. Such rule may, however, work great hardship in particular cases; and in some instances the receiver has, on this account, been compelled to look for indemnity to the party at whose instance he was appointed. See *Weston v. Watts*, 45 Hun, 219; *French v. Gifford*, 81 Iowa, 428; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438, 2 N. Y. Ch. R. Ann. 979. Certainly, if the court, in such case, allows him to pay himself out of the funds, it should compel the other party to the action to make good the loss thus occasioned to the successful litigant. It is impossible for a court to make an intelligent decree when property is in the hands of a receiver, and is to be disposed of by the decree, without settling in advance the rights of the receiver with respect to compensation and expenditures, and whether he shall be allowed to pay himself out of the funds in his hand."

Concerning provisional allowance out of the fund, 2 *Daniel's Ch. Prac.* p. 1410, says: "Where a party is entitled to his costs, but it has not been decided who ought ultimately to bear them, payment is often directed to be made out of a fund in court, or by one of the parties to the proceedings, 'without prejudice to the question how the same are ultimately to be borne.' The absence, however, of these words, or words of a like meaning, from an order directing payment of costs out of a fund in court, does not necessarily imply that the court has decided that the fund out of which the costs are paid is that which must ultimately bear them; and

costs paid out of a fund, under an order from which those words are omitted, may be directed to be recouped out of another fund, which is primarily liable for that purpose." The substance of this is that the court may make a provisional allowance out of the fund, without losing its power to place the burden ultimately upon the party who ought to bear it. It affords no certain indication as to whether the power to award costs between parties or between one fund and another (which is substantially the same thing as between party and party) is so far within the discretion of the chancellor as to preclude review, and, if so, whether such discretion extends to all costs.

Abundant authority sustains the position that, under circumstances making it just and equitable to do so, the compensation of the receiver may be decreed against the plaintiff. In *French v. Gifford*, 31 Iowa, 428, the appellate court, modifying the decree of the lower court, gave the receiver by way of compensation \$1,000 out of the fund and a decree against the plaintiff for \$2,000, the balance of his compensation. In *Radford v. Folsom*, 55 Iowa, 276, 7 N. W. 604, the defendants demanded that two-thirds of the receiver's compensation be charged to the plaintiff, and the court, admitting the power to do so under proper circumstances, upon an examination of the record, held that the 'circumstances were not such as to make it equitable to do so. In *Cutter v. Pollock*, 7 N. D. 681, 76 N. W. 235, on the second appeal, the court affirmed a decree in favor of the defendants against the plaintiffs for three-fifths of the amount which the receiver had retained out of the funds which had been adjudged to belong to the defendants; the receiver having been appointed at the instance of the plaintiffs, who had failed at the hearing on the merits. In *Cassidy v. Harrelson*, 1 Colo. App. 458, 29 Pac. 525, the court held as follows: "A receiver having been appointed by the court, on application of the interveners in a cause wherein they were not entitled to intervene, the costs incident to the appointment were properly adjudged against them." In *Highley v. Deane*, 64 Ill. App. 389, the court held that "where a party, without probable cause, obtains the appointment of a receiver, he should be made to pay the entire expense thus by him created"; and the decision was affirmed in 168 Ill. 266, 48 N. E. 50. In *Kerr v. Hill*, 27 W. Va. 576, 616, the receiver's compensation and expenses were allowed out of the fund, to the prejudice of the defendants, who were subsequent lienors, entitled to the surplus, although the appointment was illegal, because without notice, and made at the instance of the plaintiff. In *French v. Gifford*, cited, the court said: "In cases like the one under consideration, we may attach the costs to one or either of the parties, or apportion them."

What principle, respecting the nature of

the power to decree such costs as between parties, is deducible from these or other precedents cited? Has the chancellor irrevocable discretion? The many instances in which appeals have been entertained from decrees for such costs, turning on the sole question of who should pay them, answer the question in the negative. Although costs, when ascertained and fixed as to amount, they are not costs in the discretion of the chancellor. The title to such costs, as between parties, must be determined judicially upon equitable principles; else there is, in the language of the American authorities, an abuse of discretion, or, in the language of the English authorities, a lack of discretion to award them. In such cases, therefore, an appeal lies.

The decree appealed from gives costs to the prevailing party, in the absence of any attempt on the part of the defendant to show any reason why the general rule should be varied or departed from. The litigation was occasioned by an act of fraud on his part in the procurement of the deed, which made it necessary for the plaintiff to bring this suit in order to obtain what belonged to her. The case is not one involving the administration of a fund, such as a trust estate, a decedent's estate, or an estate of an insolvent person or corporation, in which both plaintiff and defendant have an interest, and out of which the costs must be taken, for the reason that they cannot be obtained from any other source. The controversy was one over the title to property. There was no middle ground—no community of interest. The whole fund belonged to one or the other. Upon obtaining it, the prevailing party was entitled to have along with it the necessary costs of the prosecution of the suit. No reason is perceived why, under such circumstances, any necessary costs of the litigation should be paid out of the property or funds of the successful party. The appointment of the receiver was without notice, it is true, but the defendants acquiesced in it by their failure to move for his discharge; and, had they procured his discharge on such ground, he would have been immediately reappointed, if the case was such, in its nature and circumstances, as to warrant the appointment of a receiver. The property he was to receive was not real estate, or the rents, issues, and profits thereof, but personal property; and in such case the statute does not forbid the appointment of a receiver in vacation without notice, and such appointment is voidable only, not void. High on Receivers, § 111 et seq. The defendants recognized the authority of the receiver, moved for an increased bond and acquiesced in his appointment by not asking for his discharge. Failure to give notice cannot afford any ground for withholding costs, for it was a mere irregularity, which has been waived. "No one, whether a party to the suit or not, who

has recognized the authority of a receiver in any way, can attack the validity of the order appointing him for mere irregularities." 17 Ency. Pl. & Pr. 757; citing many authorities.

The ability of the defendants to make restitution of the value of the property is advanced as a substantial reason why no receiver should have been appointed. In many cases insolvency of the defendant must be alleged, but they are usually cases in which questions of title are not involved. Here, title alone is the bone of contention. It was not a claim for money, but to the title to oil—the royalty oil—and the bill alleged that the defendants' claim thereto was founded upon an act of fraud. It further appeared that, for the full and adequate protection of plaintiff's interest, the oil should be sold at such times during the pendency of the suit as the market might be favorable; and the discretion to say when such sales should be made should not be left to her adversaries. Our statutes and our decisions import that the title and rightful control of property must be adequately protected, and discountenance the view that no injury results if the owner may obtain its value in damages. The courts should protect his property from misappropriation, and preserve his title to it, so that he may use, retain, or sell it, and determine the time of sale, purchaser, terms, and the price; and when legal remedies are inadequate for such protection, equity supplies the defect. *Peterson v. Hall* (W. Va.) 50 S. E. 608; dissenting opinion in *Zinn v. Zinn*, 54 W. Va. 483, 46 S. E. 202. An injunction may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in equity, against injury from the sale, removal, or concealment of such property. Code 1899, c. 133, § 1. The same chapter, at section 28, provides for the appointment of a receiver in any proper case pending in a court of equity in which the property of a corporation, firm, or person is involved, and there is danger of the loss or misappropriation of the same, or a material part thereof. Both remedies are extraordinary, and seem to be given for substantially the same purposes. Our opinion, therefore, is that there was not such want of cause as made the appointment useless and unjustifiable.

One other contention must be disposed of. Henry R. Smith and Gertrude Duncan were codefendants of Brown, and resisted the demand of the plaintiff by their joint answer, and by uniting in the second appeal. They claimed a one-fifth interest in the royalty oil. Though they were not parties to the original transaction under which Brown claimed, and subsequently obtained their interest from or through him, they claimed the benefit of his act. But the former decree gave general costs against all three, whereby these claimants of a one-fifth interest were made to pay two-thirds of said

costs. The undue proportion thereof may, for aught that can be ascertained from the record, amount to one-fifth of the extraordinary costs. We have no taxation of it. In view of this, we see no reason for disturbing the decree, and it will therefore be affirmed.

BRANNON, P. (dissenting). I cannot see that Brown should pay the receiver's compensation. The general rule is that such compensation is paid out of the fund. *Elk Fork Co. v. Foster*, 99 Fed. 495, 39 C. O. A. 615; *Kerr v. Hill*, 27 W. Va. 616. There is no need of this large extra expenditure, because there is no danger of loss or suggestion of insolvency. It was only a conflict of title to oil. *Freer v. Davis*, 52 W. Va. 37, 43 S. E. 172, 94 Am. St. Rep. 910. If the plaintiff, having no legal ground for a receiver, chose to ask one, she should pay for his services. There was no emergency calling for the appointment of a receiver without notice. Notice is required before a receiver can be appointed in vacation. *Batson v. Findley*, 52 W. Va. 343, 43 S. E. 142; *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. 5; *Smith on Receivers*, 14. But that was error only, and did not make the appointment void, so as to refuse commission. *Alderson on Receivers*, 157, 168. But can we not consider the fact that notice was not given, and that there was no need of a receiver, in exercising discretion as to piling the costs on Brown? Though the appointment was reversible for want of notice and good ground, we cannot reverse it, because appeal from that order is barred. I do not think there can be an appeal or writ of error resting alone on error as to costs. The Constitution (article 8, § 3) excludes costs, both as to sole ground of appeal, or as going to make up the sum for appeal. But what are costs under that clause? I think it means general costs, taxable under the statute, not special or extraordinary allowances, such as pay of a receiver. I think appeal lies as to such allowances. *Crawford v. Fickey*, 41 W. Va. 544, 23 S. E. 662. My reason is that they are not "costs" under said clause. Therefore, an appeal lies in this case.

(58 W. Va. 172)

STEWART v. DOAK et al.

(Supreme Court of Appeals of West Virginia.
Oct. 31, 1905.)

1. BOUNDARIES—EVIDENCE—SUFFICIENCY.

When in a controversy over the title to land, dependent upon the location of a disputed boundary line, there are no monuments at the points in dispute, and these points cannot be located by measurements from known and undisputed corners of the tracts between which the line is, so that to render a verdict for either party the descriptions of the deeds must be departed from in respect to length of lines, a verdict supported by testimony of a witness, who swears he saw the monument called for at the points fixed by the verdict as corners, and evidence of acts of recognition by owners on both sides of the line, and other circumstances, can-

not be disturbed by the appellate court as being contrary to the law and the evidence, in the absence of an admitted or clearly established controlling fact.

2. TRIAL—MISLEADING INSTRUCTIONS.

It is not error to refuse a misleading instruction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 569, 660.]

3. EVIDENCE—DECLARATIONS OF GRANTOR OF LAND.

Declarations of a living predecessor in title in disparagement thereof, made before he parted with it, is admissible evidence against the party claiming under him.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 824, 825, 836.]

4. NEW TRIAL — NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

When such admissions on the part of a deceased former owner have been proved, newly-discovered evidence, of like or similar admissions, by another predecessor who is living, is cumulative, and affords no ground for a new trial; nor can the court say, as matter of law, that such new evidence ought to produce a verdict different from the one rendered.

5. SAME—APPLICATION—DILIGENCE.

An affidavit filed on a motion for a new trial on the ground of newly discovered evidence must show such facts relating to its discovery as will enable the court to see that it probably could not have been discovered before the trial by the exercise of due diligence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 310.]

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County.
Action by Peter Stewart against Isaiah Doak and another. There was judgment for defendants, and plaintiff brings error. Affirmed.

Freer & Robinson, for plaintiff in error.
Duty & Fidler, for defendants in error.

POFFENBARGER, J. An action of ejectment, tried in the circuit court of Ritchie county, between Peter Stewart, plaintiff, and Isaiah and John R. Doak, defendants, in which the title to about six acres of land, dependent upon the location of a boundary line, was involved, having resulted in a verdict and judgment for the defendants, the plaintiff complains here, assigning as errors the failure of the court to set aside the verdict and permit a new trial on the ground that the verdict is contrary to law and the evidence; the refusal of the court to grant a new trial on the ground of newly-discovered evidence; the refusal of the court to give, at the instance of the plaintiff, a certain instruction; and the giving, at the instance of the defendants, certain other instructions. An intelligent disposition of these several assignments necessitates a particular statement of the controversy and a review of the evidence.

On the 11th day of September, 1872, there was conveyed to the plaintiff, by James Taylor and wife, a tract of land, described as containing 209 acres, out of a 780-acre tract patented by Jacob B. Blair in 1851, which was described in the patent as bordering up-

on three lines of a 100-acre tract patented by John Lewman in 1822. The part of the Blair tract obtained by the plaintiff bordered upon two lines of the Lewman tract, described as follows: From a beech and cucumber N., 69 W., 170 poles, to a white oak, and thence N., 42 E., 100 poles, to a white oak. This last line is the one whose location is in controversy; the plaintiff claiming it to be at a point 170 poles from the beech and cucumber, and the defendants at a point 187½ poles, as ascertained by the survey made in this case. This difference of location makes controversy as to a parallelogram, containing about 12 acres, at the northwestern end of the Lewman tract. The northeastern end of this parallelogram is claimed and occupied by Henry Markle. Next to him lies a small triangle, purchased by Stewart, the plaintiff, from J. H. Marshall, a former owner of the Lewman tract. This action was brought against the defendants, who are now the owners by conveyance of the Lewman tract, less the portions sold out of it to the plaintiff and Markle and J. N. Collins. The Stewart 209-acre tract is irregular in form, and calls for seven lines of the original Blair tract, two of which are lines of the Lewman tract. These seven lines are described as follows: Beginning at pointers on the top of the ridge, thence S., 44 W., 14 poles, to a gum and hickory; thence S., 28 E., 112 poles, to a maple, corner to lands claimed by Manuel Lacy; thence N., 55 E., 112 poles, with a line of lands claimed by Rolly Haddox, to a gum; thence, with another of said Haddox's lines, S., 7 E., 164 poles, to a white oak; thence, with a line known as the "Beason's Survey," N., 42 E., 216 poles, to a beech and cucumber and corner of said Collins 180-acre tract (the Lewman tract); thence, with a line of same, N., 69 W., 170 poles, to a white oak; thence N., 42 E., 100 poles, to a white oak. Plaintiff's deed supposedly makes the point at which the last above-mentioned white oak stood the beginning corner of the tract thereby conveyed, and describes the lines running thence N., 60 W., 85 poles, to pointers, and corner of the tract of land owned by Neal Hammond; thence, with one of his lines, N., 60 W., 186 poles, crossing a run to a maple, also a corner of said Hammond; thence S., 78 W., 44 poles, to a stake; thence S., 10 W., 157 poles, to pointers, said to be a corner of lands owned, or formerly owned, by William Boreman, the pointer's corner called for in the Blair patent. Then follows substantially the calls of the patent as above given, the departures from the patent being as follows: The line S., 28 E., is made 114 poles and 15 links, instead of 112 poles; the line N., 55 E., is made 117 poles, instead of 112; the line S., 7 E., is made 184 poles, instead of 164; the line N., 42 E., 216 poles, is made 220 poles; the line N., 69 W., 170 poles, is made 64° 20' W., 174 poles, to a white oak, described as being down (one of the corners in controversy); and the other line N., 42 E.,

100 poles, to the beginning, is made to run to a stone corner to lot of H. B. Collins, instead of to the white oak mentioned in the Lewman patent as well as in the Blair patent by reference to the Lewman tract. Collins, at the date of the plaintiff's deed, was the owner of the Lewman tract, and is described in the Blair patent as the occupant of said tract. Said Collins had also acquired the Blair 780-acre tract in 1856, which had been sold, under a decree of the circuit court of Ritchie county about the year 1858, to James Taylor, who was the grantor of the plaintiff, Stewart. The Lewman tract is a perfect parallelogram, the sides of which were originally described as being 170 poles and the ends 100 poles; the lines N., 69 W., 170 poles, on the southwestern side thereof, and N., 42 E., 100 poles, on the northwestern end thereof, were common to the Lewman tract and the Blair tract. As to the line N., 69 W., 170 poles, the description in the deed to the defendants follows that in the Lewman patent, as does also that given in the deed to Marshall, grantor of the defendants, and the deed to Henry B. Collins, from whom the land passed to Marshall, and in the deed to Henry Haddox from the patentee, John Lewman.

By the surveys made in this case, the lines of the Stewart tract were found to vary from the descriptions given in the Blair patent as follows: Line S., 44 W., 14 poles, is S., 46½ W., 14¾ poles; the line S., 28 E., 112 poles, is S., 25½ E., 114; the line N., 55 E., 112 poles, is N., 60½ E., 110; the line S., 7 E., 164 poles, is S., 4½ E., 184 poles; the line N., 42 E., 216 poles, is N., 46 E., 214½ poles; and the line N., 69 W., 170 poles, is N., 65 W., 170 poles, to the point claimed by the plaintiff as the corner, and 187½ poles, to the point claimed by the defendants as the corner. By actual measurement, the long lines of the Lewman tract are 170 poles, as described in the patent, to the points claimed as corners by the plaintiff, and 187½ poles, to the points claimed as corners by the defendants. This makes a difference, as stated, of 17½ poles. In what may be called the plaintiff's new lines of the Stewart tract, there is a discrepancy in length of about 18 poles in the first line. By commencing at the point claimed by the plaintiff and running to the maple corner, the distance is found to be 184 poles, instead of 171 poles, as called for in the deed. The others correspond in length with the calls of the deed, except that one line is 142½ poles long, instead of 157, as described in the deed.

Coupled with the fact that the surveys are based, in some instances, upon known and undisputed corners called for in the deeds, the plaintiff relies upon the close approximation of the measurements made to those described in the deed in support of his attack upon the verdict as being contrary to the evidence. He supplements this by the following recital in the defendants' deed, which is

subsequent in date to that of the plaintiffs: Leaving the beech and cucumber, the defendants' line is described as running N., 69 W., 170 poles, to a white oak; "thence N., 42 E., about 43½ poles, to a stone and corner to a lot owned by Peter Stewart." As has been stated, Stewart, the plaintiff, owns a small triangular piece of land by purchase from Marshall, as part of the Lewman tract, and lying within the 12-acre parallelogram, bounded by the two locations of the northwestern Lewman tract line, and adjoining the 6 acres in controversy, which is also a part of said parallelogram. The Stewart corner, referred to in the deed of the defendants, is a corner of this triangle, and clearly not a corner of the Stewart 200-acre tract, purchased out of the Blair tract. Starting at the extreme western corner of the Lewman tract, as claimed by the plaintiff, and running on a course N., 42 E., the line would strike the southeastern corner of this triangle. Commencing at the corner of the Lewman tract, as claimed by the defendants, and running on the same course, the line would strike the northwestern corner of the Stewart triangle. About the only difference would be in the length of the lines from the two different points. The former would exceed the length called for in the deed by 23½ poles, and the latter by 13½ poles. Hence, considering the difference in length of the lines only, this recital of the deed seems to favor the contention of the defendants, rather than that of the plaintiff, and not to strengthen the other circumstances relied upon by the plaintiff. A further circumstance to which weight is attached is the former existence of marked trees on the line, as contended for by the plaintiff, which had been cut down and removed by the defendants in clearing up the land in controversy. One of the defendants admitted having seen some marked trees as claimed by the plaintiff, and another witness testified to having seen them, but neither could give any definite and accurate information as to the exact location of the trees, or the age or character of the marks.

The defendants rely upon the testimony of a witness who claims to have seen the white oak trees called for in the Lewman patent as the northwestern termini of its two long lines. M. D. Barnett testified to having seen both trees standing in the year 1857 at the points claimed as corners by the defendants, and said they were pointed out to him as corners by Henry B. Collins. Other witnesses testify that Collins, in his lifetime, pointed out to them as corners the points claimed by the defendants; but both trees had then disappeared. At the end of the line on the northeastern side of the Lewman tract, as claimed by the defendants, there is now a large stone, which Collins said was within two to four feet of the point at which the oak tree stood. J. E. Taylor, J. H. Marshall, William Ridgeway, and per-

haps others, testify to the express recognition of this corner by the plaintiff, Stewart. A circumstance showing conclusively Stewart's belief, some eight or ten years before the trial of this case, in the location of the line as claimed by the defendants, is his purchase from Marshall, the then owner of the Lewman tract, of the small triangular piece of land hereinbefore described. He says he made this purchase under a misapprehension as to the location of the line, but the purchase is a fact in the nature of an admission, which was proper for the consideration of the jury in connection with the other evidence.

In arriving at the verdict for the defendants, the jury found it necessary to extend the lines of the Lewman tract 17½ poles. To have reached a verdict for the plaintiff, it would have been necessary to have extended his line from the beginning corner to the maple, about 13 poles. Hence, in either view, it was impossible to make the lines correspond in length with the calls of the deeds, and, as the corners were undisputed, as well as fairly established by the evidence, it became a question with the jury as to whose line should be lengthened. They made the solution of this question depend upon the evidence as to the location of the corners in question, because the locations of the disputed corners could not be ascertained by measurement or marks. This evidence consisted of the approximation of measurements, declarations of the deceased former owner, acts of recognition and acquiescence, the direct and positive testimony of a witness who said he had seen oak trees standing at the points contended for by the defendants, and the testimony of witnesses who said they had seen marked trees standing along the line as claimed by the plaintiff. No other mode of determining the question was open to them, and no ground is perceived upon which a verdict standing upon such evidence can be set aside by the court.

Enough has been said about the call in the defendants' deed for the plaintiff's corner to show that it could not control the force of the other evidence just referred to. That call is a corner of the triangle, purchased by the plaintiff as a part of the Lewman tract, and not of his purchase out of the Blair tract, which has no corner corresponding to the description, and the northwestern corner of the triangle on the line claimed by defendants fits the description better than the southeastern corner on the line claimed by the plaintiff. It has no controlling force. Moreover, plaintiff's deed calls for a stone as the beginning corner, and there is, and has been for a long time, a marked stone at the point contended for by the defendants, and none at the place contended for by the plaintiff, and that stone is described in the deed as the corner

of the Henry B. Collins (Lewman) tract. This, no doubt, had great weight with the jury, as justly it might have had. The instructions given for defendants harmonize with these views, and were proper.

The instruction which it is said the court erroneously refused to give the jury at the instance of the plaintiff is as follows: "The court instructs the jury that the defendants' title paper, to wit, the deed from Marshall to Isalah and John R. Doak, calls for Peter Stewart's corner, and if the jury believe from the evidence that the said corner, so called for, is at point 10 on said plat on the line N., 46 E., 106 poles—at the figure 10—the jury will find for the plaintiff." It has already been observed and distinctly pointed out that the corner mentioned in the defendants' deed is not, and cannot be, a corner of the 209-acre tract, the line of which is in controversy. There is no controversy as to the lines of the small triangle, the corner of which is plainly referred to by this deed. If the deed called for the southeastern corner of the triangle, the recital would be favorable to the plaintiff; but not a word in the deed indicates which corner of the triangle is indicated. The northwestern corner, according fully with the contention of the defendants, meets this description just as well as the southeastern corner of the triangle, if not better. In view of these facts, the action of the court in refusing this instruction, which could have had no effect other than to mislead the jury in the interest of the plaintiff and to the detriment of the defendants, was clearly proper and right.

The newly-discovered evidence upon which an application for a new trial was based is set forth in the affidavit of Samuel R. Owens, as follows: "Worked for J. N. Collins two years about the years 1885 and 1886, and more or less before these dates and after, and, during the time I worked for said J. N. Collins, he owned and controlled the old 100-acre tract of land known as the old H. B. Collins tract, and during the time I worked for him, he wanted me to do a job of grubbing for him on the west side of the old 100-acre tract next to Peter Stewart's land, and showed me where his corner was next to Stewart, in a low place, at the foot of a steep bank, just above the first bench of the hill, and now represented on the plat at figure '9.' He also showed me his line leading out from 9 to 1. There was three old line trees leading out from 9 to 1; was a hickory center line and the other two was side lines. The marks on these lines was very old. J. N. Collins showed them to me, and said there was his line, and not to grub over that. I would further state that H. B. Collins told J. N. Collins in my presence not to cut the red oak tree. That was Peter Stewart's, and he would get into trouble." The figures "9" and "1," referred to in the affidavit, represent the corners,

as contended for by the plaintiff. The red oak tree mentioned in it stood near the line as claimed by the defendants, and there was some evidence tending to show that it was regarded by H. B. Collins, and those who claimed under him, as a line tree. It had been cut down at some time before the trial.

An effort is made to sustain the action of the court on the ground that the testimony of Owens to an admission on the part of J. N. Collins, who is living, and might have been called, is inadmissible. This position is untenable. No decision of this court seems to come quite up to the question. In *Harriman v. Brown*, 8 Leigh, 697, Milburn, whose declaration was held admissible, was still interested in the land. *High's Heirs v. Pancake*, 42 W. Va. 602, 28 S. E. 536, deals with the admissibility of declarations and acts of deceased former owners and living parties, and does not seem to discuss admissibility of declarations of living predecessors in title in disparagement thereof. But *Wigmore on Evidence*, exhaustive, analytical, historical, and philosophical, perhaps beyond precedent, at section 1080, says: "The admissibility of such declarations is now firmly settled, although the recognition of it was slow, and the decisions were hesitant and vacillating until a comparatively recent date." This position he sustains by an array of authority, both English and American. The pith of his reasoning is as follows: "Having precisely the same motive to make correct statements, and being identical with the party, either contemporaneously or antecedently, in respect to his ownership of the right in issue, his admissions may, both in fairness and on principle, be proffered in impeachment of the present claim." In further elucidation of the theory, he quotes the following from *Cowen and Hill's Notes to Phil. on Ev.*, No. 481, p. 644: "[The owner's] estate or interest in the same property, afterwards coming to another by descent, devise, right of representation, sale, or assignment—in a word, by any kind of transfer—whether it be the act of the law or the act of the parties, whether the subject of the transfer be real or personal estate, corporeal or incorporeal, chooses in possession or chooses in action, the successor is said to claim under the former owner; and whatever he may have said affecting his own rights before parting with his interest is evidence equally admissible against his successor claiming from him, either immediately or remotely. And in this instance it makes no difference whether the declarant be alive or dead; for though he be a competent witness, and present in court, his admissions are receivable. This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived—has taken it cum onere—and as the predecessor might have taken a qualified right, or

sold, charged, restricted, or modified an absolute right, and as he might furnish all the necessary evidence to show its state in his own hands, the law will not allow third persons to be deprived of that evidence by any act of transferring the right to another." But the declaration must have been made before the declarant parted with the land. See Wigm. Ev. § 1082, where a long list of authorities is given in the note, sustaining and illustrating the rule and its exception.

Though admissible if it had been offered on the trial, this newly-discovered testimony of Owens did not call for a new trial, because it is palpably cumulative. By two witnesses the plaintiff had proved the same kind of admissions by H. B. Collins, a deceased former owner, and father of said J. N. Collins. It is testimony of the same character, and to the same point. Upon newly discovered cumulative evidence a new trial cannot be allowed. *State v. Betsall*, 11 W. Va. 703; *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 489; *Halstead v. Horton*, 38 W. Va. 728, 18 S. E. 953; *Grogan v. Railroad Co.*, 39 W. Va. 415, 19 S. E. 563; *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721. Nor is it clear that this evidence ought on a new trial to produce a different result. This must appear to the court before the verdict can be set aside. Another essential requisite is that the affidavit of the party desiring a new trial show on its face such facts as will enable the court to see that he could not have discovered the evidence before the trial. The affidavit of Stewart only says he could not have discovered it by due diligence, and did not know of it. Under *Swisher v. Malone*, it may be doubted whether this is enough. See 31 W. Va. 448, 7 S. E. 489. Is it sufficient to state mere conclusions? Ought not some facts appear? Who determines the question of due diligence—the party or the court? The court must be able to see it in the facts stated, not in the mere opinion of the witness, based upon facts known to him, and not given to the court.

There is no error in the judgment, and it will be affirmed.

(58 W. Va. 233)

J. E. POLING & CO. v. MOORE.

(Supreme Court of Appeals of West Virginia.
Nov. 7, 1905.)

1. PLEADING—DECLARATION—PARTIES.

The parties to an action should be named with accuracy and particularity. However, when once named, they may thereafter be referred to as plaintiff and defendant.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 101.]

2. JUDGMENT—PLEADINGS TO SUSTAIN.

There can be no judgment upon a declaration in which no one is named as defendant, and the action should be dismissed, unless the declaration is so amended as to cure this defect.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Judgment, § 36.]

(Syllabus by the Court.)

Error to Circuit Court, Tucker County.
Action by J. E. Poling & Co. against

John W. Moore, Jr. Judgment for defendant, and plaintiffs bring error. Reversed.

A. Jay Valentine, for plaintiffs in error.
W. M. Baker, for defendant in error.

SANDERS, J. This is an action of assumpsit, brought by the plaintiffs in the circuit court of Tucker county against the defendant, John W. Moore, Jr. The declaration contains the common counts, and two accounts are filed therewith, one in favor of the Union Manufacturing Company against the defendant, and by an indorsement thereon it appears to have been assigned to the Hendricks Company, Limited, and the other in favor of the Hendricks Company, Limited, against the defendant; but the declaration contains no averment of the assignment of these accounts, or either of them, to the plaintiffs. No issue was made up, and in this condition the case was referred to a commissioner, to take and state an account between the parties, and the commissioner, in obedience to the order of reference, reported, and upon his report the case was submitted to the court in lieu of a jury, and the court entered judgment that neither the plaintiffs nor defendant were entitled to recover. The plaintiffs assign many errors, and ask to have this judgment reversed.

The plaintiffs are not in a position to complain, even if the declaration averred an assignment of the accounts, and the proof showed them entitled to recover, because it does not appear from the declaration who the defendant is. The defendant is nowhere designated. The parties to the action must be set out in the declaration with certainty and accuracy. However, after once stating them, it is sufficient to designate them as plaintiff and defendant. Unless this is so, the declaration will be so defective that no judgment can be given upon it. Our statute provides that no action shall abate for want of form when the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the case. Section 9, c. 125, Code 1899. But this provision does not help this case, because judgment, according to the very right of the case, cannot be given unless there is a defendant against whom such judgment can be rendered. There must be some one complaining, and, likewise, some one against whom complaint is made. Therefore, no judgment could have been given upon this declaration in favor of the plaintiffs against Moore, he being nowhere named in the declaration, and not named defendant by the declaration. There being no declaration upon which judgment could be given, the court should not have adjudicated the rights between the parties and dismissed the action, but should have allowed the declaration to be amended. The judgment is therefore reversed, and the case remanded, with leave to the plaintiffs to amend their declaration, if they desire to do so.

(58 W. Va. 235)

DUDLEY v. BARRETT et al.(Supreme Court of Appeals of West Virginia.
Nov. 7, 1905.)**1. ERROR—REVIEW—EVIDENCE.**

In reviewing a judgment in an action at law upon a writ of error, where the evidence is not made a part of the record, this court will not consider assignments of error involving a consideration of the evidence, but will affirm the judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2911-2915.]

2. SAME—RECORD—BILL OF EXCEPTIONS.

Evidence taken down and transcribed by a shorthand reporter is not a part of the record, and can only be made so by a proper bill of exceptions. *Tracy's Adm'x v. Coal Co.* (W. Va.) 50 S. E. 825.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2370.]

3. SAME.

Where a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, or so described in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions.

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by J. W. Dudley against J. R. Barrett and A. J. Hannaman. Judgment for plaintiff, and defendants bring error. Affirmed.

W. E. McDougale, Dodge & Via, and Ohas. D. Forrer, for plaintiffs in error. F. P. Moats and Leonard & Leonard, for defendant in error.

COX, J. In this action of assumpsit, by J. W. Dudley against J. R. Barrett and A. J. Hannaman in the circuit court of Wood county, there was a trial by jury and a verdict for plaintiff for \$664.52, a motion by defendants to set aside the verdict, which motion was overruled, and defendants excepted, and judgment was entered for plaintiff, to which a writ of error was allowed defendants by a judge of this court.

Many exceptions were taken to the rulings of the court in the progress of the trial. All the errors assigned here involve a consideration of the evidence, and the evidence does not seem to be a part of the record. There is copied at length in the record what purports to be questions and answers of witnesses for plaintiff and defendants, respectively, upon the trial, to which is appended and copied what purports to be the certificate of John T. Harris, official stenographer of the circuit court of Wood county, to the effect that he made a report in shorthand writing of the testimony adduced and proceedings had at the trial of this action, and that the transcription thereof is a faithful and true translation of said report, etc. The record does not show that John T. Harris was appointed by the court to report the proceedings had and the testimony given in this case, under the statute, or that he qualified as official stenographer in this case. The whole evi-

dence is not incorporated in any bill of exceptions. The only bill of exceptions which might be claimed to make all the evidence part of it is defendants' bill No. 4, the part of which, material to be considered here, is in the following language: "Be it remembered that upon the trial of this case, and after the plaintiff had closed his evidence, as shown by the certificate of evidence, the defendants, by their attorneys, moved to exclude all the evidence introduced by the plaintiff from the jury, which said evidence is here now referred to and made a part of this defendants' bills of exceptions, which said motion, being argued by counsel and considered by the court, was overruled." What certificate of evidence is there referred to? Can it be said that it is a certificate made by John T. Harris, rather than the certificate of any other person, when the record is silent as to the appointment or qualification of any stenographer to report this case? Where a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, or so described in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions. *Tracy's Adm'x v. Carver Coal Co.* (W. Va.) 50 S. E. 825; *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909. There is nothing in the record to show that the certificate of evidence made by John T. Harris was annexed to this bill of exception, or that the certificate was so marked by letter, number, or other means of identification mentioned in the bill, as to identify such certificate of evidence as the one intended to be made a part of the bill. The cases cited clearly announce the doctrine applicable to the case under consideration, and we cannot treat the evidence as part of the record in this case.

Again, if the certificate of evidence made by John T. Harris could be considered as part of the record, it still does not appear that such certificate of evidence contains all the evidence adduced upon the trial, and therefore we must presume that there was evidence which fully sustained the verdict. *State v. Ice*, 34 W. Va. 244, 12 S. E. 695; *Bank v. Bank*, 3 W. Va. 386; *Edgell v. Conaway*, 24 W. Va. 747; *Hunter's Ex'rs v. Stewart*, 23 W. Va. 549; *Smith v. Walker*, 1 Call (Va.) 28; *Willard v. Overseers*, 9 Grat. (Va.) 139.

The evidence adduced on the trial of this action not being a part of the record, we cannot consider the assignments of error made, but must affirm the judgment. *Tracy's Adm'x v. Carver Coal Co.*, supra; *McKendree v. Shelton*, supra; *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10; *Wustland v. Potterfield*, 9 W. Va. 438; *Laidley v. County Court*, 44 W. Va. 566, 30 S. E. 109; *Williamson v. Hays*, 35 W. Va. 52, 12 S. E. 1092; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653.

(58 W. Va. 226)

DIMMACK v. WHEELING TRACTION CO.(Supreme Court of Appeals of West Virginia.
Nov. 7, 1905.)**1. APPEAL AND ERROR—PRESUMPTIONS.**

Where a demurrer was interposed and not passed upon by the lower court, it will be treated by this court as having been overruled.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3707.]

2. JURY — DISQUALIFICATION — INTEREST IN RESULT.

Upon a trial of an action where a corporation is a party, a juror is not disqualified to serve on the ground alone that he is in the employment of a stockholder or manager of such corporation.

3. SAME—VOIR DIRE EXAMINATION.

It is not error to refuse to allow questions to be asked a juror, when the sole purpose of such questions is to aid in the exercise of the right of peremptory challenge.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 563.]

4. SALES—PROPERTY INCLUDED—EVIDENCE.

Where a verbal contract for the sale of personal property is made, and a contest arises as to what property was embraced by the terms thereof, it is competent to prove the price paid therefor and the value of all the property claimed to have been purchased.

5. SAME.

If a verbal contract for the sale of personal property has been fully consummated, and subsequently thereto, and in compliance with the terms thereof, payment of the purchase price is made by check, taking a receipt therefor, no language or recitals contained in the check or receipt can be so construed as to alter the terms thereof; but where there is a contest as to what property was really embraced by the terms of the contract, and the check and receipt contain recitals defining the kind and quantity of property sold, they are competent evidence as tending to show what property was included in the sale.

(Syllabus by the Court.)

Error to Circuit Court, Ohio County.

Action by Alfred Dimmack against the Wheeling Traction Company. There was judgment for defendant, and plaintiff brings error. Affirmed.

White & Allen, for plaintiff in error.
Erskine & Allison, for defendant in error.

SANDERS, J. This is an action of detinue, instituted by the plaintiff, Alfred Dimmack, in the circuit court of Ohio county, against the Wheeling Traction Company, for the recovery of the possession of certain railway rails and steel fittings. Judgment below was given for the defendant, to which the plaintiff applied for and obtained a writ of error and supersedeas.

The plaintiff purchased the property which he claims in this action from J. G. Crawford, who claims to have purchased the same from the defendant. Therefore the plaintiff's right to recover depends upon whether or not Crawford did make such purchase. The defendant had a lease on a baseball park ground on Wheeling Island, in the city of Wheeling, which was about to expire, and this controversy grows out of a sale by the defendant to

Crawford of certain property which it had upon said baseball park ground. The property which it had upon this ground was such as fences, grand stand, buildings, etc., and, also, it had stored there the steel rails and fittings in question. The defendant claims to have sold Crawford all the baseball ground materials, but that the rails and fittings were not included in the sale, while Crawford claims to have purchased all the property which the defendant had upon the ground, including the rails and fittings.

The plaintiff's first assignment of error is that the demurrer to his declaration was not disposed of. The record does not show that the demurrer was passed upon, but the plea of non detinet was filed, and the case tried upon its merits. Therefore the demurrer will be treated as having been overruled. The rule is that, when the record does not disclose what the ruling of the court below was upon demurrer, this court will consider that the demurrer was overruled. I cannot see how the plaintiff can complain of the action of the court in not passing upon a demurrer to his declaration. The defendant makes no point in regard to it, and does not claim in this court that the declaration is not good. It is claimed that the court erred in refusing to permit the plaintiff, upon the impaneling of the jury, to inquire of them whether or not they were employes of the stockholders or managers of the defendant corporation. The fact that a juror is in the employment of a stockholder of a corporation does not disqualify him to serve, and is therefore no ground of challenge for cause; and, this being so, there is no duty resting upon the court to go into an inquisition, the sole purpose of which is to aid the defendant in determining whether he will challenge a juror peremptorily. Therefore the court committed no error in this respect.

The remaining assignments of error are numerous, but a treatment of them separately is entirely unnecessary, as a great many of them are tested by the same rules and principles and are somewhat cumulative in effect. Therefore they can be treated under three heads:

First. Did the court err in the admission or rejection of testimony? The fact that a verbal contract was made, that it was made at a certain time and place, that Crawford agreed to pay \$200 for the materials, that a few days were given within which to make payment, and that he did make payment through Robinson and by his check, and took a receipt therefor is all agreed; and the only question is whether the steel rails and fittings were embraced in the terms of the contract, and upon this question there is a direct conflict in the evidence. Therefore, in arriving at the terms of the contract, it is necessary to look at all the facts and circumstances surrounding the parties, and which led to its consummation, and any evidence, however slight, that would in any way cast light upon

the transaction is admissible. Complaint is made that the court permitted the defendant to prove the weight of the rails and fittings, and that they would sell in the market for so much per ton, and that Dimmack had hauled away a quantity of the rails before his act of so doing was discovered by the traction company, and that Shirley, the defendant's agent, was allowed to testify to the market value of the rails in February and April, 1901, and that the defendant company in October, 1900, sold some other old rails at \$19 per ton. This evidence was plainly admissible in determining what was included in the contract. The amount paid by Crawford for the material which he claimed to have purchased being \$200, and there being a direct conflict as to whether or not the rails and fittings were embraced in the contract, it was certainly proper to permit the defendant to prove that its agent, who made the sale, knew that the rails and fittings were stored upon the baseball ground, and that they were of certain value, especially when upon the whole evidence it appears that the rails were of the value of \$1,200 or \$1,400, many times the amount of Crawford's contract price. It is not probable, but highly improbable, that the agent would include these rails and fittings in the contract, when they were worth many times the amount Crawford agreed to pay, and therefore this evidence was directly pertinent, and was proper to go to the jury, to throw light upon what property was really embraced in the contract, and, if the evidence of the value of these rails as they were stored upon the ground was admissible, then evidence of the market value of the rails would also be competent as corroborating the agent's testimony, and in order to determine just what rails were left on the ground it was proper to inquire of Dimmack just how many he had hauled away. Then, again, the plaintiff says it was error for the court to permit the defendant, on the cross-examination of Robinson, to question him relative to the sale of certain property to Shafer & Moore, which had been purchased by Crawford under his contract with the defendant. This evidence is, if for no other reason, admissible as tending to show the value of the material which the defendant says it sold Crawford. In this sale Crawford excepts the iron and rails stored on the ball ground, and sells the remainder of the property which he claims to have purchased for \$350. If the property is worth \$350, and there is evidence going to show that it is, then it is another circumstance tending to show the improbability of the rails and fittings being embraced in the contract. The plaintiff also complains of the action of the court in refusing to permit him to give his judgment as to the value of these rails lying upon the ground in the condition they were when he first saw them on the baseball ground. This calls for the opinion of the witness some considerable time after the contract of Craw-

ford with the traction company, and he is not asked what the market value of these rails and fittings was. But, even if the question should have been permitted to be answered, still it would not be such error as would call for a reversal of this case, because Dimmack himself shows, in a receipt exhibited with his evidence, that he purchased these rails from Crawford and agreed to pay \$12 per ton, and in his declaration he lays his damages at \$15 per ton, and there is very little dispute, if any, upon the whole evidence, as to the value of this property.

Second. Did the court err in giving and refusing certain instructions? The plaintiff asked for eight instructions, five of which were given and three refused. It is not argued by plaintiff's counsel here, although it is assigned as error in the petition, that there was any error in refusing to give No. 3. We see no good reason that can be urged in support of this instruction. It is plainly bad, and the court did right in rejecting it. As to plaintiff's instruction No. 6, the court refused it on the ground that it had been covered by another instruction, and upon an examination of the instructions which were given this is found to be correct. As to instruction No. 7, the jury are told that if they believe from the evidence that the defendant offered to sell to J. G. Crawford its material or property upon the baseball ground, and that the rails in question then belonged to the company and were upon said ground, and if they further believe from the evidence that Crawford agreed to purchase said material and property so offered, and did purchase the same, and that the rails were not in any way excepted from such offer and sale, then Crawford was entitled to all the property and material of the company upon said ground, including the rails in question. This instruction told the jury that, in making sale of its property, it was necessary for the company to except the rails. This is foreign to the controversy, because there is no claim by the company that it did expressly except the rails, but that it sold to Crawford certain materials which were upon the baseball ground, and that it did not include the rails in question; while Crawford claims that the company sold him all the material or property kept or stored upon the ground. The question, therefore, for the consideration of the jury, was which theory was correct, and not whether the company had sold to Crawford all the material upon the ground and excepted certain parts. If Crawford purchased all the material upon the ground, then the company could not except the rails and fittings, and, if did not sell Crawford all such material, but only certain portions thereof, which was expressly designated, as defendant claims, then it was not necessary to make any exception. Therefore this instruction was clearly calculated to mislead the jury.

The court, at the instance of the defendant,

gave to the jury nine instructions, which appear to be correct and a proper presentation of the case. The plaintiff seriously complains of No. 5, but upon a careful examination of the instruction, having a proper understanding of the case, it is not prejudicial to him. It must be borne in mind that this contract is not in writing, but was made several days before payment and the giving of the receipt. Therefore the question is what was the contract between the parties? What was agreed upon? What property was embraced in it? And, when we correctly determine this question, the fact that the receipt may contain recitals or such language as would embrace other property cannot alter a contract which had already been made, and the only purpose for which the receipt and check could be used is to shed light upon what property was actually embraced by the terms of the contract, when that question is unsettled and in dispute between the parties. Now, this check and receipt, not being parts of the contract, cannot affect it, except for the purpose of defining what the terms of the contract really were, not making new terms when once those terms are ascertained. In referring to the receipt for the check, specifying with particularity the property purchased by using the words "for the grand stand, bleachers stand, fences, buildings, etc.," followed by the general language, "embracing all the property of the undersigned situated on said lot," the jury were told in this instruction that the general words were to be construed as restricted in meaning to things of the same kind as those which were specifically enumerated, and that the receipt is not of itself to be interpreted as including the steel rails as a part of the property. This part of the instruction cannot be erroneous, because the receipt is not of itself to be interpreted as including the steel rails as a part of the property sold, for the reason already given, that, if by the terms of the contract the property was not included, then in no way should the receipt be so construed or interpreted as to include it. Then the jury are further told that if they believe that the check was read in full by Shirley, and not merely casually examined for the purpose of ascertaining whether it correctly stated the amount in the receipt, then the receipt and check are to be taken together as defining the property sold, and the following words in the check, "including all property of said traction company stored or kept on said ball park," would require the said papers to be interpreted as including the iron, so far as the legal construction of those papers is concerned. But while the court instructs the jury that, under such a state of facts, the legal construction of the papers should be such as to include the rails, yet it is proper to tell the jury, as the court did here, that if the defendant's agent did not understand the rails to be included, which, of course, means at the time of the making of

the contract, that then they should find for the defendant, because, no matter what the legal interpretation of the check and the receipt should be, yet they were given long after the contract was made, and could in no way alter or change it.

Our conclusion is that the court instructed the jury fully and fairly upon the law of the case, and we see no error in its rulings in this respect.

Third. Should the court have set aside the verdict of the jury, and granted the defendant a new trial? As has been observed, the evidence in this case is in direct conflict. As this is so, it is purely a jury question, and, inasmuch as the jury has found a verdict in favor of the defendant, we cannot disturb it, unless it is so manifestly contrary to the evidence as to show that it was the result of bias, prejudice, or misapprehension of the facts. This we cannot say.

Therefore the judgment of the circuit court is affirmed.

(53 W. Va. 253)

CLAYTON v. GILMER COUNTY COURT.

(Supreme Court of Appeals of West Virginia.
Nov. 7, 1905.)

1. EMINENT DOMAIN—COMPENSATION—REMEDY OF PROPERTY OWNER—INJUNCTION.

Injunction lies against a county court to prevent it from taking private property for a public road, without having paid, or secured payment of, compensation therefor.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 762, 768.]

2. SAME—SCOPE OF ISSUES—DETERMINATION OF TITLE.

A controversy as to the title of the property so taken, or sought to be taken, turning on the construction of plaintiff's deed, constitutes no obstacle to such jurisdiction, and the court may determine in such case the question of title by construing the deed.

3. EVIDENCE—PAROL—AMBIGUITY IN DEED.

When ambiguity in the terms of a deed renders the meaning uncertain, parol evidence of the conditions under which it was executed and the character and situation of the property may be considered, in connection with its terms, in arriving at the intention of the parties, which is the test by which to determine its legal effect.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2129-2133.]

4. DEEDS—CONSTRUCTION—REPUGNANCY.

In construing a deed, words which are repugnant to and irreconcilable with other terms clearly applicable to admitted and established facts recited in the deed must be rejected, and all other words must be given some effect.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 268.]

5. SAME—PROPERTY CONVEYED.

When a deed conveys a tract of land, and gives to the grantee, as an appurtenance thereof, the right to open and use a private road along one side of it, it will be presumed that the grantor did not intend to retain a very long and narrow strip of land between the tract conveyed and the road so provided for; and, when such road is described as intended to run between the tract of land conveyed and an adjacent tract belonging to a third party, it will be presumed, in the absence of anything on the face of the deed, or in the circumstances

and situation and property, indicating the contrary, that the grantor did not intend to retain a strip of land between the road and the lands of such third party, so narrow as to be of no practical use to him.

6. BOUNDARIES—DESCRIPTION.

When a road so designed and provided for is described as an extension of an existing road, lying between a portion of the land conveyed and a lot belonging to R., so as to run between the land conveyed and a tract of land belonging to O., and at the corner of the lands of R. and O. there is a slight angle, made by their lines running to the corner from nearly opposite directions, the road will follow said two lines, and have, at the corner aforesaid, a corresponding angle, notwithstanding the deed, calling for one of the lines of the road as a boundary of the land conveyed, describes that boundary as a single line between two monuments, and as running with "line of alleys." In such case, the use of the word "alleys" will be deemed to refer to the old road as one alley, and to the extension thereof as another, and to signify intent to locate the road and the boundary line so as to run with the lines of the two adjacent tracts of land, and leave, between the tract conveyed and the adjacent lands, only sufficient space for the road.

7. EASEMENTS—PRIVATE WAY—TITLE TO FEE.

A deed which calls for the line of a private road as a boundary of the tract by it conveyed, and gives to the grantee the right to open and use such road, does not pass to the grantee the title in fee to any part of the road.

8. EMINENT DOMAIN—RIGHTS TO COMPENSATION—INJURY TO EASEMENT.

When a private right of way is enlarged into a public road by the joint action of the owner of the fee and the public authorities, the easement or right of way is neither injured nor destroyed, and no right to compensation or damages on account thereof accrues to its owner.

(Syllabus by the Court.)

Appeal from Circuit Court, Gilmer County.

Action by Dora A. Clayton against the county court of Gilmer county. From a decree perpetuating a preliminary injunction, defendant appeals. Modified and affirmed.

L. H. Barnett and R. F. Kidd, for appellant. A. L. Holt and Hamilton & Morris, for appellee.

POFFENBARGER, J. Dora A. Clayton obtained a preliminary injunction against the county court of Gilmer county, restraining it from taking and interfering with a portion of a certain piece of land belonging to her and certain rights of way appurtenant thereto, which injunction was afterwards made perpetual, and said county court has appealed from the decree by which the court refused to dissolve the injunction and perpetuated it.

The object of the injunction was to prevent the establishment and maintenance of a public road on the land in question, on the ground that the plaintiff, having title thereto, could not be deprived of it until compensation therefor had been paid or secured to her, and on the further ground that the order establishing said road was invalid, because made at a special term, the notice of which

did not specify the establishment of said road as one of the purposes for which said term was called. The county court, in its defense, asserted that the road was not located upon any portion of the plaintiff's land, but upon a strip of land, described as an alley, belonging to S. H. Whiting, adjacent to complainant's land, and over which she had a private road or way, by virtue of an express grant thereof in her deed from Whiting, from whom she had purchased the land to which this private way was appurtenant. On the 24th day of May, 1902, two deeds were made by which this alley seems to have been created or provided for. One was made between S. H. Whiting and wife, parties of the first part, W. D. Whiting and wife, parties of the second part, and D. U. O'Brien and wife, parties of the third part, effectuating two or three exchanges of land among the parties. Either by these, or some other one, Mellie O'Brien, wife of D. U. O'Brien, obtained title to a tract of land lying adjacent to a certain other tract owned by S. H. Whiting, and this deed gave to S. H. Whiting the use, for himself and his vendees, of a 16-foot road, formerly provided for and possibly opened, which came up to the corner of the two adjacent tracts of S. H. Whiting and Mellie O'Brien. The other deed was from S. H. Whiting to Dora A. Clayton, and conveyed to her the Whiting land lying adjacent to that of Mellie O'Brien, and on the south side thereof, except the said alley, which was left between them. The quantity thus conveyed was estimated to be four acres, and the deed conferred upon the grantee, Dora A. Clayton, "the right to open, make, maintain, and use for herself and vendees the 16-foot road described in deed between the grantors herein and W. D. Whiting, bearing date herewith, and the right to extend the said road with like privileges between Mellie O'Brien's lot and the lot hereby conveyed, and the said road to run between the said two lots the full length of the lot herein conveyed." The extension so contemplated is mentioned in the description of the land conveyed as a 16-foot alley. The description reads as follows: "Beginning at a stake, corner to 14-foot alley, and running thence N. 28 $\frac{1}{4}$ ° E., 275.8 feet, to a stake; N. 22 $\frac{1}{4}$ ° E., 104.5 feet, to a stake; N. 54 $\frac{1}{2}$ ° W., 400 feet, to a stake above the old sheep shed; S. 28 $\frac{1}{4}$ ° W., 485.6 feet, to a stake at 16-foot alley; thence, with line of alleys, 70 $\frac{3}{4}$ ° E., 406.6 feet, to the beginning, containing 4 acres, by surface measure."

The beginning corner, "corner to 14-foot alley," is well established by the evidence. If there is any evidence against that location as the beginning corner, it is so slight in quantity and light in character as to be not worthy of notice. Commencing there, and following the calls of the deed, the closing line intersects the first line at a point within the beginning corner several feet. This is due to an error in the course of that line

as described in the deed, which should have been, if a straight line to the beginning corner was intended, "S. 68½° E." instead of "S. 70¼° E." The surveyor accounts for this discrepancy by saying he did not ascertain the course, but took it for granted that it was the same as the line of Melle O'Brien, and that the course of her line was S. 70¼° E. Melle O'Brien's land, or the part of it fronting on the alley, was then under fence, so that the location of her line was apparent and its course easy of ascertainment. If the intention was to leave the 16-foot alley or road, and nothing more, between the two tracts of land, the road could not run from the beginning corner clear through without an angle at a point some distance west of the beginning. The 16-foot road already provided for, the extension of which was contemplated, ran past the beginning corner of the Dora Clayton land, probably 100 feet or more—how far is immaterial—up to the corner of the O'Brien land, following the line of a lot known as the "Riddle Lot." At that corner, the division line between the O'Brien land and the Whiting land purchased by Mrs. Clayton took a course slightly different from the line between the Riddle lot and the Clayton land, so that an angle at that point in the road became necessary, if the intention was to leave a strip no more than 16 feet wide between the Clayton lot and the O'Brien lot, and the last line of the Clayton lot could not be a straight line. It was necessary to make an angle in it to correspond with the angle at the corner of the Riddle and O'Brien lots, so that her line would run S. 68½° E. to that point, and thence S. 74½° E. to the place of beginning.

Assuming that, upon a proper construction of the Clayton deed, her line would be straight from the stake at the 16-foot alley to the beginning point, the county court opened its road along that line on the south side thereof. If that be a proper construction of the deed, and the deed does not confer title to any part of the alley, then no part of her land has been taken; but if, under a proper construction of that deed, the alley is not straight, but runs with the Riddle line to the O'Brien corner, and then with the O'Brien line, the road is built partly on the Clayton tract. It takes a triangular strip, ascertained to be from 4 to 7 feet broad at the widest point. The course called for on the line in dispute, S. 70¼° E., must be discarded, for the reason that the survey cannot be closed without discarding it, or lengthening the 485.6-foot line, so as to throw the last corner over in the inclosed land of Melle O'Brien. Under such circumstances, the rule is to ignore the course and close the survey by a straight line between the two corners. *Ruffner v. Hill*, 31 W. Va. 428, 438, 7 S. E. 13. Palpably erroneous and irreconcilable calls for course and distance may always be rejected, and the survey closed by

lines run according to the established monuments. *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; *Wendell v. Jackson*, 22 Am. Dec. 635; *Myers v. Ladd*, 28 Ill. 415; *Vose v. Bradstreet*, 27 Me. 156; *Kruse v. Wilson*, 79 Ill. 233; *Bond v. Fay*, 12 Allen (Mass.) 86; *Seaman v. Hogeboom*, 21 Barb. (N. Y.) 398; *Eggleston's Lessee v. Bradford*, 10 Ohio, 312; *Hull v. Fuller*, 7 Vt. 100.

If nothing in the circumstances disclosed by the evidence in the case and the deed exhibited with the bill, and under which the plaintiff claims, militated against the operation of this rule, the deed would have to be so construed; but it says the road is to be extended between the two tracts of land, and describes it as a 16-foot alley, and the last line of the Clayton tract is described thus, "Thence with line of alleys" to the place of beginning, not with the line of one alley, but with the "line of alleys," and the two deeds mentioned and described herein, as well as all the testimony in the case, shows that there were in point of fact two of these 16-foot roads, one between the Clayton land and the Riddle land, which the parties intended to extend between the Clayton land and the O'Brien land, and which could not be extended without making an angle at the Riddle and O'Brien corner. Strictly speaking, the alley as adopted by the county court is not an extension of the 16-foot road first mentioned. It begins back 100 feet or more at the intersection of a 14-foot alley with the 16-foot road, and put the old 16-foot road partly on new ground from that point, instead of commencing at its terminus at the Riddle and O'Brien corner. A circumstance tending strongly to support this view is the fact that any strip intended to be left, either between the road and the O'Brien land, or between the Clayton land and the road, would have been in quantity as well as in form useless to anybody except Mrs. Clayton or Mrs. O'Brien, but would belong to Whiting. What purpose could he have had in retaining a triangular strip more than 400 feet long and not more than 7 feet broad in the widest part between Mrs. O'Brien's land and the road? It is not to be supposed for a moment that he retained this strip between the road and Mrs. Clayton's land, for it would be unreasonable and absurd to suppose that she would accept the deed under such circumstances. Was there to be but one point at which she could reach the road, the use of which was granted to her? Was she to be limited to a mere way of necessity to the road over this strip retained by Whiting? On the other hand, did he propose to cut Mrs. O'Brien off from the road by retaining such a strip? Of what earthly use could it be to him, except a means of forcing Mrs. O'Brien to purchase a right of way through him or purchase the land? This is not to be supposed or assumed, because their relations seem to have been friendly and their efforts to have been di-

rected along the same line. In a deed, to which Mrs. O'Brien and Whiting were both parties and in which exchanges of property were made, and bearing even date with that of Mrs. Clayton, the 16-foot road is mentioned, and it is quite likely that, if she had suspected any such intention on the part of Whiting, she would have provided against it in this deed.

To break the force of these circumstances and the terms of the deed, plainly disclosing intent on the part of the grantor to leave only a 16-foot road between the two tracts, the county court relied upon a plat of other lands showing the 16-foot road up to the O'Brien and Riddle corner, with a dotted line on the north side thereof, indicating, in their opinion, a purpose to make the angle at the 14-foot road, instead of at the Riddle corner. But the surveyor who made the plat says the dotted line was not run, but that the straight line on the south side of the 16-foot road, disclosing the opposite intent, was run, and according to that line Riddle holds his lot, and not according to the dotted line. The evidence of intent afforded by this plat is entirely too slight to overcome the weighty evidence above referred to. Hence the conclusion is that a 16-foot road, following the Riddle line up to the O'Brien corner and then the O'Brien line to the end thereof, was intended; that the line of the Clayton tract follows the north side of said 16-foot alley; and that a portion of the road, as opened by the county court, is clearly on the land of the complainant.

Intention of the parties to a deed is the test by which to determine its legal effect; and this rule applies to the description, as well as to other parts of the instrument. When ambiguity in the terms used renders the meaning uncertain, resort may be had to the circumstances and conditions under which the deed was executed. Dev. Deeds, §§ 839, 840. "Although parol evidence is not admissible to prove that the parties intended something different from that which the written language expresses, or which may be the legal inference and conclusion to be drawn from it, yet it is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, water courses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were probably used by the parties, especially in matters of description." Chief Justice Shaw, in *Salisbury v. Andrews*, 19 Pick. (Mass.) 250, 252. "Generally, it will not be presumed that a party granting land intends to retain a long narrow strip next to one of his lines." *Western M. & M. Co. v. Cannel Coal Co.*, 8 W. Va. 406. It is presumed that he does not, unless an intent so to do is manifest. *Id.*; *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 99, 18 S. E. 42, 29 Am.

St. Rep. 793. Repugnant and impossible words are to be discarded, and every other word given some effect, and the deed reconciled to admitted and established facts and circumstances. The conclusion above expressed accomplishes this, and no other one will do it. Making an angle in the line in controversy violates no rule. "Law will not declare in favor of a straight line between monuments, when the language of the deed shows that a different line was intended." *Pratt v. Woodward*, 91 Am. Dec. 573. This must be especially true when the language, importing intent to the contrary, is aided by circumstances.

In so far as the injunction prohibits the maintenance of the road on said triangular strip shown on plat No. 2, filed with the deposition of R. L. Ruddell, the court below properly overruled the motion to dissolve and perpetuated it. The jurisdiction in equity to prevent the taking of private property for public purposes without payment of compensation therefor, or security for the same having been given, is undoubted, and not disputed in this case. *Foley v. County Court*, 54 W. Va. 16, 46 S. E. 248.

Mrs. Clayton claims one-half of the alley, upon the theory that, as it is made the boundary line of her property, the conveyance carries title in fee to one-half of the alley. For this she relies upon the general rule that, where a public highway or a stream not navigable is made a boundary of the tract conveyed, the line is in the middle of the highway or stream. *Hutchinson, Land Titles*, p. 292, citing a large number of authorities: *Devlin on Deeds*, § 1024, giving a long list of decisions. In this assumption her counsel has overlooked the fact that the deed does not make the alley, but only the lines thereof, a boundary of her land. If this alley were a public highway, she could not claim to the center of it under a deed showing an intent that the line of the alley, and not the alley itself, should define the limits of her land. *Lough v. Machlin*, 40 Ohio St. 332; *Insurance Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep. 361; *Lee v. Lee*, 27 Hun. 1; *Railroad Co. v. Helsel*, 38 Mich. 62, 31 Am. Rep. 306; *Smith v. Slocumb*, 9 Gray (Mass.) 36, 69 Am. Dec. 274; *Brainard v. Railroad Co.*, 12 Gray (Mass.) 407; *Murphy v. Copeland*, 51 Iowa, 515, 1 N. W. 691; *Hanson v. Campbell's Lessee*, 20 Md. 223; *Perrin v. Railroad Co.*, 40 Barb. (N. Y.) 65; *Cottle v. Young*, 59 Me. 105. In all such instances, the title to the fee in one-half of the street, road, or stream stands upon the presumption that the grantor did not intend to retain the narrow strip between the street or road line or bank of the stream and the middle thereof; but this presumption cannot exist when there is anything on the face of the deed indicating a contrary intention, and the authorities universally hold that when the deed says to the line of the street or the bank of the stream, the line or bank and not the road or stream is the boundary.

and the deed carries nothing beyond the boundary line, except the easement and rights appurtenant to property abutting upon a public highway. Devlin on Deeds, § 1025. As to which lines of the alley were intended, north lines or south lines, there is but one answer. If the south, what need was there for the grant of a right of way to Mrs. Clayton? If the south, she took title to the whole of the alley, and needed no permission to use it. If the north, she took no title to it, and her convenience demanded a road along the side of the land she bought. This is the only interpretation consistent with the terms of the deed.

A further contention is that the easement in and over the alley, vested in Mrs. Clayton by her deed, will sustain this injunction as to the alley, as well as in respect to the strip of land belonging to her and not included in the alley. It is difficult to see how this claim can be supported, in view of the many decisions of this court which hold that an injunction does not lie to prevent mere damage to property by a work of internal improvement authorized by law, unless it be so great as to amount to a taking thereof. *Watson v. Railway Co.*, 49 W. Va. 528, 39 S. E. 193; *Arbenz v. Railway Co.*, 83 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; *Spencer v. Railway Co.*, 23 W. Va. 406; *Mason v. Bridge Co.*, 17 W. Va. 396. In such case an action at law for the damages to the property is deemed adequate to protect and vindicate the right of the abutting property owner. In the cases referred to the easements involved were such as an owner whose property abuts upon a highway has in the highway; but this is an important and valuable easement or right, distinct from the public easement. *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275.

But, as invalidity of the order establishing the road is advanced as another basis for the injunction, another conclusive reason for the untenableness of the position taken by counsel for the appellee in respect to the easement will be given. No compensation can be had where there is no injury. If property is not taken, no compensation for it can be demanded; and if it is not injured, there can be no claim for damages. The transformation of this private road into a public highway neither destroys nor injures the easement. It amounts only to an enlargement of the use to which the land is subjected by the deed. By that instrument, the use of it for purposes of ingress and egress is given to the grantee and her tenants. When it is converted into a public highway, she and her tenants still have that use of it and are in better position, because the public authorities maintain and keep it in repair. As to whether the owner of such an easement is entitled to compensation, when the land is taken for the purposes of a public highway, not much authority has been found, but such as there is plainly indicates the contrary. *Murphy v. Bates* (R. I.) 41 Atl. 1011, propounds the doctrine that a private way becomes merged in the public

way when both are upon the same ground. To the same effect is *Ross v. Thompson*, 78 Ind. 90. The authorities do not seem to deem it necessary to proceed against anybody but the owner of the fee in enlarging the private way into a public way. *Elliott on Roads*, § 5; *Abbott v. Stewartstown*, 47 N. H. 223. Though merged in the public use, the easement is not destroyed, for discontinuance of the highway works a dissolution of the merger and leaves the easement still in the hands of its owner. *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275; *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. 1047, 1052; *Showalter v. Railway Co.*, 49 Kan. 421, 32 Pac. 42; *Challiss v. Railroad Co.*, 45 Kan. 398, 25 Pac. 894; *Railroad Co. v. Patch*, 28 Kan. 470.

Agreeably to the foregoing conclusions, the decree will be so modified as to limit its operation and effect to so much of the land included in the road, mentioned and described in the bill and proceedings, as lies within the limits of the plaintiff's deed as herein construed and given effect, and, as so modified, the same will be affirmed, and costs in this court decreed to the appellant, as the party substantially prevailing.

(72 S. C. 516)

HUGHES v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Oct. 31, 1905.)

1. TELEGRAM—DELAY IN DELIVERY—DAMAGES.

Where a telegram announcing the death of a relative was delivered too late for the recipient to attend the funeral because of delay of the company, it does not confer a cause of action because he was deprived of the consolation of attending such burial; but if the telegram shows a probability that he would have arrived in time, and would have gone if the message had been promptly delivered, the company is liable for the pain caused by being deprived of such privilege.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 70.]

2. SAME.

Delay in delivering telegram announcing death of a relative, where it appears that there was a probability that the recipient would have arrived in time to attend the funeral but for the delay, and that he would have gone, renders the company liable for anxiety caused by such delay, though as a matter of fact the funeral had been fixed at a time at which the recipient could not have arrived, where he had no notice of such time.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 70.]

3. SAME—MEASURE OF DAMAGES—LEX FORI.

The measure of damages for delay in delivering a telegram to a person in the state is not governed by the laws of the foreign state from which it is sent.

Appeal from Common Pleas Circuit Court of Lancaster County; Watts, Judge.

Action by W. Alonzo Hughes against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The sixth, seventh, eighth, and ninth paragraphs of the complaint are as follows:

"(6) That if said message had been promptly transmitted and delivered to plaintiff by defendant, as it was its duty to do, plaintiff could have wired to his family at Coleman when he would arrive there, and could have left on an afternoon train on December 18, 1903, and arrived at Coleman at 2:45 p. m., on December 19, 1903, in plenty of time to have attended the funeral of his said dead brother, which consolation said delay in delivering said telegram deprived him of. That on receipt of said telegram, as before stated, plaintiff immediately sent a telegram to his said sister, at Coleman, but same was not received by her until after plaintiff's brother had been buried.

"(7) That after receiving said delayed message by him, as aforesaid, plaintiff left on the earliest train for Coleman, Fla., leaving Heath Springs, which was not until about 11 a. m. on Sunday, 20th December, 1903, and by traveling the quickest and shortest route he did not reach Coleman, Fla., until the afternoon of December 21, 1903, two days after the plaintiff's brother had been buried, to his great mental pain, distress, and anguish.

"(8) That by reason of defendant's willful, wanton, and gross negligence in not transmitting and delivering promptly said message, plaintiff, on arriving at the nearest railroad station to the place where his dead brother's family resided, was not met with a conveyance by any member of his said brother's family and his own family, as would have been the case had said message been promptly delivered, and in consequence thereof had to walk a distance of one mile and one-half through deep sand, which very much fatigued and discommoded plaintiff, especially after his long and tedious trip by rail from Heath Springs to said railroad station.

"(9) That by reason of this wanton, willful, and gross negligence of defendant in failing to promptly transmit and deliver the said message, as aforesaid, the plaintiff was not only fatigued and jaded by his said walk through the deep sand, as stated above, but he was caused great mental anguish, pain, and suffering not to have had the privilege of seeing his dead brother's face for the last time, and of being with the family before the burial, and of attending the burial, all to his damage in the sum of \$1,990."

The fourth request of the defendant, and modification, is:

"(4) The court charges you that if it appears from the testimony in this case that, even if the message in question had been promptly delivered to the plaintiff, and the plaintiff by going the shortest and quickest route and using all possible diligence could not have reached and have been with his family before the burial, could not have seen his brother's face before the burial, and could not have arrived in time to have attended the

burial, then the plaintiff cannot recover compensatory damages for any mental anguish caused by his not being able to attend the funeral,' etc. I charge you that in this connection, if you believe that was the facts of the case, or if you believe that the plaintiff here didn't intend to telegraph or didn't telegraph, and if he had telegraphed, if you believe they wouldn't have waited, then I charge you that as good law."

From judgment for plaintiff, defendant appeals on the following exceptions:

"(1) Because his honor, the circuit judge, erred in refusing to charge the defendant's third request to charge, the same being as follows, to wit: 'Sections 8 and 9 of the complaint set out the injury and damage plaintiff claims to have suffered as follows: [Here read the eighth and ninth sections of the complaint.] The court charges you that, before the plaintiff is entitled to recover for mental anguish, he must show (1) not only that the defendant telegraph company did not exercise reasonable diligence or ordinary care in delivering the message, but (2) that, had it been delivered without the unreasonable delay alleged, the plaintiff, after receiving it, by the exercise of reasonable diligence, could have seen his dead brother's face, and have been with the family before the burial, and could have attended the burial of his deceased brother, and that he not only could have done so, but that he would have done so.' Error consisting in that the said request contained a correct statement of the law applicable to the facts in issue.

"(2) Because his honor, the circuit judge, erred in refusing to charge the jury defendant's sixth request to charge, the same being as follows, to wit: 'The court further charges you, as a matter of law, that the plaintiff can only recover as compensatory damages for such consequences as were within the contemplation of the parties to the contract at the time of the sending of the telegram; that is to say, for such consequences as naturally and reasonably flow from a breach of the contract or from negligence in performing any duty imposed by the contract. The court, therefore, charges you that the telegram constituting the written contract out of which this action arose is not sufficient to put within the contemplation of the defendant telegraph company the possibility of a postponement of a funeral or burial. The telegram is the simple announcement of death. The plaintiff, therefore, is not entitled to recover damages in the way of compensation for mental anguish on account of not being able to see his dead brother and attend his burial, as alleged, on the ground alone that if he had received the said message promptly he could have had the funeral postponed.' Error consisting in that the said request embodied a correct statement of the law applicable to the facts in issue in said cause.

"(3) Because his honor, the circuit judge,

erred in refusing to charge defendant's seventh request to charge, the same being as follows, to wit: "That the question of what compensatory damages, if any, plaintiff is entitled to recover, that is to say, the measure of damages, is governed in this case by the law of the state of Florida, where the contract for sending the message involved was made. Under the law of Florida, any mental anguish which does not accompany or proceed from a physical injury, as a consequence of such physical injury, is not an element of damage, and cannot be recovered on account of a breach of contract or negligence. I therefore charge you that the plaintiff is not entitled to recover compensatory damages in this case for the mental anguish he claims to have suffered in not seeing his dead brother and attending the funeral, as alleged, due to any breach of contract by the telegraph company, or negligence in transmitting and delivering the telegram involved." Error consisting in that the said request embodied a correct statement of the law applicable to the facts in issue."

Geo. H. Fearons, Willcox & Willcox, and J. H. Marion, for appellant. R. E. Wylie, for respondent.

GARY, A. J. This is an action for damages arising out of the alleged negligence and willfulness of the defendant in failing to deliver a telegram addressed to the plaintiff, announcing the death of his brother. At 12:30 p. m., on the 18th of December, 1903, the sister of the plaintiff filed with the defendant at Coleman, Fla., the following message, addressed to Alonzo Hughes, Heath Springs, S. C.: "John killed at Panasoffkee at mill this morning. [Signed] Dora Hughes." It is alleged that the message was not delivered to the plaintiff until 2 o'clock p. m. on the 19th of December, 1903, although it was received by the defendant at its office in Heath Springs at 8 o'clock a. m. on the 19th of December, 1903. Some time during the afternoon of the 19th of December the plaintiff sent the following telegram to his sister at Coleman, Fla.: "Telegram received at 2 p. m. Will come if possible. [Signed] Alonzo." The sixth, seventh, eighth, and ninth paragraphs of the complaint will be set out in the report of the case; also, the defendant's fourth request to charge, together with the modification thereof by his honor, the presiding judge; also the appellant's exceptions. The jury rendered a verdict in favor of the plaintiff for \$700. In considering the exceptions, we will refer to them by their numbers.

1. First and second exceptions: Section 2223 of the Code of Laws of 1902 is as follows: "All telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering even in the absence of bodily injury, for negligence in receiving, transmitting or delivering mes-

sages. Nothing in this section shall abridge the rights or remedies now provided by law against telegraph companies, and the rights and remedies provided for by this section shall be in addition to those now existing. In all actions under this section the jury may award such damages as they conclude resulted from negligence of said telegraph companies." It will be well to bear in mind at the outset that it was not the object of the statute, in a case where a telegraph company negligently fails to deliver a telegram announcing the death of a person, to confer upon the addressee of the message a right of action based upon the fact that he was thereby deprived of the consolation of seeing the face of the dead, being present with the family in the trying hours of sorrow, or taking part in the funeral ceremonies. These facts may be introduced in evidence, in a proper case, for the purpose of showing mental suffering, but they form no part of the cause of action, and are merely evidentiary. *Harrison v. Telegraph Co.*, 71 S. C. 386, 51 S. E. 119. The intention of the statute was to give a right of action for mental anguish suffered by the addressee as a direct and proximate result of the negligent delay in delivering the message. If, when such telegram is received by the addressee, he knows that he could not have arrived in time, then there is no legal foundation for mental anguish arising from the failure to deliver promptly. But, on the contrary, if he would have gone, and it appears upon the face of the telegram that there was a probability for him to have arrived in time, in case it had been promptly delivered, then the thought of being deprived of this privilege would naturally and reasonably be expected to produce anxiety and pain, and may fairly be said to have been in contemplation of the contracting parties. The fact that the parties in charge of the funeral rites may have seen proper to fix a time when it would not have been possible for him to have attended, even if the message had been delivered in time, does not prevent the suffering of mental pain before he had knowledge of such fact, when the telegram showed that there was a probability he would have been able to go in time, if it had been promptly delivered. This interpretation of the statute is just and fair both to the telegraph company and the addressee, as it makes the liability dependent upon facts existing at the time of delivery and which can be made certain, instead of being based upon circumstances that are uncertain, and subject to the caprice of others not parties to the contract. Furthermore, the request set out in the first exception was substantially the same as the request hereinbefore mentioned, which the presiding judge charged, except as modified, and the modification was too favorable to the appellant.

2. Third exception: The question presented by this exception has been adjudicated

in the recent cases of *Hellams v. Telegraph Co.*, 70 S. C. 83, 49 S. E. 12, and *Harrison v. Telegraph Co.*, 71 S. C. 386, 51 S. E. 119.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

WOODS, J., concurs in the result.

JONES, J. (concurring). In this action plaintiff recovered a judgment for \$700 for alleged negligence and willfulness in failing to promptly deliver a telegram addressed to plaintiff by his sister, Dora Hughes, in these words: "John killed at Panasoffkee at mill this morning." "John" was a brother of the plaintiff. The message was filed with the defendant at Coleman, Fla., at 11:45 a. m., December 18, 1905, according to the testimony of one of plaintiff's witnesses, or at 12:30 p. m. of that day, according to the time of filing as entered by the defendant on the message blank. This was Central time, which, according to the evidence, is one hour earlier than Eastern time prevailing in South Carolina; that is to say, the message was filed with defendant company at 12:45 p. m., or 1:30 p. m., December 18, 1905, for transmission to plaintiff at Heath Springs, S. C. The message arrived at Heath Springs at 8 o'clock a. m., December 19, 1905, and was not delivered to the plaintiff, residing in Heath Springs, until 2 o'clock p. m., of that day. The burial took place at Adamsville graveyard, 3 miles from Coleman and 1½ miles from the home of the deceased, between 3 and 4 o'clock p. m., December 19th, Central time, or between 2 and 3 o'clock p. m., Eastern time. The funeral was, therefore, had in Florida a few minutes after the delivery of the telegram in South Carolina. The plaintiff, some time during the afternoon of December 19th, one hour after the receipt of the message, as he testified, but at 5:11 p. m., according to the time of receiving entered on the message, sent his sister the following message: "Telegram received at 2 p. m. Will come if possible." The plaintiff testified that he hesitated about wiring at that time, as he thought the funeral would probably be over with then. He further testified that, if the message had been promptly delivered to him on the 18th, he would have immediately wired that he was coming, and that if it had been delivered to him before 3 p. m. of that day he could have taken a train leaving Heath Springs that afternoon and could have reached Coleman, Fla., the next day on train due to arrive there at 2:35 p. m., according to his testimony, but according to the testimony of Mr. R. A. Long, for the defendant, at 3:05 p. m. The train did not actually arrive at Coleman, Fla., on the 19th of December, until after the funeral, which took place between 3 and 4 o'clock. Miss Dora Hughes testified that the burial was not postponed for the arrival of plaintiff be-

cause she failed to hear from him, and did not know whether he was coming or not; that she expected hourly a reply from plaintiff as to when he would come on, but no message was received from plaintiff until the afternoon of December 19, 1903, after the burial; that she sent a conveyance two or three times to the nearest railroad station to meet plaintiff, whom she expected by every train. The plaintiff left Heath Springs, S. C., for Coleman, Florida, on the morning of the 20th, and arrived on the afternoon of the 21st, two days after the funeral. The complaint alleged that, if said message had been promptly transmitted and delivered, plaintiff could have wired to his family at Coleman when he would arrive there, and could have left on an afternoon train on December 18, 1903, and arrived at Coleman at 2:45 p. m. on December 19, 1903, in plenty of time to have attended the funeral of his dead brother, of which consolation he was deprived by said delay in delivering the message; that by reason of this willful, wanton, and gross negligence of defendant, in failing to promptly transmit and deliver the said message, plaintiff was caused great mental anguish, "not to have had the privilege of seeing his dead brother's face for the last time, and of being with the family before the burial, and of attending the burial." The foregoing statement will enable us to better understand the application of defendant's requests to charge, which were refused by the circuit court, and to which exceptions have been taken.

1. First exception: The defendant requested the court to charge the jury as follows: "The court charges you that before the plaintiff is entitled to recover for mental anguish, he must show (1) not only that the defendant telegraph company did not exercise reasonable diligence or ordinary care in delivering the message; but (2) that, had it been delivered without the unreasonable delay alleged, the plaintiff, after receiving it, by the exercise of reasonable diligence, could have seen his dead brother's face, and have been with the family before the burial, and could have attended the burial of his deceased brother, and that he not only could have done so, but that he would have done so." It is alleged that this is a correct statement of the law and applicable to the facts in issue. It is a well understood rule that, when a request to charge is presented to the court containing both sound and unsound propositions of law, it is not the duty of the court to separate the charge and instruct the jury as to that portion of the charge which is correct, but the court may, without committing reversible error, refuse the request. While the proposition of law contained in the first clause of the above request is undoubtedly correct, that contained in the second clause is not wholly free from error. The complaint alleged three matters the deprivation

of which caused mental suffering: (1) The privilege of seeing his dead brother's face for the last time; (2) of being with the family before the burial; (3) of attending the burial. The deprivation of any one of these privileges or consolations, if due to the negligent conduct of defendant, would have afforded ground of recovery for resulting mental suffering; but the request to charge made recovery dependent on the deprivation of all said privileges. Damages for mental anguish are recoverable when such damages are the natural and proximate result of the negligence charged. It is, therefore, doubtless true that mental suffering cannot be said to so arise, if the sufferer by the use of the means and instrumentalities available after prompt delivery of a telegram could not have secured to himself the privilege the deprivation of which caused him mental suffering, or, if he could have secured such privilege by the use of available means, that he would not have availed himself of such means. In such a case, the mental suffering arising from such deprivation is not due to the negligence of the telegraph company, but to an efficient intervening cause for which the telegraph company is in no wise responsible. Whether in this case the failure to postpone the burial for the arrival of plaintiff on the first train that would have been available, if the telegram had been promptly delivered, was the natural and proximate result of the negligent delay in delivering the telegram, is a question that may more properly be noticed in considering the next exception.

The second exception is based upon the refusal to charge the following request: "The court further charges you as a matter of law that the plaintiff can only recover as compensatory damages for such consequences as were within the contemplation of the parties to the contract at the time of the sending of the telegram; that is to say, for such consequences as naturally and reasonably flow from a breach of the contract or from negligence in performing any duty imposed by the contract. The court, therefore, charges you that the telegram, constituting the written contract out of which this action arose, is not sufficient to put within the contemplation of the defendant telegraph company the possibility of the postponement of the funeral or burial. The telegram is the simple announcement of the death. The plaintiff is, therefore, not entitled to recover damages in the way of compensation for mental anguish on account of not being able to see his dead brother and attend his burial, as alleged, on the ground alone that if he had received the said message promptly he could have had the funeral postponed." This request to charge is subject to criticism in assuming that the rule as to damages is precisely the same whether the action is upon a contract or in tort. In actions for damages for breach of contract, it is usual to say that compensa-

tory damages may be recovered for such consequences as are within the contemplation of the parties to the contract at the time of contracting; but in an action in tort it is usual and proper to say that compensatory damages may be recovered for such consequences as naturally and proximately result from the negligence of performing a duty imposed by law. In this case the action is by the addressee of the telegram, and his right of action is based upon a breach of duty imposed by general law, although such duty springs out of a relation arising from the contract, and the defendant is, therefore, responsible in damages for mental anguish that naturally and proximately resulted from breach of duty imposed by law to promptly deliver the telegram. It may be that damages may result as a natural and proximate consequence of an act or omission, and yet not be within the actual contemplation of the parties at the time of the contract, unless it be true that a party must be conclusively presumed to contemplate whatever naturally and proximately results from his act or omission. But, waiving this criticism of the request to charge, we are disposed to respond to the question sought to be raised, viz., when it appears that the plaintiff, seeking recovery for mental anguish on account of not being able to attend a relative's funeral, could not have been present at the funeral even if the message involved had been delivered in due time, can such plaintiff recover on the ground that if the message had been reasonably delivered he could have telegraphed and had the funeral postponed? Appellant submits that he could not unless (1) the tenor of said message was such as to put the telegraph company on notice that there was reasonable probability of the postponement of the funeral or burial; and (2) unless it appears that he would have had the funeral postponed for the purpose of attending it.

With reference to the second reason suggested above, we may remark, as already stated, that there was evidence that plaintiff would have telegraphed of his coming if the message had been delivered in due time, and that the funeral would have been postponed until his arrival on December 19th if notice of his coming had been received. So that the real question presented is whether the tenor of the message was such as to put the telegraph company on notice that there was reasonable probability of the postponement of the funeral, or, more accurately stated, whether the failure to postpone the funeral was a natural and proximate result of the defendant's failure to deliver the message in seasonable time. Appellant cites to sustain its contention the case of *W. U. Tel. Co. v. Stone* (Tex. Civ. App.) 27 S. W. 144, the syllabus of which is: "In an action for delay in delivering a telegram announcing the death of plaintiff's mother, plaintiff cannot recover for mental suffering resulting from not being able to attend the funeral, where it

appears that he could not have reached the place where it was held in time had the message been promptly delivered, though he testified that he would have wired to have it put off." To the same effect, appellant cites from *Texas, W. U. Tel. Co. v. Linn* (Sup.) 28 S. W. 490, 47 Am. St. Rep. 58; *W. U. Tel. Co. v. Motley* (Sup.) 27 S. W. 52; *W. U. Tel. Co. v. Redinger* (Civ. App.) 53 S. W. 156; *Swearingen v. W. U. Tel. Co.* (Sup.) 78 S. W. 491. The foregoing principle may be correct, if the evidence went no further than to show that plaintiff would have wired to have the funeral postponed. This would fall short of showing that the funeral would have been postponed in consequence of the telegram, a deficiency of evidence in the Texas cases which was supplied in the present case. On the contrary, in *Telegraph Co. v. Zane* (Tex. Civ. App.) 25 S. W. 722, it was held that (quoting from the syllabus): "A telegram stating that J. is dangerously sick is sufficient to notify the company that J. was a relation of the addressee, that it was sent to enable him to go to J., and that that would be the probable action taken on its receipt." In the case of *Swearingen v. Tel. Co.*, supra, cited by appellant, it was held that (quoting from the syllabus) "damages from a father's failure to be present at his son's funeral on account of delay in the transmission of a telegram reading, 'Come, Frank is dead,' are within the contemplation of the parties to the contract of transmission, and are recoverable, though a reply message from the father would have been necessary to secure a postponement of the funeral, so as to admit of his reaching the place of interment in time." The only difference between that case and this case is that the telegram in the *Swearingen* Case contained the word "come" in addition to the notification as to death. But we do not regard the difference as essential in principle. When the message relates to the serious illness or death of a person, a telegraph company is bound to take notice that the addressee has an interest in the subject of the message, and that in the case of a near relative the probability is that the addressee will follow the promptings of nature and respond to the message, and, if possible, at once set out to attend the sick bedside or the funeral, as the case may be. The telegraph company is bound to know that mental suffering may be the result of failure to deliver a death message, and whether it thinks of it or has it in actual contemplation at the time of the contract of transmission is of no consequence, provided the mental suffering results naturally and proximately from its negligence in doing its duty.

In the case of *Harrison v. Berkley*, 1 Strob. 525, 47 Am. Dec. 578, a slave's death was

held to be the natural and proximate result of the sale of liquor to him in violation of law, which produced intoxication, which resulted in exposure, from which he died. In the case of *Pickens v. Railroad Co.*, 54 S. C. 504, 32 S. E. 567, it was held proper to submit to the jury whether the injury to the plaintiff from exposure to a sudden storm, after she left the depot because of the defendant's failure to provide transportation according to contract, was the natural and proximate result of such breach of duty. In this case there was some evidence tending to show that the failure to postpone the funeral was the result of the failure of plaintiff to telegraph as to his coming, and that plaintiff's failure to so telegraph and to take the train for Coleman, Fla., on the afternoon of December 18th, was the result of the long delay of defendant in delivering the telegram; that is to say, had the telegram been promptly delivered, plaintiff would have wired at once that he was coming, and would have taken a train which would have enabled him to have reached the place of the funeral in time. A postponement of the funeral for one hour would have been sufficient. Had the judge charged as requested, he would have taken from the jury a question which properly belonged to them; it being their province, where there is any evidence at all tending that way, to determine whether the injury alleged is the proximate result of the negligence charged.

2. The third exception imputes error in refusing to charge the following request: "The question of what compensatory damages, if any, plaintiff is entitled to recover—that is to say, the measure of damages—is governed in this case by the law of the state of Florida, where the contract for sending the message involved was made. Under the law of Florida, any mental anguish which does not accompany or proceed from a physical injury is not an element of damage, and cannot be recovered on account of a breach of contract or negligence. I therefore charge you that the plaintiff is not entitled to recover in this case for the mental anguish he claims to have suffered in not seeing his dead brother and attending the funeral, as alleged, due to any breach of contract by the telegraph company, or negligence in transmitting and delivering the telegram involved." The action not being based upon a Florida contract, but being in tort for a breach in this state of a duty imposed by the laws of this state, it was proper to refuse the request. *Hellams v. Telegraph Co.*, 70 S. C. 83, 49 S. E. 12; *Harrison v. Telegraph Co.*, 71 S. C. 386, 51 S. E. 119.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(72 S. C. 411)

JENNINGS v. EDGEFIELD MFG. CO.

(Supreme Court of South Carolina. Oct. 7, 1905.)

1. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

Where, in an action for personal injuries, there was no motion of nonsuit as to the cause of action for punitive damages, and no request to charge that the plaintiff was not entitled under the evidence to recover the same, the Supreme Court cannot inquire if there was any evidence to warrant a finding of the same.

2. TRIAL—INSTRUCTIONS.

That the court in his charge states an admitted fact does not make the charge one on the facts.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 432-434.]

3. SAME—NECESSITY OF REQUEST.

Where modifications of instructions are desired, requests submitting such modifications should be submitted.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 623.]

4. SAME.

An instruction as to elements of damage in an action for personal injuries which have universal judicial recognition is not a charge on the facts, where the fact of injury was not in dispute.

5. MASTER AND SERVANT—DANGEROUS APPLIANCES.

The law imputes to the master the knowledge of danger, though latent, in the use of appliances which he provides for his servant.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 246.]

6. SAME.

The test of a master's duty in furnishing appliances is whether he furnished such as were reasonably safe, and not whether they were of the character "ordinarily in use."

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 178.]

7. APPEAL—REVIEW—EXCEPTIONS TO EVIDENCE.

Exceptions to the admission of evidence will not be considered, where no grounds are stated in the printed case or the argument.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4259.]

8. TRIAL—INSTRUCTIONS—REPETITION.

Where the court has already charged that a master is not liable for injury due to the ordinary hazards of the business or the negligence of the servant, failure to repeat the instruction in plaintiff's request as to the master's duty to furnish safe appliances is not error.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

9. SAME.

Where all the main issues in the cause are covered by the charge, failure to charge a proposition not covered by request is not error.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 627, 630.]

10. MASTER AND SERVANT—DEFECT IN APPLIANCES—KNOWLEDGE OF MASTER.

Where a master supplies an appliance, and has knowledge of a defect therein, he cannot escape liability for injury to a servant from the defect, on the ground that the duty of the servant was to inspect the machinery, and that he failed to discover the defect, where he gave no notice of the same.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 299.]

52 S.E.—2

Appeal from Common Pleas Circuit Court of Edgefield County; Purdy, Judge.

Action by A. H. Jennings against the Edgefield Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are the defendant's exceptions:

"(1) Excepts because his honor erred in charging the jury that 'it was the duty of the defendant company to keep the means and appliances and machinery in proper condition, to keep them in proper repair,' whereas he should have charged the jury that it was the duty of the defendant company to furnish proper machinery and appliances to the engineer, to plaintiff herein, to enable him to operate the machinery, and it was the duty of the engineer to use said appliances in such a manner as to keep the machinery and appliances in proper repair and in a reasonably safe condition.

"(2) Excepts because his honor erred in charging the jury as follows: 'Where a person in the employment of another is injured through the default or neglect of the master who employs him, and the injury is due to said fault or neglect, then the party can recover.' It is respectfully submitted that this is a charge upon the facts and in violation of the Constitution, in that the judge assumes that there was an injury.

"(3) Excepts because his honor erred in charging the jury that they 'might give punitive damages in this case,' when there is no testimony showing willfulness, recklessness, wantonness, and disregard of the servant's rights.

"(4) Excepts because his honor erred in charging the jury as follows: 'Was his injury due to the negligence of the defendant, the ordinary negligence of the defendant, in the situation in which the plaintiff was placed?' It is respectfully submitted that this is a charge upon the facts, and in violation of the Constitution, in that the judge assumes that the plaintiff was injured.

"(5) Because his honor erred in charging as follows: 'Was his injury due to the negligence of the defendant, the ordinary negligence of the defendant, in the situation in which the plaintiff was placed? If so, he can recover such actual or compensatory damages as may be entitled'—whereas he should have charged that if the defendant was negligent and the plaintiff did not contribute to that negligence of the defendant, was the sole and proximate cause of the injury, if there was an injury, then he could recover actual damages.

"(6) Because his honor erred in charging the jury in reference to punitive damages; there being no testimony upon which the jury could infer or conclude that the defendant acted in a reckless, willful manner, or in utter disregard of the plaintiff's rights.

"(7) Because his honor erred in charging the second request of the plaintiff; that is: 'It is the duty of the master to provide suits-

ble machinery and appliances and keep them in proper repair, and the employé has the right to assume that the master has discharged his duty in this respect, and is not bound to exercise care in ascertaining whether the master has so acted.' The judge should have charged in this case that it was the duty of the plaintiff, acting as engineer in charge of this machinery and appliances, to keep the same in proper repair.

"(8) Because the judge erred in charging the jury the third request of the plaintiff; that is: 'A master is liable for injury to his servant caused by his own negligence or the negligence of any person representing him, and the person employed to do anything which is the master's duty to do is the master's representative.'

"(9) Because the judge erred in charging the fifth request of the plaintiff: 'If there is a defect in appliances, inclusive of a place to work, then whether a servant is guilty of contributory negligence by remaining in the employ of the master after knowledge of such defect is a question for the jury.'

"(10) Because the judge erred in charging the sixth request of the plaintiff; that is to say: 'There can be no assumption of risk by an employé without knowledge of the risk, as the doctrine of the assumption of risk depends upon agreement or waiver, which depends upon such knowledge.'

"(11) Because the judge erred in charging the eighth request of the plaintiff; that is: 'It is the duty of the master, when a servant is set to work in a dangerous place or with dangerous machinery, material, or other appliances, where he knows or ought to know that the servant is not aware of the danger, to notify him of the same.'

"(12) Because the judge erred in charging the ninth request of the plaintiff; that is: 'The physical and mental pain and suffering which the plaintiff has already endured by reason thereof, and also that which he is likely to experience in the future by reason thereof, the impairment of health, resulting from such injury or sickness, the pecuniary loss sustained up to the trial of the case, and the pecuniary loss to earn in the future'—because this is a charge upon the facts and is a violation of the Constitution.

"(13) Because the judge erred in charging the tenth request of the plaintiff; that is: 'If the jury find that the plaintiff was injured by wantonness or recklessness on the part of the defendant, and that such wantonness and recklessness was the proximate cause of the injury, then he would be entitled to punitive damages, the amount being in the discretion of the jury'—there being an entire absence of any testimony showing recklessness or wantonness on the part of the defendant towards the plaintiff, it being the special duty of the plaintiff to look after this special machinery and appliance, and because the charge does not limit the jury to the amount fixed in the complaint.

"(14) Because the judge erred in charging the jury the twelfth request of the plaintiff; that is: 'The law imputes to the master the knowledge of the danger, even though latent, in the use of instrumentality with which he provides the servant. He cannot escape liability by showing he is ignorant of the fact, unless he could further show that by use of due diligence he could not have discovered the danger.'

"(15) Because the judge erred in refusing to charge the defendant's request to charge No. 6, as same was written, but by elimination therefrom the words, 'and of the character ordinarily in use'—the said request as written being as follows: '(6) It is not the duty of the employer to furnish the best machinery and appliances that are obtainable. His duty is discharged when he furnishes machinery and appliances which are reasonably safe and suitable, for the intended use and of the character ordinarily in use, having regard for the character of the services required.'

"(16) Because his honor erred in permitting the plaintiff's attorney to ask the following question, and the same over objection: 'Q. You did not accept \$30 to pay for your damages? A. No, sir.'

"(17) Because the court erred in allowing J. T. Robinson to testify 'that he saw Mr. Sossaman taking it out once' (take the pipe out once), and allowed the witness to testify, over objections of the defendant, with reference to taking up a pipe by Mr. Sossaman, three or four years prior to the accident.

"(18) Because the judge did not allow the witness of the defendant, J. H. Walker, to answer the following question, on objection by plaintiff's attorney: 'Q. If Jennings allowed the fireman to stop up the pipe, whose carelessness would it be?'

"(19) Because his honor erred in charging the first request of the plaintiff to charge as follows: 'The master is bound to use ordinary care in providing a reasonably safe place in which, and reasonably safe and proper appliances and instruments with which, the servant may do his work. Appliances include a place to work'—without adding the proper qualification, that the ordinary hazards of business are excepted, and that the plaintiff (servant) must not rashly and deliberately expose himself to unnecessary and unreasonable risks.

"(20) Because his honor erred in his general charge as a whole in not instructing the jury, in the light of the circumstances of this case, that among the assumptions of risks of an employé incident to the business are the carelessness of those at least in the same work or employment, with whose habit, conduct, and capacity he has in the course of his duties and opportunities become acquainted, and against whose negligence or incompetence he may take such precaution as his inclination or judgment may suggest.

"(21) Because his honor erred in his gener-

al charge in not making clear to the jury the distinction between the duty of a master and servant, with reference to third parties and the neglect of the servant to do the very thing required of him in his duties, and in not charging the jury that if in this case it was the duty of the plaintiff as servant, as engineer, to look after the engine room and its fixtures and pipes, and the plaintiff, as such engineer, failed to look after the same, and if the negligence brought about the conditions which resulted in his injury, if he was injured, then he could not recover."

Tompkins & Wells, Sheppard Bros., N. G. Evans, and Mordecai & Gadsden, for appellant. J. Wm. Thurmond, S. McG. Simkins, and Jas. H. Tillman, for respondent.

WOODS, J. The plaintiff, who was an engineer at defendant's mill, in charge at night of the engine and boiler and of the pipes attached to them, was injured while going from the engine to the pump by stepping into a pool of hot water, made by the breaking of a defective underground pipe. The judgment was for the plaintiff, and the defendant appeals.

Gardner, master mechanic of the mill, under whom plaintiff worked, testified his own duties "were to keep up the machinery and to see that everything was in running condition." His testimony, and that of other witnesses for plaintiff, was to the effect that before the accident he had twice seen the pool of hot water, and his attention had been called to the defective pipe, and, instead of repairing it, being "pushed up with work," he "poked in cinders" to stop the hole, and "just let it go." He stated also that he had talked to the superintendent about the defective pipe a few days before the accident. This witness further says, upon examination after the accident, he found the pipe "corroded and eat up with rust; little bubbles, holes, all through it." The plaintiff was on duty only at night, and testified he had no information before the accident that there had been a leak or that the pipe was defective. There were two ways of going from the engine to the pump used by the employees of the mill—one through the door, and the other through a window. The plaintiff was injured on the way that led to the window, whereas, if he had gone through the door, the accident could not have occurred. The superintendent, Spencer, testified he had given both Gardner and Jennings specific instructions not to allow any one to use the way through the window. He denied the knowledge imputed to him by Gardner, the master mechanic, of the defects which were alleged to have caused the injury. There was evidence on the part of defendant to the effect that the pipe was stopped at its vent by clinkers dumped there by the fireman, who was working under the direction of the plaintiff, and

that the steam and hot water would not have escaped and made the pool, but for this stoppage. The foregoing statement indicates the issues of fact with sufficient clearness for an understanding of the questions of law made by the appeal.

1. The record furnishes no ground for this court to inquire whether there was any evidence to warrant a verdict for punitive damages. There was no motion for a nonsuit as to the cause of action for punitive damages, and no request to charge that under the proof the plaintiff was not entitled to such damages. In the absence of such action on the part of the defendant, it was not reversible error for the circuit judge to charge the general law applicable to that cause of action. This disposes of the third, sixth, and thirteenth exceptions.

2. The second and fourth exceptions fail because it is too manifest for anything more than mere statement that when the circuit judge said, "Where a person in the employment of another is injured through the default or neglect of the master who employs him, and the injury is due to said fault or neglect, then the party can recover," he announced a proposition of law and did not charge on the facts. Plaintiff's injury was no more in dispute than his name, and, as has been often said by this court, it was not error for the circuit judge to assume the fact in his charge.

The fifth exception cannot be sustained, because the charge fully and clearly stated the law as to contributory negligence as requested by defendant.

3. The appellant fails to state in what respect the propositions taken from the charge in the eighth, ninth, tenth, and eleventh exceptions are erroneous. They are as follows:

"A master is liable for injury to his servant caused by his own negligence or the negligence of any person representing him, and the person employed to do anything which is the master's duty to do is the master's representative.

"If there is a defect in appliances, inclusive of a place to work, then whether a servant is guilty of contributory negligence by remaining in the employ of the master after knowledge of such defect is a question for the jury.

"There can be no assumption of risk by an employé without knowledge of the risk, as the doctrine of assumption of risk depends upon agreement or waiver, which depends upon such knowledge.

"It is the duty of the master, when a servant is set to work in a dangerous place or with dangerous machinery, material, or other appliances, where he knows, or ought to know, that the servant is not aware of the danger, to notify him of the same."

No one will dispute that these are correct general statements of the law. If instructions were desired as to what constitutes

representation of the master and what the duties of the master are, or when assumption of the risk may be presumed from remaining in the employment of the master after knowledge or notice of the defect and of the danger, and as to when such notice or knowledge will be imputed, requests should have been submitted covering the modification or elaboration desired. *State v. Kendall*, 54 S. C. 192, 32 S. E. 300; *Crosswell v. Association*, 51 S. C. 103, 28 S. E. 200; *State v. Adams*, 68 S. C. 421, 47 S. E. 676, and authorities cited.

4. The defendant insists by his twelfth exception that a charge on the facts was contained in the following instruction: "If the jury believe from all the evidence that the defendant is liable to the plaintiff for damages in this case, in estimating the same you may consider the following elements of damages, if you find them to exist in this case: Loss of time to the plaintiff; expense incurred by reason of injury or sickness, if there was any, the physical and mental pain and suffering which the plaintiff has already endured by reason thereof, and also that which he is liable to experience in the future by reason thereof; the impairment of health resulting from such injury or sickness; the pecuniary loss sustained up to the trial of this case by reason of such injury or sickness, and the pecuniary loss to the capacity to earn in the future." As these elements of damage have universal judicial recognition, we can conceive of no view, and counsel have suggested none, in which this can be regarded a charge "in respect to matters of fact"; the fact of injury not being in dispute.

5. The charge as to the duty of the master to use due diligence to discover latent defects, quoted in the fourteenth exception, is in accordance with the rule laid down in *Chase v. Electric Co.*, 64 S. C. 215, 41 S. E. 899.

6. The test of a master's duty in furnishing appliances is whether he furnished such as were reasonably safe and suitable, not whether they are "of the character ordinarily in use," and therefore the words just quoted from the defendant's request on this subject were properly stricken out. *Lowrimer v. Palmer Mfg. Co.*, 60 S. C. 153, 38 S. E. 430.

7. In the sixteenth, seventeenth, and eighteenth exceptions defendant complains of the admission and the exclusion of certain evidence, but no grounds are stated either in the printed case or the argument; hence we are unable to consider these exceptions, and assume they are regarded of no importance.

8. The circuit judge having already charged in effect that the master was not liable for an injury due to the ordinary hazards of the business, or the rashness or negligence of the servant himself, the failure to repeat the instruction as a modification of plaintiff's request as to the master's duty

to furnish safe appliances and a safe place obviously was not error. The nineteenth exception is overruled.

9. The twentieth and twenty-first exceptions complain of error in not charging certain propositions of law. The circuit judge made a general and comprehensive charge, embracing all the issues as they had been made to appear to him in the course of the trial. He then charged every request submitted by the defendant, with the slight modification above referred to in discussing the fourteenth exception. These requests did not include the proposition which it is now submitted should have been charged. It is manifestly too late to submit them now.

10. The defendant strenuously urges that the first and seventh exceptions should be sustained. They are as follows: "(1) Except because his honor erred in charging the jury that 'it was the duty of the defendant company to keep the means and appliances and machinery in proper condition, to keep them in proper repair,' whereas he should have charged the jury that it was the duty of the defendant company to furnish proper machinery and appliances to the engineer, to plaintiff herein, to enable him to operate the machinery, and it was the duty of the engineer to use said appliances in such manner as to keep the machinery and appliances in proper repair and in a reasonably safe condition. * * * (7) Because his honor erred in charging the second request of the plaintiff; that is: 'It is the duty of the master to provide suitable machinery and appliances and keep them in proper repair, and the employé has the right to assume that the master has discharged his duty in this respect, and is not bound to exercise care in ascertaining whether the master has so acted.' The judge should have charged in this case that it was the duty of the plaintiff, acting as engineer in charge of this machinery and appliances, to keep the same in proper repair."

It might be sufficient to say that the modifications now suggested were not presented to the circuit judge; but, if they had been, it would have been error to adopt them. The defendant's position is that it was the duty of the plaintiff to see that the pipes were in repair while he had charge. Assuming this to be the duty ordinarily incident to plaintiff's employment, manifestly the defendant, as master, would not be allowed to supply an appliance which it knew to be defective, and then escape liability for injury to its servant (the plaintiff) due to the defect, on the ground that he was intrusted with the repair of the appliance and failed to discover the defect. Good faith in such case imposes on the master the duty to make known the defect. From the statement of the issues of fact made at the beginning of this opinion, it will be seen there was testimony to the effect that the defendant, through its superintendent, was fully advised of the defect,

yet it failed to make the defect known to the plaintiff, and he was in entire ignorance of it. It is true the superintendent denied the knowledge imputed to him, but upon this point the testimony raised a vital issue of fact. To have charged without qualification that it was plaintiff's duty to keep the pipe in repair would have placed upon him responsibility to discover and repair a defect not known to him as servant, without respect to the duty of the defendant, as master, to impart to him, as servant, the actual knowledge of the defect imputed to it by some of the witnesses. These exceptions are therefore overruled.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 434)

PROVIDENCE MACH. CO. v. BROWNING
et al.

(Supreme Court of South Carolina, June 30, 1905. On Rehearing, Oct. 7, 1905.)

1. EVIDENCE—DECLARATIONS.

A conversation between two partners as to taking in a third person as partner, in his absence, is inadmissible on the question of partnership.

2. APPEAL—HARMLESS ERROR.

Error in the exclusion of evidence is harmless, where testimony substantially the same as that excluded was afterwards admitted.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4200-4205.]

3. EVIDENCE—QUESTION OF FACT.

Evidence of a contracting party as to whether he consented to a variation of the contract involved is a question of fact, and not of law, and admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2150, 2151.]

4. PARTNERSHIP—WHAT CONSTITUTES.

There cannot be a partnership without an agreement, express or implied, and a person cannot be a partner unless he agrees to embark in the undertaking and to share in the profits and losses.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 4, 27.]

5. PRINCIPAL AND AGENT—POWERS OF AGENT.

Where an agent is appointed solely to rent the land of his principal, or to do whatever he pleased with it, he has no authority to bind his principal, so as to make her a party to a partnership involving the use of the land.

6. TRIAL—INSTRUCTIONS.

Failure to charge is no ground for an exception, where there was no request to charge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 627.]

7. APPEAL—EXCEPTIONS—REFUSAL OF NEW TRIAL.

Where an exception assigns error in refusal to grant a new trial, on the ground that the uncontradicted evidence showed defendant was a partner, it cannot be sustained, where the facts mentioned in the exception were susceptible of more than one inference, and there was testimony tending to show that defendant was not a partner.

8. GUARANTY—DISCHARGE OF GUARANTOR.

A guaranty provided that if the debtor should fail to pay any notes, when due, given in "payment" of the debt, the guarantors would make good the amounts which might be due the creditor in accordance with his contract with

the debtor. Thereafter the creditor sent a letter acknowledging the receipt of two notes, and continuing, "Inclosed please find statement in settlement." The statement set forth the amount due and credited the debtor with receipt of two notes. To the statement was added, "Settled as above." Held, that it was incumbent on the guarantors to establish the fact that the words "in settlement" in the letter and statement were used in a different sense than the word "payment" in the guaranty.

9. SAME.

Where guarantors had agreed to become liable if a debtor failed to pay for certain machinery bought, the taking of negotiable paper from the debtor did not discharge the guarantor, where the agreement with the guarantor looked to the execution thereafter of negotiable notes by the debtor.

Appeal from Common Pleas Circuit Court of Laurens County; Watts, Judge.

Action by the Providence Machine Company against M. E. Browning and others. From judgment for defendants, plaintiff appeals. Reversed.

N. B. Dial and F. P. McGowan, for appellant. Ferguson & Featherstone and H. J. Haynesworth, for respondents.

GARY, A. J. Upon the third trial of this case, the jury rendered a verdict in favor of the defendant Mrs. M. E. Browning. The facts of the case are fully set out in the opinions of the court upon the former appeals, reported in 68 S. C. 1, 46 S. E. 550, and 70 S. C. 148, 49 S. E. 325.

1. The first exception is as follows: "(1) Because his honor, Judge Watts, erred in excluding the testimony offered at the trial by the plaintiff, as follows: Striking out or excluding the following statement of L. W. C. Blalock, a witness for the defendant, on cross-examination: 'Q. Had you any conversation with your father about the mills? A. Yes, sir. I told him my idea about building a mill, and he wanted me to make a larger mill. Told me if I would make it a 10,000 spindle mill, he would help me if I took sister in'—the object of the testimony being to show the conduct of James and L. W. C. Blalock, two of the partners, in projecting the enterprise on the plan of associating Mrs. Browning as a partner; the error being in excluding circumstantial evidence bearing upon the formation and identity of the members of the partnership of the Goldville Manufacturing Company." Mrs. Browning was not present when the conversation took place, and the testimony was therefore irrelevant. Furthermore, it tended to show that she was not a member of the partnership at the time of the conversation.

2. The second exception is as follows: "(2) Excluding the testimony of L. W. C. Blalock, a witness for the defendant, on cross-examination, as to the management of Mrs. M. E. Browning's land at Goldville, and the disposition of her land, crops, and material in connection with organizing, building, and equipping the cotton mill of the Goldville Manufacturing Company, the object of the

testimony being to show that Mrs. Browning's property, with her knowledge and consent, was applied to the organization, building, or equipping of the Goldville Manufacturing Company; the error of the exclusion being to prevent the plaintiff from showing the existence of a silent or a dormant partner, by contribution to the capital stock." Testimony substantially the same as that mentioned in the exception was afterwards introduced in evidence without objection, and really the facts do not seem to have been in dispute. Under these circumstances there was no prejudicial error.

The third exception is as follows: "(3) Excluding the testimony of L. W. C. Blalock, a witness for the defendant, on cross-examination, as to how much stock Mrs. Browning was to have in the corporation of the Goldville Manufacturing Company, the object being to show the relation of Mrs. Browning to the partnership, by her relation to the company, upon the principle of connection between effect and cause; the error being prejudicial in excluding circumstantial evidence tending to show her relation to the partnership." His honor, the presiding judge, permitted the introduction of the testimony for the purpose which the appellant contended rendered it admissible.

The fourth exception was abandoned.

The fifth exception is as follows: "(5) In excluding the testimony of L. W. C. Blalock, on cross-examination, as follows: 'Q. What was the indebtedness of the corporation (Goldville Manufacturing Company)?—the object of the testimony being to show the amount of debts at the time of incorporation and the identity of projectors of the corporation who contracted debts; the error being the exclusion of circumstantial evidence relating to the partnership.' The question arose as follows: 'Q. I believe you said, a while ago, the Goldville Manufacturing Company went through bankruptcy—don't you know the Goldville Manufacturing Company was sold? A. Yes, sir. Q. So that corporation is not now in existence at all? A. No, sir. Q. What was the indebtedness of that corporation?' The question had reference to the indebtedness at the time of its bankruptcy, and not to indebtedness at the time of incorporation as set out in the exception.

3. The sixth exception is as follows: "(6) in permitting Mrs. Browning, as a witness, to answer the following question, against plaintiff's objection: 'State whether or not you consented to the variation of this contract, if there was a variation?'—the error being the assumption of the existence of an issuable question of law and not of fact, and propounding to the witness a question of law and not of fact." Consent may be given in express terms, or it may be implied from facts and circumstances. The question evidently related to the giving of

consent in express terms, and this involved a question of fact.

The seventh exception was abandoned.

4. The eighth exception is as follows: "(8) Because his honor, Judge Watts, erred in charging the jury as follows: 'If there was no agreement between Mrs. Browning and Mr. Blalock, as alleged in the complaint, if there was no mutual agreement to embark in an undertaking, and if she did not agree to enter into a contract with them and go into business with them and share profits and losses, then she was not a partner'—the errors being (a) that there was an allegation of a partnership agreement in the complaint; (b) that it left the impression upon the jury, which was prejudicial, that it was necessary to the status of partnership that a mutual agreement should be entered into between the parties specifically stipulating that they should go into business and share the profits and losses as between them; (c) that, while such specific and express agreement would constitute partnership, such a status could exist between two or more persons without any agreement to that effect, as by contributing labor, capital, or skill to some lawful undertaking for the common benefit of the persons interested." There cannot be a partnership without an agreement, express or implied. Furthermore, that part of the charge mentioned in the exception must be construed in connection with the entire charge, which shows that there was no error.

5. The ninth exception is as follows: "(9) He erred in charging the jury as follows: 'But if she simply turned a plantation or a house or anything of that sort over to him to let him rent it or collect the rent, or anything of that sort, then she could not be bound by anything that he did which was in excess of the authority. If Mrs. Browning was owner of a tract of land, and did not give Mr. Blalock authority more than to take charge and rent the land out or to do what he pleased, and that was the extent of his authority, then she could not be bound by anything he did for her, other than within the scope of that authority. You cannot make any one a partner against their will'—the errors being (a) a charge upon the facts, or in respect to matters of fact proven in the case, in violation of article 5, § 26, of the state Constitution, and making a hypothetical statement of a part of the testimony in the case and drawing a conclusion therefrom that Mrs. Browning was not a partner, in regard to the use of her lands, products and materials by her agents, L. W. C. and Jas. S. Blalock, in contributing to the capital stock of the Goldville Manufacturing Company." The charge contained a correct proposition of law, and the statement of the facts therein mentioned was not prejudicial to the appellant.

6. The tenth, eleventh, and twelfth exceptions merely assign error in the failure to charge the propositions therein mentioned,

and cannot be sustained, for the reason that there were no requests to charge.

7. The thirteenth exception is as follows:

"(13) Because his honor erred in refusing plaintiff's motion for new trial: (a) In that the verdict was against the testimony and unsupported by it, both as to the alleged partnership and as to the guaranty. The testimony of the defendant showed that Mrs. Browning's money, land, products and material contributed to the capital stock of the partnership before the corporation was formed. The documentary evidence, the guaranty, notes, and settlement sheet, all showed that the parties did not contemplate a change or release of the guarantor's liability for the debt. (b) The verdict was manifestly against the weight of the evidence both as a partnership and the guaranty, because the verdict was manifestly against the charge of the presiding judge, when the uncontradicted testimony showed that Mrs. Browning's land, money, products, and materials were used in building and equipping the plant of the Goldville Manufacturing Company for the common benefit of the Blalock family. The presiding judge charged that the contribution of labor, capital, or skill to a lawful undertaking constituted relation to partnership. The presiding judge charged that (c) a jury should find for the plaintiff, if there was no agreement of the parties upon a new and valuable consideration to extend the time of the performance of the contract, or unless there was an agreement or understanding of the parties that the notes were received in extinguishment or satisfaction of the debt, and there was no such testimony, and only one inference could be drawn from the testimony, and that inference was that the notes were received as security for the debt, and that the account was credited by the notes, or that they were received by the plaintiff 'in payment' of the debt as stipulated by the parties in the guaranty." In so far as the exception assigns error in the refusal to grant a new trial, on the ground that the uncontradicted testimony showed that Mrs. Browning was a partner and that the verdict of the jury was against the charge of the presiding judge, it cannot be sustained, because (1) the facts mentioned in the exception were susceptible of more than one inference, and (2) because there was other testimony tending to show that Mrs. Browning was not a partner.

8. We will next consider whether there was error in refusing the motion for a new trial, on the ground that there was no testimony tending to show an agreement of the parties upon a new and valuable consideration to extend the time for the performance of the contract, or that the notes were received in extinguishment or satisfaction of the debt, otherwise as contemplated in the original contract. The defendant in her answer set up as a defense that the notes materially changed the terms of the original contract, by extending the time of payment, and also as a defense that the notes were accept-

ed in satisfaction of the indebtedness created by the guaranty. There was no testimony whatever tending to prove the facts which the former opinion (70 S. C. 148, 49 S. E. 325) showed were necessary to sustain the first defense. But the fact that there was no testimony tending to establish the first defense would not entitle the plaintiff to a new trial, if there was testimony tending to sustain the other defense, as the verdict would be referred to the latter defense. The defendant contends that the words "in settlement," used in the letter and statement, furnished evidence of an intention to extinguish the indebtedness created by the guaranty.

The guaranty was as follows:

"Whereas, the Goldville Manufacturing Co., Goldville, S. C., have purchased machinery from Providence Machine Co., Providence, R. I., amounting to \$9,104.52, payable one-half cash, one-fourth in six months, one-fourth in twelve months; deferred payments to be secured by bankable notes bearing interest at six per cent. per annum: We hereby agree to indorse the said notes, and should the Goldville Manufacturing Co., fail to pay for the said machinery on terms of contract made between themselves and Providence Machine Co., dated July 30, 1900, or shall fail to pay any notes when due which are given in payment, we, the undersigned, do hereby bind and obligate ourselves, jointly and severally, each with the other and the Providence Machine Co., to make good and pay to Providence Machine Co. the amounts which may be due them in accordance with the contract above mentioned. Goldville Manufacturing Co., per J. S. Blalock. J. S. Blalock. L. W. C. Blalock. M. E. Browning. Goldville, S. C., Sept. 7, 1900."

The letter and statement were as follows:

"Providence, R. I., May 6, 1901. Goldville Manufacturing Co., Goldville, S. C.—Gentlemen: Two notes duly to hand. Enclosed please find statement in settlement. The item of \$81.94 is for interest on \$4,552.26, or one-half of account, from due date, January 12th to May 1st, date of notes (would refer you to your letter of April 22). We trust you will find it correct. Yours truly, W. C. Pierce, Treas."

"Providence, R. I., May 1, 1901.

"Goldville Manufacturing Co. to Providence Machine Co., Dr.

Terms cash. Office 564 Eddy street.

1900. For account rendered.	
Dec. 12. For merchandise, per bill rendered.....	\$9,104 52
1901. Cr.	
Jan. 31. By cash.....	4,552 26
	<u>\$4,552 26</u>
108 days interest from Jan. 12th to May 1st.....	81 94
	<u>\$4,634 20</u>
May 6. By note May 1, 6 mos.....	2,317 10
By note May 1, 12 mos....	2,317 10
	<u>\$4,634 20</u>

"Settled as above May 6, 1901.

"Providence Machine Co., by F. Pierce,"

This court, in delivering the opinion upon the former hearing (reported in 70 S. C. 148, 49 S. E. 325), used this language: "Merely construing the language of the warranty, it is manifest that the parties did not contemplate that the giving of the notes 'in payment' of the indebtedness should be 'in settlement' of the liability resting upon the obligors under the terms of the warranty. Therefore, if the words 'in settlement,' in the letter and statement, were used in the sense of the word 'payment,' as intended by the parties in the guaranty, then they do not show that the plaintiff intended to release the defendant from her obligation as a guarantor. Whether the words were so used presents a question of fact for the jury." The words "in payment," used in the guaranty, and the words "in settlement," mentioned in the letter and statement, are of similar import and meaning. It was therefore incumbent on the defendant to establish the fact that the words in the letter and statement were used in a different sense from similar words in the guaranty. She, however, failed to introduce any testimony tending to prove this fact.

The defendant also contends that the acceptance of the notes was prima facie evidence of an intention to extinguish the liability existing under the guaranty. Ordinarily, when a creditor takes new negotiable paper from the debtor, the guarantor is prima facie discharged; but the understanding of the parties at the time of the transaction will, of course, prevail. 27 Enc. of Law, 491; Morse v. Ellerbe, 4 Rich. Law, 600. When, however, there is an agreement looking to the execution thereafter of negotiable notes, and notes, in form such as the parties contemplated, are delivered, the presumption is that they were intended to carry into effect the terms of the original contract, and it is incumbent on the party contending otherwise to show that they were delivered for a different purpose. The guaranty in this case contemplated the giving of negotiable notes as additional security, and the presumption is that the notes were so intended. In this case the burden rested upon the defendant to rebut the presumption. After careful examination of the record, we are unable to find any testimony tending to prove the facts necessary to establish the second defense.

As there was no testimony tending to sustain either defense, it was error to refuse the motion for a new trial.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

On Petition for Rehearing.

PER CURIAM. After careful consideration of the petition for a rehearing, the court is satisfied that no material question of law or of fact has either been disregarded or overlooked.

It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(72 S. C. 453)

KAYLOR et al. v. HILLER et al.
(Supreme Court of South Carolina. Oct. 7, 1905.)

1. JUDGES—POWERS OF SUCCEEDING JUDGE—FILING ANSWER.

An order of a judge allowing defendant time within which to file an answer after default is an administrative order, as distinguished from a final order, and does not involve the merits, so that a succeeding circuit judge has power to modify it by permitting an answer to be filed after a second default.

2. SAME—DOCKETING CASE.

A succeeding circuit judge may cause a case to be placed on its appropriate calendar, as the docketing of the case appertains to the orderly conduct of the business of the court and takes the place of notice of trial.

3. TRUSTS—ACTION—TRUSTEE AS PARTY.

Where plaintiff makes a trustee a party as such, and alleges that he is interested in the subject of the action, it was within the discretion of the court to require him to answer for the protection of his beneficiary.

Appeal from Common Pleas Circuit Court of Richland County; Purdy, Judge.

Action by Felicita Rosetta Kaylor and others against Louis P. Hiller and others. From an order permitting defendants to answer after default, plaintiffs appeal. Affirmed.

De Pass & De Pass and D. W. Robinson, for appellants. W. S. Monteith and Thomas & Thomas, for respondents.

JONES, J. In this action to recover possession of real estate, the defendants failed to answer the complaint within 20 days after service of summons, and moved Judge Watts for leave to file an answer. Judge Watts, by an order, dated July 7, 1904, allowed defendants to file their answer within 20 days thereafter, upon payment to plaintiffs of \$10. The defendants failed to comply with this order. They then, on November 18, 1904, served notice of a motion to be made November 21, 1904, before Judge Purdy, for leave to file answer. When the motion was called, 8 days after notice, upon objection of plaintiffs' counsel to hearing the same for want of proper notice, the court of its own motion set November 24, 1904, as the day for hearing, over objection of plaintiffs' attorneys. The motion was heard on that day, and an order was granted by Judge Purdy allowing defendants to answer within 5 days, upon the same terms as imposed by the order of Judge Watts. In this order Judge Purdy on his own motion required Louis Paul Hiller, who was made defendant, both in his individual capacity and as trustee, to also file answer as such trustee. The plaintiffs in their appeal from this order present three questions: (1) Whether sufficient notice of the motion before Judge Purdy had been given. (2) Whether Judge Purdy had the right to allow answer to be filed after the expiration of the time fixed in the order of Judge Watts. (3) Whether Judge Purdy erred in ordering Louis Paul Hiller to file answer as trustee, on his own motion.

1. The exception as to want of sufficient notice was not alluded to in argument, and for that reason should probably be deemed abandoned. Appellants, however, have no ground for complaint, as the motion was not heard until six days after the notice thereof, when four days' notice was sufficient.

2. We think Judge Purdy had the right to allow defendants to file answer after the expiration of the time fixed in the order of Judge Watts. The order of Judge Watts belongs to the class of administrative orders as distinguished from final orders. The order does not involve the merits and makes no determination which would authorize plaintiffs to have judgment against defendants; hence cases along the line of *Brown v. Easterling*, 59 S. C. 479, 88 S. E. 118, do not apply. That case held that a succeeding circuit judge has no power to permit the plaintiff to serve an amended complaint after expiration of the time prescribed therefor, in an order sustaining the demurrer to the complaint and granting leave to serve an amended complaint. The judgment on demurrer was a determination of the merits and authorized dismissal of the complaint upon failure to comply with the terms offered. For the same reason it is held that an order requiring security for costs to be filed by a day stated, or in default thereof that the plaintiff be nonsuited, cannot be reviewed or reversed by a succeeding circuit court (*Bomar v. Railroad Co.*, 30 S. C. 458, 9 S. E. 512; *Cummings v. Wingo*, 31 S. C. 432, 10 S. E. 107); the ruling resting upon the ground that the judgment of nonsuit became final upon failure to comply with the alternative. But in the present case the order authorized no judgment to be rendered in favor of plaintiffs upon failure to answer within the time prescribed. Indeed, as the action was to recover real estate, it falls within that class of cases, although there is default of answer, wherein the "relief to be afforded plaintiff shall be ascertained by the verdict of a jury," etc., as provided in section 267, Code Civ. Proc. 1902. The fact that the case was left docketed on calendar 3, upon failure to comply with Judge Watts' order, is not a material circumstance, as such docketing could not unalterably fix the status of the case. A succeeding circuit judge may cause a case to be placed upon its appropriate calendar, as the docketing of a case appertains to the orderly conduct of the business of the court, and takes the place of notice of trial. *Bank v. Thompson*, 46 S. C. 499, 24 S. E. 334. The order of Judge Watts being administrative instead of final, it was such an order as Judge Purdy in his discretion could modify.

3. No reason appears for disturbing the order of Judge Purdy in requiring, on his own motion, that defendant Louis Paul Hiller should answer in his capacity as trustee. The plaintiff made him a party as trustee, and alleged in the complaint that he is interested in the subject of the action as trustee.

Under this allegation, a trustee seems to be a proper and necessary party to the complete determination of the controversy, and it was clearly within the discretion of the court to require the trustee to answer for the protection of the *cestui que trustent*.

The judgment of the circuit court is affirmed.

(140 N. C. 115)

ROSS v. DOUBLE SHOALS COTTON MILLS.

(Supreme Court of North Carolina. Nov. 28, 1905.)

1. NEGLIGENCE—RES IPSA LOQUITUR—EFFECT.

The doctrine of *res ipsa loquitur* does not relieve plaintiff of the burden of the issue, nor raise a presumption in plaintiff's favor, but merely carries the case to the jury, permitting it to infer negligence and find on all the evidence whether plaintiff has sustained his burden of proof.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 218, 225, 235.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINERY—EVIDENCE—QUESTION FOR JURY—RES IPSA LOQUITUR.

While plaintiff was operating a machine in a cotton mill, it became clogged, and he stopped the machine by shifting the belt to a loose pulley, and attempted to remove the cotton. While so engaged the machine suddenly started from a cause unknown to plaintiff, and he was injured. There was evidence that the belt shifter fork was wider than the belt, and that this had been corrected by placing a piece of wood in the same, which might have fallen out and permitted the belt to shift to the tight pulley. Held, that the happening of the accident was of itself sufficient evidence of negligence to take the case to the jury, under the doctrine of *res ipsa loquitur*.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1003.]

Appeal from Superior Court, Cleveland County; Justice, Judge.

Action by M. C. Ross against the Double Shoals Cotton Mills. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Action for personal injury sustained by plaintiff while operating a lapper in defendant company's mill. Plaintiff introduced Alfred Gilliam, who testified that he was 67 years of age, had worked at defendant's mill since he was 15 and up to two years ago. The lapper was purchased and put in mill six or seven years ago; examined, and found to be very good; nothing wrong with it; was not new. It was a 36-inch lapper, had been taken out of a mill to give place to a 40-inch one. It run very well. The worm gear gave out, and it gave trouble—a good deal first and last. The shaft, the coupling from the evenner plates, broke once—was off when left there. The belt shifter fork was wider than the belt, and put on a piece of wood to make it correspond with the width of the belt. Think put the piece of wood next to the tight pulley—am not certain. Have worked in cotton mills 52 years. Was superintendent

of defendant mill 32 years. Nothing wrong with the machine. Evener plates under the feed rolls, then the beater bars—two arms or bars. Beater shaft revolves 1,400 or 1,500 times a minute. Bars cannot be seen when cap is down—arched cap on hinges. Could not get hurt when cap is down. Worm gear has no connection with beater or belting. If plaintiff got hurt by beater bars, the worm gear could not have affected it. Stop motion rod has no connection with beater bar. Beater bars are stopped by throwing the belt from the tight to the loose pulley by means of the belt shifter. There is no danger of operating machine that know of. The shaft, pulleys, belt, and beater shifter were brought into court, and used by witness in explaining testimony to jury. Plaintiff testified that he was hurt July, 1904, working for defendant. Had been a card hand. Ran machine an hour and a half, when it choked down, and belt ran off big pulley. Carded the belt off, and put belt grease on it to prevent belt from running off. Ran five or ten minutes and choked again. Moved the belt shifter, stopped machine, and carried two loads of cotton back to the hopper. Jim Champion came along; went to opposite side and raised cap from beater, and the plaintiff put his hand into the beater bars to get cotton out. Machine started by some means, and tore off my arm to my elbow; knocked me numb or paralyzed. Had run lapper three months before I was hurt. Belt ran off pulley, which runs beater, when I got hurt. Am certain that I changed belt shifter and stopped machine when it choked, but cannot tell how it started. When I went to unclog it, know of nothing that could have put the belt on tight pulley." At the close of the evidence defendant demurred, and moved the court to dismiss the action. Motion allowed. Judgment and appeal.

Webb & Mull and D. F. Morrow, for appellant. O. F. Mason and Ryburn & Hoey, for appellee.

CONNOR, J. (after stating the case). We did not have a model of the machine or any of its parts before us by which to illustrate the testimony and argument. The plaintiff in the employment of defendant was on the day of the injury operating a lapper in defendant's cotton mill. The motive power was applied by a belt running over a pulley on the machine, attached to another pulley overhead, working upon shafting connected with the power. When it was desired to stop the machine for any purpose, the belt was removed or shifted from the tight to the loose pulley by means of the belt shifter. If the machine became choked with the cotton passing through the beater, and it became necessary to clean it, or remove the cotton, it is stopped by throwing the belt from the tight to the loose pulley; this being done by a shifter. If in proper condition,

it will remain motionless until the belt is thrown back on to the tight pulley. While machine is in motion, there are parts in which the hand of the operator may be put without injury. There are other parts in which the beater shaft revolves very rapidly. Plaintiff's witness Gilliam says that two years ago, when he left the mill, the lapper was all right and in good condition. The plaintiff says: That on the 11th day of July, 1904, he was operating the lapper. That it became choked, and "the belt ran off the big pulley." That he carded the belt off, and put belt grease on it to prevent belt from running off. In five or ten minutes it choked again. That he stopped the machine with the belt shifter, and carried some cotton back to the hopper. Champion went to the opposite side, raised the cap from the beater, and the plaintiff put his hand into the beater bars to get the cotton out. The machine, by some unknown means, started, and tore his arm off. The plaintiff's witness refers to some defects in parts of the machine, which he says could not have had any connection with the plaintiff's injury. The immediate cause of the injury was that by some means the belt was thrown back on the tight pulley. The only testimony which throws any light on the condition of the belt shifter is that of Gilliam, who says "the belt shifter fork was wider than the belt, and I put on a piece of wood to make it correspond with the width of the belt." There is no suggestion as to what effect, if any, this would have on the movement of the belt.

With the light afforded us, but one of three possible explanations of the unexpected starting of the machine occurs to our minds. Either Champion accidentally struck the shifter and threw the belt onto the tight pulley, or the plaintiff, in moving about the machine, did so, or there was some defect in the belt or shifter. It is elementary learning that the defendant is not liable for the movement of the belt, unless, either by the negligent conduct of some employé not a fellow servant, or by some defect in the condition of the shifter, it worked back and threw the belt onto the tight pulley. In this condition of the case, what shall be done? The defendant has charge of the machinery and its operation, except in so far as the plaintiff, in the discharge of his duty, had such charge. The plaintiff is suddenly and unexpectedly caught in the machine, struck dumb, his arm torn off, paralyzed. Conceding that there is no direct evidence of a defect in the machine or any of its parts, is the plaintiff driven to a nonsuit, or may he, upon the doctrine of *res ipsa loquitur*, have his case submitted to the jury to say whether there be actionable negligence which is the proximate cause of his injury?

To prevent any misconception of the circumstances under which or the manner in which this principle applies in the trial of

causes, we wish to restate what was said in *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493: "The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence and say whether, upon all of the evidence, the plaintiff has sustained his allegation." It does not in any degree affect or modify the elementary principle that the burden of the issue is on the plaintiffs. Walker, J., in *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562, clearly states the law in this respect: "The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury which requires the defendant to 'go forward with his proof.' The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor." The suggestion has been made in argument of cases at this term that, when the rule applies, it is the duty of the court to instruct the jury that proof which calls the rule into action constitutes a *prima facie* case or raises a presumption of negligence. This is a misapprehension, both of the principle upon which the rule is founded and its application. It must be conceded that expressions are used in cases, some of which are cited in the opinion in *Womble's Case*, supra, which give color to the suggestion. These cases were cited as illustrations of the rule. The author of the opinion was not advertent, as he should have been, to this inaccuracy. The conclusion which is drawn from the cases and quoted herein does not contain the error. Mr. Justice Walker, in *Stewart's Case*, puts the subject in its true light. So learned and accurate a jurist as Judge Gaston, in *Ellis v. Railroad*, 24 N. C. 138, being the first time that we find the rule declared in this court, refers to it as making out, when applicable, a *prima facie* case. Smith, C. J., in *Aycock v. Railroad*, 89 N. C. 323, quotes with approval the language used in *Ellis' Case*, supra. The correct application of the rule is as stated in *Stewart's Case*, supra. In *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786, the court held that permitting a live wire to lie upon the street was negligence—a breach of duty. In that case it was not necessary to invoke the rule. The defendant, by permitting the live wire to be upon the street, became liable for any injuries sustained thereby, unless it showed that it was there through no fault of its agents and servants. The learned justice writing in that case was of the opinion that the rule applied. When, as in that case, a breach of duty is shown, which is the proximate cause

of the injury, a verdict follows for the plaintiff, unless exculpatory circumstances are shown. It is only, as here, when there is no direct evidence of a defect in the machine, and the physical conditions surrounding the transaction do not ordinarily produce injury, that the occurrence speaks for itself. Such conditions are shown to exist in this case. A machine operated as this one, with the adjustment of the belt, etc., does not ordinarily resume its motion after being disconnected with the motive power. The evidence shows that it did start suddenly, and, so far as the plaintiff is able to say, from some unknown cause. The defendant says that it was an accident. That may be true, and, in the absence of any other testimony, a jury would be justified in so finding. But, on the other hand, the jury may infer that this is not a satisfactory explanation; that the difference between the width of the belt fork and the belt in some way caused the machine to start; that the piece of wood put upon it to make it correspond had worn or dropped out, and that caused the movement of the belt on the pulley. We do not suggest that either of these hypotheses is true. We are not sufficiently advised to have any opinion in regard to it. We merely say that a properly adjusted belt, removed from the tight pulley on to a loose pulley, does not usually get back on to the tight pulley and start the machine at so rapid movement as to tear a man's arm off. It is for this reason the law says that the plaintiff is entitled to have a jury pass upon the physical facts and condition, and to say whether in their opinion he has made good his allegation of actionable negligence. The defendant may or may not introduce evidence, as it is advised. By failing to do so, it admits nothing, but simply takes the risk of nonpersuasion. This is what is meant by going forward with testimony. He, by this course, says that he is willing to go to the jury upon the plaintiff's evidence.

While the rule has not been, in express terms, often applied in this state, it is by no means new or of unusual application. Professor Wigmore says that, for a generation at least, in England it has been conceded to exist "for some classes of cases at least." In 1865 *Erle, C. J.*, in *Scott v. London Dock Co.*, 3 H. & C. (Com. L. R. U. S. 134), said: "There must be some evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such that, as in the ordinary course of things, does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The limitations governing the application of the rule are thus stated by Wigmore (section 2509): "(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected, unless

from a careless construction, inspection, or user. (2) Both inspection and user must have been, at the time of the injury, in the control of the party charged. (3) The injurious occurrence or condition must have happened, irrespective of any voluntary action at the time by the party injured." The underlying reason for the rule is that usually the chief evidence of the true cause of procedure is practically accessible to the defendant, but inaccessible to the person injured. *Stewart's Case*, supra. It is for this reason that in some cases the Legislature has made the fact of injury "presumptive evidence," and in others a "prima facie" case. *Aycock's Case*, supra.

The learned counsel for defendant insisted that the plaintiff cannot recover, because there is no evidence that, if defective, the defendant had notice or could by reasonable care have known of such defect. It is well settled that this is essential to the plaintiff's recovery. The question is not, in the present condition of the record, presented. We cannot tell in what respect, if at all, the jury would find the shifter or other part of the machine defective. Their attention would be directed to this element in the plaintiff's case, either by a specific issue or by instruction. *Hudson v. R. R.*, 104 N. C. 491, 10 S. E. 669. Other questions will probably arise upon the trial. If the belt was thrown upon the tight pulley by an accidental contact with the plaintiff or some other person, or if it was the result of the negligence of a fellow servant, the court would instruct the jury in respect to the law. The question of the plaintiff's own conduct and its effect upon his right to recover are to be presented by proper instructions. Our ruling is confined to the one question, whether the case should have gone to the jury upon the physical conditions disclosed by the evidence. It does not appear what the plaintiff proposed to show by the rejected question. Hence we cannot pass upon the exceptions to his honor's rulings.

The judgment of nonsuit must be set aside, and a new trial had.

New trial.

(129 N. C. 333)

MABRY v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Oct. 31, 1905.)

INJURY TO EMPLOYÉ—FELLOW SERVANTS—RAILROADS.

The doctrine of fellow servants, so far as concerns liability of railroads, is abolished by Priv. Laws 1897, p. 83, c. 56, § 1, providing that recovery may be had of a railroad company where any employé is injured or killed in the course of his employment by the negligence of any other of its employés.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 354-356.]

Appeal from Superior Court, Guilford County; Peebles, Judge.

Action by J. C. Mabry against the North Carolina Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Civil action to recover damages for personal injuries caused by alleged negligence of the Southern Railway Company. The ordinary issues in actions for negligence were submitted. There was evidence of plaintiff tending to show that plaintiff, an employé of the Southern Railway Company, operating the defendant's road under a lease, while in discharge of his duty as such employé, was seriously injured by the negligence of two fellow servants, also in service of the same company, and so engaged at the time. There was evidence of defendant adverse to the claim of plaintiff. Verdict and judgment for plaintiff, and defendant excepted and appealed.

King & Kimball, for appellant. Stedman & Cooke, for appellee.

HOKE, J. It has been settled by repeated and well-considered decisions of this court that defendant company is responsible for actionable negligence of the Southern Railway Company done in the operation of the road under defendant's lease and in the exercise of its franchise. *Aycock v. Railroad*, 89 N. C. 321; *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959; *Harden v. Railroad*, 129 N. C. 354, 40 S. E. 184. The statute (Priv. Laws 1897, p. 83, c. 56, § 1) enacts: "That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any such servant or employee who shall suffer death, in the course of his service or employment with said company, by the negligence, carelessness or incompetency of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company." One effect of this statute is to abolish, so far as railroads are concerned, the doctrine known as the "fellow servant doctrine," and make the company responsible for the negligent acts of its employés in the course of their service or employment, when by reason of such negligence a fellow servant or other employé is injured. We have carefully examined the record and the exceptions presented for our consideration, and find no reversible error in the charge of the court or the conduct of the trial. The jury have accepted the version of the occurrence given by the plaintiff, and, taking this to be true, the plaintiff had a clear cause of action.

There is no error, and the judgment below must be affirmed.

(139 N. C. 448)

WALKER et al. v. MILLER.

(Supreme Court of North Carolina. Nov. 7, 1905.)

1. EVIDENCE — PAROL—LATENT AMBIGUITY—DEED—FIRM NAME AS GRANTEE.

After the death of J. and C., constituting the firm of J. W. & Bro., their heirs and distributees, with the approval of the administrators of J. and C., who were selected to manage the business, continued it in the old firm name till the goods and store were sold. They then appointed A. to collect debts owing J. W. & Bro., and he with money so collected, for the purpose of collecting from M., a debtor of J. W. & Bro., bought land at foreclosure of a mortgage given thereon by M. to a third person, taking deed to J. W. & Bro. Thereafter the heirs and distributees of J. and C. deeded the land to plaintiffs. Held that the use of the firm name as grantee created a mere latent ambiguity, removable by parol evidence showing that the owners of the assets of the old firm, the heirs and distributees of J. and C., were intended to be described by such name.

2. PARTNERSHIP — REAL ESTATE — FIRM AS GRANTEE.

At least an equitable title is conveyed by a deed describing the grantees by a firm name.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 105.]

3. PARTIES—BRINGING IN NEW PARTIES.

The court, to the end that substantial justice be done, may before or after judgment direct the bringing in of new parties.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 76.]

4. JUSTICES—ACTION ON EQUITABLE TITLE.

One may sue on an equitable title in a justice's court.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 184.]

Appeal from Superior Court, Orange County; Peebles, Judge.

Action by C. T. Walker and others against W. J. Miller. Judgment for defendant. Plaintiffs appeal. Reversed.

Civil action for the recovery of crops, instituted in justice court, brought by appeal to the superior court, and heard by his honor Judge Peebles, who by consent found the facts respecting the title to the land upon which the crops were grown. For some time prior to 1893, Jas. Webb, Jr., and Jos. C. Webb were engaged in mercantile business as copartners, under the firm name and style of Jas. Webb, Jr., & Bro. Jos. C. Webb died in the year 1893, leaving a last will and testament, properly executed and proven to pass real and personal estate, naming Jas. Webb, Jr., executor, who duly qualified. He bequeathed and devised his entire estate to his widow, Alice Webb. With the full knowledge and consent of said Alice Webb, the surviving partner and executor continued to conduct the said mercantile business under the same name and style. Mrs. Webb did not become a member of the firm, but permitted and consented that the executor should use her husband's estate to carry on the business as it was done prior to his death. James Webb, Jr., died in February, 1904, intestate, leaving as his heirs at law and distributees Mary Webb, his widow, and

Brown R. Webb and J. C. Webb, his sons. The estate of Jos. C. Webb was not settled at the time of the death of said Jas. Webb, Jr. A. J. Ruffin and H. W. Webb were appointed and duly qualified as administrators of Jas. Webb, Jr., deceased. T. N. Webb and J. Cheshire Webb were appointed administrators with the will annexed of Jos. C. Webb, deceased. On the 15th day of February, 1904, the said administrators joined in the publication of a notice to debtors of the firm of Jas. Webb, Jr., & Bro. to make prompt payment, concluding: "We take great pleasure in assuring the old friends and patrons of this firm that the business is to be continued indefinitely under the same style and management, and we earnestly solicit the continuance of your valued patronage, promising to give you at all times the best possible values, together with the most courteous treatment." Neither of the administrators put any money into the business, nor did they intend to form a new firm, but did intend to give notice that the business would be continued, under the firm name and style of Jas. Webb, Jr., & Bro., with the funds belonging to the estates of the deceased partners, which had been invested in said business. This action was taken with the full knowledge and consent of the heirs, distributees, devisees, and legatees of both of said deceased partners. On July 18, 1904, the property and assets of the firm of Jas. Webb, Jr., & Bro. were sold to H. W. and J. C. Webb. The old firm was continued for the sole purpose of collecting the debts and settling the business. J. Cox Webb was appointed agent to collect the debts due the firm. Jas. Webb, Jr., & Bro. held a judgment against defendant Miller, duly docketed in Orange county. D. S. Miller held a mortgage on the lands of defendant W. J. Miller, which he duly foreclosed under power of sale therein. The crops in controversy were growing on the lands at the time of the sale. J. Cox Webb became the purchaser at the sale, paying the purchase price from money collected by him on account of the debts due Jas. Webb, Jr., & Bro., and took deed therefor to Jas. Webb, Jr., & Bro. Soon thereafter Alice H. Webb, widow of Jos. C. Webb and B. R. Webb, J. Cox Webb, children, and Mary B. Webb, widow of Jas. Webb, Jr., executed a deed for said land to plaintiffs. The land brought at said sale an amount in excess of the mortgage debt. In an action brought by defendant, W. J. Miller, the administrators of Jas. Webb, Jr., and Jos. C. Webb intervened. The said Miller claimed and recovered, on account of his homestead interest in said land, \$112.75; the balance, \$55, being applied to the judgment held by said administrators. His honor was of the opinion, upon the foregoing facts, that, as the title to the land did not pass by the deed from D. S. Miller to Jas. Webb, Jr., and Bro., the plaintiffs acquired none by the deed of Mrs. Alice Webb and others. He

rendered judgment dismissing the action. The plaintiffs excepted and appealed.

Jno. W. Graham, for appellants.

CONNOR J. (after stating the case). His honor was of the opinion that there was no such person or partnership in existence as Jas. Webb, Jr., & Bro. at the time of the sale of the land, and upon the elementary proposition that, to constitute a valid deed of conveyance, there must be a grantor, grantee, and thing granted, the deed or paper writing having the form of a deed was inoperative. It is, of course, common learning that the death of a partner, in the absence of any stipulation in the articles of copartnership to the contrary, works an immediate dissolution; that the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts, and turn over to his personal representative the share of the deceased partner. We speak only of the personality in this connection. The facts found by his honor show that, upon the death of Jos. C. Webb, his widow, sole legatee, permitted the surviving partner, who was also executor of her husband, to continue the business under the name of the old or original firm. This condition, with her consent, continued for nine years. The only persons interested in the assets, other than creditors, were Jas. Webb, Jr., and Mrs. Alice Webb. His honor finds that Mrs. Alice Webb did not become a member of said firm, so as to be personally responsible for debts incurred after her husband's death. We do not see how this is material to the questions presented upon this appeal, and we do not express any opinion regarding her liability to creditors, notwithstanding her purpose or intention. Certainly she and the executor were the real, beneficial, and only owners of the property and the profits accruing from the business. Upon the death of Jas. Webb, Jr., the same arrangement was made and continued by all of the parties in interest. They were all *sui juris*, and we can see no reason why, *inter sese*, it was not competent for them to permit their property, with the consent and co-operation of the administrators, to remain in common and used for their joint benefit, adopting any name or style agreeable to them for more easily and conveniently carrying out their purpose. The fact that they chose to carry on the business under the name of the old firm does not change their rights. They could, if they had so preferred, have selected any other name. Of course, the old firm, as originally constituted, was dissolved by death of the partners. Whether the parties so intended or not, the legal effect of what they did was to create a new and original arrangement for carrying on business, the capital of which was contributed by the beneficial owners of the property. The fact that they selected the administrators of the deceased

partners to manage the business so far as the questions presented upon this record, is immaterial. It may be that, if debts were contracted, liabilities not contemplated would have attached.

For the purpose of this appeal, the transaction consisted of an arrangement between the distributees and legatees, with the approval of the administrators, to use the property for a joint and common benefit. The widows and children of the deceased partners were the owners, and the administrators were their agents. Viewed from this standpoint, we have parties conducting business in a manner which, in a limited, if not absolute, sense, constituted a partnership adopting a name which, by reason of being well known and enjoying the confidence of its customers, was valuable to them. It was entirely proper, and not unusual, that they should do so. There was no concealment of the personal status of the parties. They gave notice of the death of the original partners. It is not uncommon for a business which, by reason of the credit and reputation for integrity of the founders, possesses value, to be conducted after their death under its original name. In such cases it is the business of the living owners, and contracts made by or with them, under the name adopted, have all the force and effect as if made in the names of the individuals to whom it belongs. A man, if he chooses, may carry on business in a name other than his own, or, as is said by Erle, C. J., in *Maughan v. Sharpe*, 112 E. C. L. 443: "It is clear that individuals may carry on business under any name and style which they may choose to adopt." That a deed to a partnership, in which the partners are not named, is valid, is abundantly established by this and many other courts. In *Murray v. Blackledge*, 71 N. C. 492, the deed was made to "Murray Ferris & Co." To the objection that the deed was inoperative, because there was no grantee, Rodman, J., said: "But a deed for land is not for that reason void any more than a bond for the payment of money is. It is a latent ambiguity, which may be explained by parol." *Institute v. Norwood*, 45 N. C. 65. In *Morse v. Carpenter*, 19 Vt. 614, the mortgage was made to "Morse & Houghton, of Bakersfield." Parol evidence was received to show that two persons were doing business in Bakersfield under that firm name. Royce, C. J., referring to descriptions *ambiguitas patens*, said: "There is, however, an important difference between a description which is inherently uncertain and indeterminate and one which is merely imperfect, and capable, on that account, of different applications. To correct the one is, in effect, to add new terms to the instrument; while to complete the other is only to ascertain and fix the application of terms already contained in it." The distinction between a patent and a latent ambiguity is pointed out with his usual clear-

ness by Pearson, C. J., in *Institute v. Norwood*, supra. In *Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671, it is said: "If the true owner conveys by any name, the conveyance, as between the grantor and grantee, will transfer title, and in all cases evidence aliunde the instrument is admissible to identify the actual grantor. The admission of such evidence does not change the written instrument or add new terms to it, but merely fixes and applies terms already contained in it." The same principle controls when the uncertainty or ambiguity is regarding the grantee. The same is held in *Blanchard v. Floyd*, 88 Ala. 53, 9 South. 418; *Coleman, J.*, saying: "If the proof shows that *Blanchard & Burrus*, a partnership, were the purchasers of the land, they owned as tenants in common an equitable interest in the land." In *Menage v. Burke*, 43 Minn. 211, 45 N. W. 155, 19 Am. St. Rep. 235, a mortgage to "Farnham & Lovejoy" was held valid; *Dickinson, J.*, saying: "While it is necessary to the legal validity of such instruments that there be a grantee having a legal existence, capable of taking and certainly designated, or so designated that his identity can be certainly ascertained, these conditions are complied with in this case; resort being had, as may be done, to facts beyond the instrument for the purpose of applying the description or designation of the persons named to the persons so described." 1 Jones on Conveyances, 244. In *Maughan v. Sharpe*, supra, the deed was executed to "The City Investment & Advance Company." It was objected that, as there was no such corporation, the deed was void. *Erle, C. J.*, said: "The bill of sale under which the defendants claim purports to convey the property to the City Investment & Advance Company, and not to the defendants by name; and it was contended for the plaintiffs that the goods could not pass to *Sharpe & Baker*. * * * It is clear that individuals may carry on business under any name and style which they may adopt, and I see no reason why the defendants may not do so under the name of 'The City Investment & Advance Company.' * * * As between these parties the company are *Sharpe & Baker*, and the conveyance in question is a conveyance to those individuals. I cannot, therefore, say that the deed was inoperative on this ground." *Williams, J.*, said: "In this case I apprehend the meaning of the grant is plain. The deed purports and intends to convey the goods to those persons who use the style and firm of the City Investment & Advance Company. They may or may not be a corporation; but, where it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them." *Sheppard's Touchstone*, 236.

His honor in his judgment cites the case of *Neal v. Nelson*, 117 N. C. 393, 23 S. E. 428, 53 Am. St. Rep. 590, in which it is held that

a deed to "A. and his heirs," A. being dead, is void. This decision is put upon the ground that "heirs" is a word of limitation, and not of purchase. It is said that a deed to "A. or his heirs" would be good, A. being dead, if his heirs could be ascertained. It is well settled that a deed to "A. and his children" is valid to vest the title in them as tenants in common. His honor was of the opinion that "after July 18, 1904, when the goods and store were sold to H. W. Webb and J. C. Webb, no one constituted the old firm of *Jas. Webb, Jr., & Co.* It then ceased to exist." He therefore concluded that the deed from D. L. Miller conveyed nothing, leaving the legal title in Miller in trust for the administrators. If it be conceded, as his honor concluded, that the old firm ceased to exist, certainly the assets belonged to some one. *Jos. C. Webb* was appointed agent to collect them. There were no debts to pay. The assets then belonged to the legatees and distributees of the deceased partners. When *J. Cox Webb*, in executing the trust reposed in him to collect the assets, purchased the land with the money of his principals, and directed title to be made in the name of the old firm, it is manifest that it was his purpose to put the title in the persons who paid the purchase money. They ratified his act, treating the land as theirs by selling to the plaintiffs. The defendant, *W. J. Miller*, recognized the status of the title by suing for and receiving from the purchase money his homestead interest. We can perceive no reason why, both upon reason and authority, in the light of the fact found by his honor, the latent ambiguity in the description of the parties in the deed is not removed and the true owners, ascertained to be the grantors of the plaintiffs. *Lowe v. Carter*, 55 N. C. 383; *Ryan v. Martin*, 91 N. C. 464; *Simmons v. Allison*, 118 N. C. 776, 24 S. E. 716. It is sometimes said that only an equitable title is conveyed in such cases. The better view, we think, is that which we find sustained by the authorities cited—that the ambiguity is latent and open to explanation by which the real party is disclosed and the deed treated as if the name were inserted. If, however, the other view be adopted, the same result would follow in this case. It is well settled, under our judicial system, that a party may recover in ejectment upon an equitable title. *Clark's Code*, § 177, and cases cited at page 102. The mortgagee, *D. S. Miller*, has sold under the power and received the purchase money more than sufficient to pay the mortgage debt. The mortgagor, *W. J. Miller*, has received his interest in the surplus. The administrators turned over the assets of the late firm of *Jas. Webb, Jr., & Bro.* to *J. C. Webb* to collect for the benefit of the owners. He has in the discharge of his agency applied their money to the purchase of the land and procured a deed to be made, as he understood and intended, to them. They, acting upon the

belief that the land was theirs, have sold for a valuable consideration to the plaintiffs. We cannot see how a more perfect equitable title could vest in the plaintiffs. If, as the learned judge thought, the naked legal title still remained in D. S. Miller, certainly no one, save the plaintiffs, can call for it.

There are no unadjusted questions between the administrators and the grantors of the plaintiffs, or between W. J. Miller and either of the parties to the transactions. He does not suggest any reason why the plaintiffs should not recover, save that they are not the real parties in interest. We think that they are the real and only parties in interest, and are entitled to recover the crops. If, however, D. S. Miller was a necessary party, we can see no reason why he should not be brought in now to perfect the record. The action should not have been dismissed. The court may at any time, before or after judgment, direct other persons to be made parties, to the end that substantial justice be done. While it is true that a justice has no power to administer an equity, the owner of an equitable title may sue in the justice's court. *Lutz v. Thompson*, 87 N. C. 334. Many of the difficulties which obstructed the courts in the administration of justice and necessitated the dismissal of suits because of a divided jurisdiction between courts of law and courts of equity, or the failure to sue out the writ applicable to the right to be enforced, are avoided by the reformed Codes of Procedure. Courts now seek to ascertain the facts and administer the right to the real party in interest. Amendments are liberally made to enable the court to so mold the judgment that substantial justice is administered.

Upon the facts found by his honor, judgment should have been entered that the plaintiffs are the owners of the crops in controversy. Judgment will be entered accordingly in the superior court of Orange.

Error.

(129 N. C. 457)

TUSSEY et al. v. OWEN.

(Supreme Court of North Carolina. Nov. 7, 1905.)

1. WILLS—CONTRACTS TO DEVISE—PERFORMANCE OF CONDITIONS.

The contract of an adult child with her old and afflicted father to remain with and work for him during his lifetime, he, in consideration, to will her one-fourth of his property, requires her, unless prevented by him or those acting for him, to remain with and serve him till his death.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 173.]

2. SAME—PREVENTING PERFORMANCE.

A child who had agreed to remain with and serve her father till his death, he in consideration to will her one-fourth of his property, and who married and voluntarily removed from his home 15 months before his death, never returning, is not shown to have been prevented by him from performing the contract

by her testimony that she did not go back after her marriage; "they did not want me to go back." Something prior to, so as to justify her apparent abandonment of her contract, must be shown.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 173.]

3. SAME—PARTIAL PERFORMANCE—IMPLIED CONTRACT.

A contract of a child to remain with and serve her father till his death, he in consideration to will her one-fourth of his property, is entire and indivisible, and so includes no implied contract to pay for the benefit conferred by her partial performance.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 171, 173.]

Appeal from Superior Court, Davidson County; Long, Judge.

Action by J. A. Tussey and another against L. A. Owen, executor, etc., to recover on a specific contract or agreement, set out in the complaint, for services rendered by the feme plaintiff to her father, Anderson Owen. The material allegations of the complaint are denied in the answer. The issues and responses are as follows: "(1) Did the testator, Anderson Owen, make the agreement with the plaintiff Della Owen to pay her at his death for her services, as alleged in the complaint? Answer: Yes. (2) Did the plaintiff Della render the services to her father agreeably to said contract as alleged in the complaint? Answer: Yes. (3) What, if any, is the value of such services? Answer: \$1,500." From the judgment rendered, defendant appealed. Reversed.

E. E. Raper, for appellant. Watson, Buxton & Watson and Walser & Walser, for appellees.

BROWN, J. The cause of action as stated in the complaint, as well as by counsel for plaintiff on the argument, is substantially that plaintiff Della Tussey, the daughter of Anderson Owen, she being then of age and unmarried, agreed to remain with her father and work for him during his lifetime, and that in consideration thereof he agreed that at his death he would devise her one-fourth of all his lands and personal estate, and that she performed the contract on her part, and that her father made a will carrying out the contract on his part, but afterwards added a codicil in which he revoked the will, so far as he had willed the said property to the feme plaintiff, and devised all his estate to his wife and his two sons, thereby failing to carry out the contract. The complaint fails to allege in specific terms that the feme plaintiff fully performed the contract upon her part, or that she was prevented from performing it by the testator or by those duly authorized to act for him. Therefore, if it is deemed advisable to try this case again, the complaint should be redrafted as to those particulars, or properly amended. There is some objection to the form of the third issue. It should be, "What sum, if any, is plaintiff entitled to recover?"

If the contract, as alleged in the complaint, be established, its breach is admitted by the facts stated in section 6 of the answer; but the burden is still on the plaintiff to establish the performance of it on her part, or else that she was prevented from performing it by the testator or those acting for him. That the feme plaintiff, Della, did not perform the contract is fully established by all the evidence, including her own. A fair interpretation of the contract set out required her to remain with her father and serve him until his death, as he was old and afflicted. She failed to do that. On the contrary, she was married March 11, 1903, and immediately removed to Chattanooga, and returned only after her father died. He lived for 15 months after her marriage and removal to Chattanooga, and only added the codicil to his will after that event, viz., on January 18, 1904. In view of these facts, the plaintiff can only recover upon the contract by showing some legal excuse, as that she was prevented from performing the contract by her father or those authorized to act for him. As the marriage and removal to Chattanooga were voluntary acts upon her part, the evidence that she was prevented from performing the contract would have to antedate such events, so as to justify her apparent abandonment of it. The feme plaintiff testified: "I did not go back after I got married. They did not want me to go back." That statement alone would not justify a finding that she was prevented by her father from performing the contract.

The pleadings have been framed and the case tried upon the theory that a specific contract—not an implied one—had been entered into between the plaintiff and her father, but she performed it, and that there was a breach of it upon her part. Therefore it is unnecessary to review the numerous cases which have come before this court as to when a contract will be implied between parent and child that the former will pay the services rendered by the latter after attaining full age. The jury have found the first issue as to the agreement in favor of the plaintiff, and there was evidence to support such finding. But the record fails to disclose any evidence whatever to justify the response to the second issue, to wit, that she performed the contract upon her part. "The proposition is too plain to need any reference to authority in its support, that a party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a nonperformance thereof." Smith, C. J., in *Ducker v. Cochrane*, 92 N. C. 597. His honor instructed the jury: "If you find that the contract was that he would pay her one-fourth of his estate, at his death, for her services, you will consider all the evidence offered on that question and determine what the value of the one-fourth of the estate is, and make your answer to the third issue from

the facts as you find them to be. The defendant excepted. This instruction cannot be sustained, in view of the fact that the plaintiff failed to perform the contract. Under the form of the third issue it is practically a judicial determination that the value of her services equals one-fourth of the testator's estate.

There is a class of cases where, under some circumstances, the rigor of the common-law rule has been relaxed, and a person has been permitted to recover the actual value of his services, although failing to perform the entire contract on his part. In some cases the law implies a promise to pay such remuneration as the benefit conferred is really worth. *Dermott v. Jones*, 23 How. (U. S.) 220, 16 L. Ed. 442. But we know of no authority to support the claim that the plaintiff could recover the full contract price unless she had performed the contract. Chief Justice Smith quotes a number of such cases in *Chamblee v. Baker*, 95 N. C. 100, but he also quotes, with approval, from the opinion in *Munroe v. Phillips*, 8 Ellis & Black. 739: "The inclination of the courts is to relax the stringent rule of the common law, which allows no recovery upon a special unperformed contract, nor for the value of the work done, because the special includes an implied contract to pay. In such case, if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. Accordingly restrictions are imposed upon the general rule, and it is confined to contracts entire and indivisible, and when, by the nature of the agreement or by express provision, nothing is to be paid till all is performed." The general rule is laid down in *Outler v. Powell*, 2 Smith, L. C. 1: "But, if there has been an entire executory contract and the plaintiff has performed a part of it, and then willfully refuses without legal excuse, and against the defendant's consent, to perform the rest, he can recover nothing, either in general or special assumpsit." This rule has been repeatedly recognized and acted on by this court. *Thigpen v. Leigh*, 93 N. C. 47; *Lawrence v. Hester*, 93 N. C. 79.

For these reasons, we think the motion to nonsuit should have been allowed.

Error.

(129 N. C. 523)

BILES v. SEABOARD AIR LINE RY. CO.
(Supreme Court of North Carolina. Nov. 15, 1905.)

1. TRIAL—MOTIONS FOR NONSUIT—CONSTRUCTION OF EVIDENCE.

On a motion for nonsuit or direction of verdict for defendant, the evidence of plaintiff must be accepted as true, and construed in the light most favorable to him.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 374, 402.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for injuries

to a brakeman, who was shaken off the pilot of an engine which did not have a bar to which the brakeman could hold, evidence held to make a case for the jury on the question of the railroad's negligence.

3. SAME—CONTRIBUTORY NEGLIGENCE—DANGEROUS WORK.

The mere fact that a servant works in the performance of a dangerous duty, such as riding on the pilot of an engine without having any rod by which to hold, while it may charge him with the assumption of the risk, does not render him guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 754.]

4. SAME—ASSUMPTION OF RISK—DEFECTIVE APPLIANCES—STATUTORY PROVISIONS.

Under Priv. Laws 1897, p. 83, c. 56, giving a right of action to any employé who is injured by defects in the machinery, ways, or appliances of a railroad, and declaring any contract or agreement by an employé to waive the benefits of the statute void, a railroad cannot defend an action for injuries to a brakeman, caused by a defective engine or appliance, on the ground that the brakeman assumed the risk of the defect.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 554.]

5. SAME—CONTRIBUTORY NEGLIGENCE.

While, under Priv. Laws 1897, p. 83, c. 56, a railroad employé is not precluded, on the ground of assumption of risk, from recovering against the railroad for injuries caused by a defective engine or appliance which makes the performance of his duty obviously dangerous, yet he must act with due care and circumspection under the circumstances, and cannot recover if he is careless in such manner as to amount to contributory negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 663, 674.]

6. SAME—VIOLATION OF MASTER'S RULES.

The violation by a railroad brakeman of a known rule of the company, made for the protection and safety of employes, which rule is alive and enforced, will usually bar a recovery for injuries to the brakeman proximately caused by such violation.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 759-775.]

7. SAME—ABROGATED RULES.

A rule of a master, promulgated for the protection and safety of servants, which is habitually violated to the knowledge of the master or those who stand towards him in the position of vice principals, or which has been violated so frequently and openly and for such a length of time that the master could, by the exercise of ordinary care, have ascertained its nonobservance, will be deemed waived or abrogated, and a failure of a servant to observe the same will not preclude him from recovering for injuries sustained by reason of such nonobservance.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 287, 763.]

Appeal from Superior Court, Anson County; Ward, Judge.

Action by David Biles against the Seaboard Air Line Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Civil action to recover damages for an injury caused by alleged negligence on part of defendant company. The three ordinary issues in actions of this character were framed for submission to the jury: (1) As to the negligence of defendant; (2) as to contributory negligence on the part of plaintiff; (3)

on the question of damages. At the close of the testimony, on an adverse intimation of his honor, both on the first and second issues, the plaintiff submitted to a nonsuit and appealed.

H. H. McLendon and J. A. Lockhart & Son, for appellant. John D. Shaw and Adama, Jerome & Armfield, for appellee.

HOKE, J. (after stating the case). In *Hopkins v. Railroad*, 131 N. C. 464, 42 S. E. 902, Douglas, J., delivering the opinion said: "It is well settled that on a motion for nonsuit, or its counterpart, the direction of a verdict, the evidence of the plaintiff must be accepted as true and construed in the light most favorable for him." Applying this rule to the facts set forth in the case on appeal, we are of opinion that the plaintiff is entitled to have his cause submitted to a jury. The plaintiff himself testified that he was a brakeman on a freight train of defendant company, and on the night of November 29, 1902, was injured by having his foot run over and crushed by the engine of the train with which the plaintiff was then working; that the injury occurred as the train was entering on the yard at Hamlet, N. C., where there were a great many tracks and switches; that it was a part of the plaintiff's duties at such times to keep a lookout in front of the engine, and his proper placing for the purpose was on the pilot of the engine.

Selecting a portion of his testimony from the notes of the evidence sent with the case in the form of questions and answers we find this statement: "Q. Go on and state how you were hurt. A. I was on the front part of the engine on the standard step, where I always had to ride, going into a yard. Q. Why did you ride there going into the yard? A. To look out for the switches and loose cars. Q. Why did you ride there to look out for switches? A. That was my duty. Q. To look out for switches and cars? A. Yes; loose cars would roll down sometimes, and we would change the switches right quick. I would always have to head, so I could throw the switch. Q. What do you mean by throwing the switch? A. Changing the switch from one track to another. Q. That is, you kept the switches in their proper place and order? A. Yes." At another point the plaintiff testified that he could not properly perform the duties, unless he was stationed in front on the pilot, and that the defendant would not keep a man who could not keep the train moving, but was so slow that he would require it to stop to enable him to do his work; that in order to enable employes, charged with this duty, to hold their positions, there was usually a short step on the face of the pilot, eight to ten inches long and wide enough for the placing of one foot, and a bar or rod along the beam of the pilot, by which the brakeman could hold on with reasonable safety when the train was in motion; that this particular engine had the step, but did

not have the rod or other means to enable the plaintiff to hold properly, and, as the engine was going into the yard, it jostled or careened in some way—probably by a depression in the rail; that the plaintiff's foot was jarred from its position on the step, and, not being able to hold, his foot slipped under the fore wheel of the engine, was crushed as stated, and finally had to be amputated, etc. If these facts are established, there would seem to be a case of negligent injury, not unlike that of *Coley v. Railroad*, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817, 83 Am. St. Rep. 720; and unless the facts are successfully controverted, or the plaintiff himself has failed to exercise proper care in the matter, there would be an actionable wrong.

The judge below also expressed an intimation adverse to the plaintiff on the issue of contributory negligence. Without going into a detailed statement of the testimony, we are of opinion that on this issue, also, the case should be submitted to the jury under proper instructions. The plaintiff has stated in one place that it was a dangerous duty, and he had looked for some one to get hurt in performing it. But, so far as the mere working on in the performance of a dangerous duty is concerned, this, while sometimes spoken of as contributory negligence, is usually and more properly classed and considered under the head of assumption of risk, and, being a contractual defense, where it is allowed, is not open to the defendant by reason of the statute. *Priv. Laws 1897*, p. 83, c. 56, § 1. This statute provides that any employé who is injured by any defect in the machinery, ways, or appliances of a railroad company shall be entitled to maintain an action; and section 2 provides that any contract or agreement, express or implied, made by any employé to waive the benefit of the aforesaid section, shall be null and void. If, in answer to the first issue, the jury should find that the plaintiff, while in the performance of his duty, was injured as the proximate consequence of a defective engine or defective appliance, then the defense of assumption of risk is not open to the defendant. *Coley v. Railroad*, supra; s. c., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817. While the mere working on in the presence of known and dangerous conditions, but in the honest effort to discharge his duty faithfully, usually treated under the head of assumption of risk, shall not be considered in bar of the plaintiff's recovery, this does not at all mean that in cases of the kind we are now considering the plaintiff is absolved from all care on his own part. Except in extraordinary and imminent cases, like those of *Greenlee and Troxler*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, and 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, he is still required to act with that due care and circumspection which the presence of such conditions require, and if, apart from this element of assumption of risk, the plaintiff

has been careless in a manner which amounts to contributory negligence, his action must fail.

There is evidence here tending to show that the plaintiff, at the time of the injury, in taking his position on the pilot of the engine, was acting in violation of the rules of the company. While the disposition of the present appeal does not require that we consider evidence making for the defense, we deem it well to note that the violation of a known rule of the company, made for an employé's protection and safety, when the proximate cause of such employé's injury, will usually bar a recovery. This is only true, however, of a rule which is alive and enforced, and does not obtain where a rule is habitually violated to the knowledge of the employer or of those who stand towards the employer in the position of vice principals, or when a rule has been violated so frequently and openly, and for such a length of time, that the employer could, by the exercise of ordinary care, have ascertained its nonobservance. Under such circumstances the rule is considered as waived or abrogated. 5 Thompson, *Law of Negligence*, § 5404; Beach, *Cont. Neg.* § 373.

There was error in the ruling of the court below, and the plaintiff is entitled to have his cause submitted to the jury.

New trial.

CLARK, C. J. and WALKER, J., concur in result.

(139 N. C. 470)

KEARNS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. TRIAL—NONSUIT—WHEN GRANTED.

It is the duty of the judge to nonsuit a plaintiff when the evidence is not legally sufficient to justify a verdict in his favor.

[Ed. Note.—For cases in point, see vol. 46, *Cent. Dig. Trial*, § 360.]

2. SAME—QUESTIONS FOR COURT AND JURY—SUFFICIENCY OF EVIDENCE.

The measure and quantity of proof and its sufficiency in law is a question for the court, while its weight and sufficiency to establish a fact is for the jury.

[Ed. Note.—For cases in point, see vol. 46, *Cent. Dig. Trial*, §§ 332-345.]

3. SAME.

Where the evidence fails to establish, either directly or by rational deductions, all the facts which go to make up the issue, as where there is a failure of evidence in respect to any material fact involved in the issue, the evidence is not legally sufficient to sustain a finding upon such issue, and it is the duty of the trial judge to instruct the jury accordingly.

4. RAILROADS—INJURIES AT CROSSINGS—ACTIONS—BURDEN OF PROOF.

In an action against a railroad for injuries to a traveler on the highway, caused by a collision at a railroad crossing, the burden is upon plaintiff to show, not only the negligence of the railroad, but that such negligence was the proximate cause of the injury.

[Ed. Note.—For cases in point, see vol. 41, *Cent. Dig. Railroads*, §§ 1117, 1123.]

5. NEGLIGENCE—PROXIMATE CAUSE—CHARACTER OF PROOF REQUIRED.

The relation of negligence to injury as proximate cause thereof must be established by a clear preponderance of proof, which must be of such strength and character as to warrant the inference that the negligence was the proximate cause of the injury, and evidence which merely raises a surmise or conjecture of such fact is legally insufficient.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 273.]

6. RAILROADS—INJURIES AT CROSSINGS—ACTIONS—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.

In an action against a railroad for injuries caused by a collision with a team at a crossing, evidence held insufficient to show that the alleged negligence of the engineer in not stopping his engine sooner than he did was the proximate cause of the injury.

Clark, C. J., and Hoke, J., dissenting.

Appeal from Superior Court, Davidson County; Long, Judge.

Action by Alexander Kearns against the Southern Railway Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

This action was commenced on December 7, 1904, to recover damages for an injury alleged to have been received by plaintiff on August 17, 1902, by coming in contact with a train of the defendant at Lexington. At the conclusion of the evidence, his honor, Judge Long, being of opinion that the plaintiff had failed to make out a case of actionable negligence, sustained defendant's motion to nonsuit, and dismissed the action. The plaintiff appeals.

McCrary & Ruark, for appellant. Manly & Hendren, for appellee.

BROWN, J. The duty of the judge to nonsuit, when the evidence is not legally sufficient to justify a verdict for the plaintiff, is too well settled to admit of dispute. It is the law in this state, long since declared by this court and recognized by the General Assembly. It is also a rule of practice in every court where the practice and principles of the common law prevail. "We would be recreant to our duties as judges were we to fail to declare the law with respect to the question whether there is any evidence for fear of offending the jury. This question the jury do not decide." Connor, J., in *State v. Smith*, 136 N. C. at page 687, 49 S. E. at page 337. Evidence has a twofold sufficiency, a sufficiency in law and a sufficiency in fact. Of the former, the court is the exclusive judge; of the latter, the jury is. The measure and quantity of proof is a question for the court. When submitted to the jury, its weight and sufficiency to establish a fact is for them.

An issue is made up of one or more facts. Where the evidence fails to establish all these facts, either directly or by rational deductions, as where there is a failure of evidence in respect to any material fact involved in the issue, then the evidence is not legally sufficient to justify a finding upon the issue it is

offered to sustain, and it becomes the plain duty of the judge to instruct accordingly, for in such case the jury has no duty to perform. We agree with his honor that the plaintiff in this action has failed to make out a case of actionable negligence. To establish actionable negligence, the plaintiff must show, by the greater weight of evidence, not only that the engineman was guilty of some negligent act, but also that such negligent act was the proximate cause of the injury. As clearly expressed by Mr. Justice Walker: "There must always, in actions of this kind, be a causal connection between the alleged act of negligence and the injury which is supposed to have resulted therefrom. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established; and the negligent act of the defendant must not only be the cause, but the proximate cause, of the injury." *Byrd v. Express Co.* (at the present term) 51 S. E. 851.

The burden of proof is therefore upon this plaintiff to show that the alleged negligence of the engineman, in not stopping his train sooner than he did was not only the cause, but the proximate cause, of the injury. The law requires him to establish that fact by a clear preponderance of proof, as much so as it does the fact of negligence. The proof must be of such strength and character as to warrant the inference that the failure to stop caused the injury, and not merely to raise a surmise or conjecture that such was the fact. Evidence which merely shows that it was possible that such was the result, or raises a conjecture that it was so, is legally insufficient, and should not be submitted to the jury. *State v. Vinson*, 63 N. C. 335; *Brown v. Kinsey*, 81 N. C. 245. "The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further, and offer at least some evidence which reasonably tends to prove every fact essential to his success." *Byrd v. Express Co.*, supra. Applying these well-settled principles, we have concluded that the plaintiff has failed to show that the alleged negligent act of the engineman in not stopping his train sooner than he did caused the injury, and therefore he cannot recover.

The facts, as gathered from the testimony of the plaintiff and his witness, Elliott, who alone testified as to the occurrence, are these: On August 17, 1902, plaintiff, driving his horse and top buggy, crossed the defendant's track in the town of Thomasville. After he had gotten across, and when distant from 15 to 40 feet from the track crossing, and about the time the engine passed the crossing, the horse began to back, and continued backing, and backed into the cars, about the second or third coach. Plaintiff testifies: "I had just crossed the track, and the horse began to

cut up and ran back, and backed the right wheel against the cars, and threw me between the shafts and the horse, under his feet. The first time I saw the train the horse wheeled right around towards Lexington and cut up, and I could not see anything. I was something over the length of the horse and buggy when train came along the track." Plaintiff states that then the horse began to back, and he urged him forward. "I do not know as I said my horse was an old fool, but she was an old fool, or else she would not have run back that way." Elliott testified, in substance, that about the time the engine passed the crossing the horse began to back, and kept on backing, and backed into the train. The engineman was looking out at plaintiff and his horse. He slackened up the speed of the train. It was going at a very slow rate of speed. The engine, tender, and several cars had passed before plaintiff's buggy struck the train. He also testified that the train stopped very quickly, but he did not hear the brakes applied, being 150 feet distant. The train was going very slowly, and, after plaintiff's buggy struck it, stopped very quickly. He further stated that the engineman shut off steam and slowed up when he saw the horse backing. The engineman could not have seen the horse "cut up" before the engine got on the crossing, because the horse did not begin to back and "cut up" until then. Witness said that he could see engineman looking out of his window. "He was going very slowly, looking at this man. Stopped very quickly. Went about 10 or 15 feet, apparently holding his train under control, looking at this situation."

In view of the fact that the engineman was on the crossing with his engine when he saw the horse commence to back, and brought his train to a standstill in 15 feet of the crossing, according to the witness, Elliott, and within two or three car lengths, according to plaintiff, it is very doubtful if there is any negligent conduct upon the part of the engineman disclosed by the evidence. But, assuming there is such evidence, in our opinion there is nothing which tends to prove that the alleged negligent conduct caused the damage to the plaintiff or his buggy. This is not a case where the train ran over or backed into the plaintiff, but where the plaintiff backed into the train. While there is no evidence offered that the engineman could have stopped his train any sooner than he did after first seeing the horse "cut up" yet, assuming that he could have done so, and that the train was at a standstill at the moment the horse backed the right buggy wheel into the car, we think no rational inference can be drawn that the result to the plaintiff and his buggy would have been otherwise than it was. There is no affirmative proof whatever that the stopping of the train a moment sooner would have prevented the contact with the buggy wheel or

the resultant injury. In view of the lack of evidence, to submit that question to the jury would be to refer it to the domain of guesswork and conjecture for solution. The engine was on the crossing when the horse began to back. That was the earliest moment that the engineman could have discovered plaintiff's situation. Suppose he had stopped his engine and train instantaneously (although we do not know it to be possible); what would have been the evident consequence to the plaintiff? His horse would have backed his buggy into a hissing and steaming engine, a much more dangerous predicament. There is no evidence that the engineman could have so quickly reversed his engine as to back it out of plaintiff's way, and that was hardly possible in so short a time. There is not the slightest evidence that the car steps caught into the wheel and dragged the buggy any distance, or that the wheel struck the steps, as alleged in the complaint. When the frightened horse backed the right hind wheel against a very slowly moving car, it was well calculated to "smash the wheel" and pitch the plaintiff out between the shafts and horse by the force of the impact alone, and not because the car was moving. The same result would doubtless have happened, had the horse backed with the same force against a stone wall. If the train had been moving rapidly, its momentum might possibly have drawn the buggy and its occupant under it when the horse backed the buggy into it. On the contrary, it was moving with such exceeding slowness that it came to a full stop very quickly, almost immediately after the contact, so that some person safely alighted and got hold of the horse's head, and the plaintiff was pitched forward, instead of backwards, or alongside or under the cars. The plaintiff has failed to establish by evidence any circumstances from which it can be fairly inferred that there is reasonable probability that the accident resulted from the failure of the engineman to stop the train sooner than he did, assuming that he could have done so, which is by no means certain. The plaintiff has failed to show that the alleged negligence was, in the expressive language of Mr. Justice Hoke, "the cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Ramsbottom v. Railroad*, 138 N. C., at page 41, 50 S. E., at page 449.

We are of opinion that the proximate cause was (to quote the language of the plaintiff) "the old fool horse."

Affirmed.

HOKE, J. (dissenting). I differ from the court in its decision of this case, and, while no question of law is seriously involved, the difference as to its application to the facts

before us is sufficiently pronounced to justify some statement of the reasons for my dissent. It is accepted law in actions of this character that, when two men of fair minds can come to differing conclusions on the question of actionable negligence, the jury must determine the issue, and that this applies, not only to the negligent act, but to the question of proximate cause. It is also the better doctrine that, where the negligent act has been established or admitted, it is only in clear and exceptional instances that the question of proximate cause should be withdrawn from the jury and determined by the judge. *Shearman & Red. Neg. vol. 1, § 52; Thompson's Com. on Law of Neg. vol. 1, § 181.* Another position may be considered as established—that, when a judge withdraws a case from the jury by directing a nonsuit, the evidence favoring the plaintiff must be taken as true. *Hopkins v. Railroad, 131 N. C. 464, 42 S. E. 902; Biles v. Railroad (at this term) 52 S. E. 129.* The court does not seem to have been altogether advertent to this last principle; for in the opinion apparent consideration is given to evidence favoring the defendant in certain phases of the case, where there was other evidence, contradictory or qualifying, which was more favorable to plaintiff. This matter is not dwelt upon at much length or in greater detail, for the reason that, in any aspect of the case, I am of opinion that the ruling of the judge below cannot be sustained.

Applying the above rules to the facts before us, as I understand them: Here was a man, over 80 years of age, in a top buggy, who had just driven over a crossing of defendant's railroad, when a passenger train of defendant company passed the crossing, going north. The railroad ran about north and south here. The plaintiff had just driven over, being something over the length of the horse and buggy, as he states it—was from 15 to 20 feet from crossing, as the witness Elliott states it—and, as the train went by the crossing, the horse commenced backing the buggy towards the train. The road sloped upward some towards the crossing, and as the train moved on, going the distance of several car lengths, the horse continued to back the buggy up the slope till the train and the buggy collided. The right hind wheel of the buggy was crushed down, and the old man thrown from his seat onto the forewheel, falling under the shafts, between the horse's heels, and receiving severe injuries, from which he still suffers. During the time the horse was backing the engineer was looking directly at him. A collision was evidently imminent, for some one jumped from the train and caught the horse by the bridle in an effort to avoid the catastrophe, "but the train moved on." The witness Elliott, a merchant in Thomasville, who had no interest in the matter, so far as appears, and who had the entire occurrence in full view, at a distance of not more than 134 feet from the

center of the crossing, testifies in part as follows: "To the best of my recollection, about the time the engine passed the crossing the horse began to back, and kept on backing, and backed into the train. I saw the engineer looking out of the window, and some one else stepped from the train. The engineer was looking at Mr. Kearns and his horse. He apparently kind of slacked up the speed of the train. It seemed so. Then he kept looking back after the engine had passed, and just after he struck the train he put on brakes and stopped the train. It was going at a very slow rate of speed. The engine, tender, and several cars had passed before he struck it. I don't know the manner in which the train was stopped. I know it stopped very quickly. * * * The train was going along very slowly, not trying to make good time, and after it struck it stopped very quickly. * * * It seemed that he slowed up after he saw the horse start to backing. He kind of shut off steam, apparently. The train stopped very quickly after he was hit. I saw Kearns. I do not know how badly he was hurt. * * * I live on the south side of the track. That is the side the engineer was on. I could see him looking out of his window. He was going very slowly, looking at this man. He stopped very quickly. He went about 10 or 15 feet. He was apparently holding his train under control, looking at this situation. * * * The horse's head was pointed south, and when he commenced going back he gave a cut and went back against the train. His head was in a westerly direction. The horse and buggy were going backward. * * * It is just an incline—I do not know what degree—10, 15, or 20 degrees. It was a gradual incline down to where the horse was." There are several points in the testimony of this witness which may be noted as a help to the true understanding of the matter. Thus, "I saw the engineer looking out of the window, and some one else stepped from the train. * * * The engineer was looking at Kearns and his horse. He apparently kind of slacked the speed of the train. It seemed so. Then he kept looking back after the engine had passed, and just after he struck the train he put on brakes and stopped the train. * * * The train stopped very quickly after he was hit. * * * He stopped very quickly. He went about 10 or 15 feet. He was apparently holding the train under control, looking at this situation." These facts make out a clear case of negligence. The engineer, in the exercise of ordinary prudence, should have stopped the train when he saw that a collision was imminent; and it is almost equally as clear that the movement of the train had something to do with the nature and extent of the injury.

The opinion substantially admits that there was negligence in not stopping the train outright, and sustains the ruling of the court below on the ground that there is no evi-

dence that the motion of the train had anything to do with causing the injury, and that this is so clear there can be no two opinions about it among fair-minded men. A dissertation on the momentum possessed by bodies of vast weight and tremendous power, though moving slowly, might be of service here; but I find it difficult to discuss this last position with that seriousness which is always becoming when making final deliverance on the rights of parties, and which the great respect entertained for my Brethren always prompts. To hold that the movement of the train, though negligent, had nothing to do with causing or contributing to the plaintiff's hurt, to my mind involves the proposition that when a 400,000-pound train, in motion, collides with a 300-pound buggy and a 900-pound horse, also in motion, in which the wheel of the buggy is crushed down and the occupant thrown from his seat, causing him to fall beneath the horse's heels, the motion of the train had nothing whatever to do with intensifying the shock or increasing the damage, and that this is so clear that there can be no two opinions about it. The reasons given in support of the position are no more satisfying than the position itself. It is urged that the train was going "slowly, very slowly." This is a comparative term, and does not mean the same thing, when speaking of trains, as in slower methods of locomotion. Thus the witness Elliott says at one place, "It was going along very slowly, not trying to make good time." However this may be, it was going forward faster than the horse was backing, for it had gone three or four car lengths, while the horse had backed from 15 to 40 feet. It is also suggested that there is not the "slightest evidence that the car steps caught in the wheel and dragged the buggy any distance, or that the wheel struck the steps, as urged in the complaint." No; the evidence is silent on these points. No one seems to have noted just what part of the car came in contact with the buggy, nor which way the wheel was dragged. The first point was probably considered of no consequence, and any evidence on the second was more than likely effaced in the crush and wreck of the offending wheel.

It is also repeated, in aid of the defendant's engineer, that after the collision the train was stopped very quickly; but I cannot see how that can help the defendant. The train had gone 10 or 15 feet beyond the point of contact, and stopping it quickly only tended to show that the engineer had his train under full control, and could readily have stopped in time to avoid the injury, if he had so desired. As to the plaintiff, the injury had been already done, and the train could have proceeded on its way north, and not added one whit to the plaintiff's grievance or his injury. It might be suggested in support of plaintiff's position, as a matter of common observation, that under all the conditions de-

scribed by this testimony a buggy could have backed up that incline at the rate described against a stationary object, and it would not have crushed a buggy wheel of ordinary strength 1 time out of 10, or even 100. The only other element present was the motion of the train, and the strong probability is that this motion either caused or greatly intensified the injury. It would seem almost to permit the application of the principle "*res ipsa loquitur*," and that neither evidence nor further argument is required. I agree with my Brethren that there cannot well be two opinions on the question, but the conclusion should be the other way.

CLARK, C. J., dissenting, concurs in what is so admirably said by Mr. Justice HOKE. Whether the proximate cause of the plaintiff's injury was his owning a "foolish" little horse, over which he lost control, and which backed the buggy and its occupant up a steep hill against the car, or whether it was the act of the defendant's servant in crushing into the buggy with the energies of steam and the weight of a heavy train of cars, which, notwithstanding, he had under perfect control, and with full knowledge that the plaintiff could not control his horse, was a matter of fact eminently for a jury to decide. If "only one inference could be drawn," it would be that the proximate cause was the vastly greater power of steam, which was under the control of the defendant's servant. In this collision between the backing horse and the moving train, not only was the impact of the latter the greater force, but there was negligence on the part of the defendant, and none on the part of the plaintiff. How much of the damage was due to the neglect and default of the defendant was a matter which only a jury can determine. If there had been no negligence by the defendant, the injury would have caused it no liability, but the defendant's negligence is clear. In *Craft v. Railroad*, 136 N. C. 49, 48 S. E. 519, the court holds that "on a motion for nonsuit the evidence of the plaintiff must be taken as true and construed in the light most favorable to him, and, if there is more than a scintilla of evidence tending to prove the plaintiff's contentions, the question must be left to the jury, who alone can pass upon the weight of the testimony and the credibility of witnesses." To the same purport are *Cox v. Railroad*, 123 N. C. 604, 31 S. E. 848; *Coley v. Railroad*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817; *Hopkins v. Railroad*, 131 N. C. 463, 42 S. E. 902, and *Butts v. Railway*, 133 N. C. 82, 45 S. E. 472. In *Purnell v. Railway*, 122 N. C. 832, 29 S. E. 953, the court holds that "a motion of nonsuit is substantially a demurrer to the plaintiff's evidence. * * * Every fact which the plaintiff's evidence proved or tended to prove must be taken by the court to be proved. It must be taken in the strongest light as against the defendant." The same view is taken in *Printing Co. v. Railroad*,

126 N. C. 516, 36 S. E. 33; *Gibbs v. Lyon*, 95 N. C. 146; *Springs v. Schenck*, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552. And in *Snider v. Newell*, 132 N. C. 614, 44 S. E. 354. Connor, J., speaking for the court, says: "The demurrer to the evidence admits the truth of the plaintiff's testimony, together with every reasonable inference to be drawn therefrom most favorable to the plaintiff. *Brittain v. Westhall*, 135 N. C. 492, 47 S. E. 616."

The theoretical proposition that the only inference which could reasonably be drawn was that the *causa causans* lay with the little horse, backing buggy and driver up hill, is met by the fact that two members of this court draw a different inference. There is no place to apply a theory, when the foundation fact, which would deprive the plaintiff of the sacred right of trial by jury, is lacking. Const. art. 1, § 19, declares that "the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." The guaranty of the right of trial by jury is traced back with pride to the words of *Magna Charta*, "*Legale iudicium parium suorum*." The disparity of power between John and his armed barons was not great, and, indeed, at Runnymede the latter were the stronger. If the right of trial by a jury of one's peers should have been guaranteed between the barons against the King, certainly it should be still more sacred when the controversy, as here, is between a citizen of humble means, more than 80 years of age, on the one hand, and on the other a powerful corporation, with its roads extending into many states, with (as we know from the official reports of both state and federal governments) nearly \$50,000,000 of annual receipts, more than \$16,000,000 of which are in excess of its operating expenses, and with influence extending to every sphere of activity, state and federal. If ever the right of trial by jury should be held sacred, it is between litigants of such disproportionate power. Constitutional guaranties, like that of trial by jury, are the necessities of the weak and humble. The great and powerful can get their dues (if not more) without such aid. Therefore such right should be always sacredly guarded and never dispensed with. If a judge can dispense with a jury trial because he thinks that upon the evidence the verdict ought not to be in favor of the plaintiff, then the judge, not the jury, tries the case and weighs the evidence, whether it is "reasonably sufficient" to justify a recovery. Why carefully forbid the judge to express an opinion "whether a fact is fully or sufficiently proved" (Code, § 413), if the judge can decide that the "evidence is not sufficient" to justify a verdict for the plaintiff and refuse to submit the cause to the jury.

The ancient landmark was that, if there is "any evidence beyond a scintilla," either party has a right to have the jury pass upon the evidence, leaving it to the judge, in the

interest of justice, to set aside the verdict, if palpably erroneous. *Jordan v. Lassiter*, 51 N. C. 133. This was fully debated and reiterated in *Wittkowsky v. Wasson*, 71 N. C. 451, where Bynum, J., with great foresight and to his lasting honor, in a dissenting opinion of great force, combated the "new and dangerous proposition," as he termed it, which was intimated by the majority opinion, that "any evidence" could be construed to mean such "as reasonably to satisfy the jury." As he clearly perceived and earnestly insisted, this would take the right of trial by jury out of the rank of a constitutional guaranty and make it discretionary with the judge. "Power is ever stealing from the many to the few." Here two out of five members of this court are of opinion that there was not only evidence, but, indeed, that the weight of the evidence was, in favor of the plaintiff. The counsel for the defendant railroad evidently thought that the jury would also find the facts against him, else he would not have been so anxious to prevent their being submitted to the jury. In the differing opinion of the members of this court as to what the evidence proves, the actual and real result is that the defendant is exonerated by the opinion of a bare majority of five men as to the weight of evidence, and the plaintiff does not receive the benefit of his constitutional right to have the weight of the evidence passed upon by a jury of twelve men "of the vicinage." Yet, in cases of any doubt, the citizen should always be granted the protection claimed.

(129 N. C. 608)

STATE v. HORNER.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. CRIMINAL LAW—VOLUNTARY CONFESSION.

In a prosecution for murder, statements of the prisoner as to the occurrences leading up to the shooting, which are voluntarily made while under arrest, without any inducements or threats, are properly admitted in evidence as showing a confession.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1146, 1167.]

2. SAME—ARGUMENT OF COUNSEL—ABUSIVE LANGUAGE.

In a prosecution for murder, reference by the prosecution to the prisoner as an "outlaw" in his argument to the jury was not prejudicial, where the evidence considered most favorable to the prisoner made him guilty of manslaughter.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3127.]

3. HOMICIDE—SELF-DEFENSE—RESISTING ARREST.

In a prosecution for the murder of an officer attempting an arrest, where the prisoner knew that deceased was an officer and had a warrant for his arrest, and was avoiding, if not resisting, arrest when he killed deceased, his plea of self-defense was not sustained, and the court properly instructed that he was at least guilty of manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 144.]

Appeal from Superior Court, Orange County; Ward, Judge.

James K. Horner was convicted of murder in the second degree, and he appeals. Affirmed.

R. B. Boone, S. M. Gattis, P. C. Graham, and J. W. Graham, for appellant. The Attorney General and Winston & Bryant, for the State.

CONNOR, J. Prisoner was charged with the murder of one Nichols, a deputy sheriff. Deceased was endeavoring to arrest prisoner, having in his hands a warrant for a misdemeanor. After a verdict of murder in the second degree, followed by a judgment, prisoner appeals, assigning a number of errors in his honor's ruling. It is not necessary to consider all of the exceptions, because, if there is no element of self-defense disclosed in the testimony, his honor correctly instructed the jury that they should find the prisoner guilty of manslaughter at least. There is no exception pointed to instruction in regard to murder in the second degree.

The first exception is directed to the admission of evidence tending to show a confession. The state introduced one G. C. Ray, who testified that he assisted in bringing prisoner to jail. He had been shot by those who arrested him. Did not seem to be suffering very much from the shot. After traveling two or three miles, prisoner began the conversation. Two men were with him in the wagon, three or four others following on horses and in buggy. He was tied, but had stated that tying did not hurt him. There was a bed in the wagon and he seemed to be comfortable. No inducements were offered him and no threats made. He did not seem to be excited. Dr. Jordan was called, who testified that he examined prisoner after he was arrested and found that his neck was peppered with small shot; seemed to be suffering some pain; was feeble from having been in the woods for some time without nourishment. He was complaining of dislocated shoulder. Witness set his shoulder and had food provided for him. After the arrest he was kindly treated, no indignities were offered him; seemed to be perfectly sound in mind; did not seem to be afraid when the guard started with him to jail. The court found that the statement was voluntary. Witness Ray was asked to state what he said. Prisoner objected, objection overruled, and prisoner excepted. Witness stated that prisoner asked when Nichols died and what part of his body he was shot. He said that Nichols acted too hastily in following him, and that he had acted too hastily in shooting him; that Nichols had lost his life, and he would now lose his. He said that he told Nichols that he was not going to be arrested by him; that Nichols said he would arrest him; that he told Nichols that if he followed him he would

shoot him; that Nichols did follow him; and that when he got within five or six feet of him he turned and shot. Witness asked him who shot first, and he said that some of them told him that Nichols shot at him first with a pistol. The exception cannot be sustained. This court has uniformly refused to permit confessions, obtained by threats made, or inducements held out, to persons under arrest, or surrounded with a number of pursuers or otherwise so situated as to render it doubtful whether they were freely and voluntarily made, to be used against a person charged with crime. We have no disposition to depart from or weaken the salutary and humane principle upon which the decisions are based. We fully approve the language of Mr. Justice Reade in *State v. Dildy*, 72 N. C. 325, in regard to the admissibility of confessions. We think, however, that the confession made in this case comes directly within the exception "when he voluntarily opens the door and invites us in." The testimony of Ray and Dr. Jordan brings the case clearly within the decisions of this court in *State v. Whitfield*, 109 N. C. 876, 13 S. E. 726; *State v. Daniels*, 134 N. C. 641, 46 S. E. 743; *State v. Exum*, 138 N. C. 599, 50 S. E. 283.

The next exception is directed to the language used by the counsel for the state referring to the prisoner as an "outlaw." It appears that counsel, assisting the solicitor in his opening speech, argued that from the evidence prisoner was an outlaw, to which no objection was made. Counsel for prisoner replied vigorously to the language used by counsel for state. The solicitor in his closing argument referred to the criticism of the counsel for prisoner, and argued that upon the evidence prisoner was an outlaw. Prisoner's counsel objected and asked the court to hold that such language was improper. His honor did not respond to this request. The solicitor then stated that, as he understood it, an outlaw was a man who put himself beyond and outside the reach of the law, that prisoner admitted that he had been indicted in the state and federal courts, and that when the officer came to arrest him, he would not go with him, etc., and he submitted to the jury that from these facts the imputation that he was an outlaw was not an unjust one, but was warranted from all the facts and circumstances of the case. To these remarks prisoner excepted. As has been frequently said by the court in passing upon exceptions to language used by counsel, it is difficult to define the line between that which rests in the sound discretion of the presiding judge and that which as a matter of law is subject to revision upon exception and appeal. The exception was duly and in apt time taken, and the question is fairly presented whether the language of the solicitor falls within the prohibited domain of debate as being prejudicial to the prisoner. Reade, J., in *Jenkins v. Ore Dress-*

ing Co., 35 N. C. 563, says: "It is difficult to lay down the line further than to say that it must ordinarily be left to the discretion of the judge who tries the cause; and this court will not review his discretion unless it is apparent that the impropriety of counsel was gross, and well calculated to prejudice the jury." It is settled by this court that unless exception is taken, either at the time the language is used or by request to the court to instruct the jury that they must disregard the objectionable language, it cannot be assigned as error. The cases are collected and discussed in *State v. Tyson*, 133 N. C. 692, 45 S. E. 838.

The solicitor did not apply the term "outlaw" to the prisoner in the sense in which it is used in the statute, as one who was to be dealt with otherwise than by the procedure provided for the trial of those charged with crime. It is not very clear in what way or for what purpose the term was used or intended to impress the jury. The fact that he was being tried according to the forms of law excluded the idea that it was contemplated that the jury should convict otherwise than as they were sworn and charged according to the law and the evidence. It would seem that counsel were indulging in that kind of license which poets claim and are permitted to indulge in. We cannot think that the jury, in the light of the charge of the court, supposed that they were trying the question submitted to them by the solicitor, whether upon the evidence the argument that he was an outlaw was justified. There is a difference between arguments addressed to the jury which are either illogical or irrelevant and the use of abusive and degrading epithets or characterization of parties or witnesses. The former may be disposed of in reply or either of its own motion or upon request by the court. They are usually disposed of by the common sense and intelligence of the jury. Abusive epithets or denunciatory characterizations, unless counteracted, are calculated to prejudice the minds of jurors, arouse their passions, and unsettle their judgments. It is a matter of common observation that a charge made against a man without foundation will make but little and only temporary lodgement in the mind of others, whereas an odious or degrading name or term of reproach once attaching to a person will follow and degrade him for years. No one was contending in this case nor was it material to the guilt of the defendant to maintain the proposition that the deputy sheriff would have been justified upon the testimony in shooting the prisoner. The question whether he had placed himself beyond or outside the protection of the law was not involved in the issue. It was, rather, whether, assuming that the officer unlawfully shot at him, the prisoner's attitude and conduct was such that he could, even in self-defense, take the life of the officer. In many cases the atti-

tude of both parties precludes a successful defense when charged with felonious homicide. While it would have been eminently proper for the judge in his charge to have said to the jury that they should discard from their minds all that was said in regard to the prisoner being an outlaw, and doubtless he would have done so, it is manifest that, in his opinion, that and very much more of the argument became irrelevant because of the instruction which he gave in regard to the law of the case. While we do not commend the use of any term of reproach in regard to a witness, and certainly not to a defendant on trial, we cannot say that the breach of privilege is gross or manifestly prejudicial. The prosecuting officer is in a sense, and in a very important sense, a judicial officer and aids the court and jury in the administration of the criminal law. He should use a sound judicial discretion, both in respect to the evidence he will offer and the arguments he will use, to aid the jury in arriving at a correct verdict. Representing the people of the state, he wishes no verdict against the citizen unless it is the result of truthful, competent testimony, considered in the light of fair, legitimate argument. We are sure such is the rule by which the prosecuting offices of the state are guarded. While we do not think that upon principle and decided cases the language used and the course pursued would entitle the prisoner to a new trial, it is manifest that, in the light of the instruction given the jury, no harm in this respect was done the prisoner.

His honor instructed the jury that the testimony, considered in the light most favorable to prisoner, made him guilty of manslaughter at least. The exception to this instruction is based upon the contention that in certain aspects of the testimony, if believed by the jury, the homicide was *se defendendo*. For the purpose of passing upon this exception, the testimony of prisoner in his own behalf, together with other testimony from which the most favorable inferences could be drawn, should alone be considered. The state introduced A. W. Brees, a deputy sheriff, who testified: That deceased had a warrant for prisoner charging him with a misdemeanor. That witness went with deceased to make the arrest; drove into the yard; no one in house; saw prisoner's wife and sister in the yard. Deceased searched the house; did not find prisoner; started towards the house of prisoner's son, when deceased said: "Yonder is Knapp now." He was squatted down behind a tree with a gun in his lap. Deceased said he would go and talk with him. Just as he got to him deceased said: "If you will meet me at Squire Terry's tomorrow at 2 or 3 o'clock, I will summon witnesses and go back home." Prisoner said: "I will go with you nowhere—no such trash as you are, and, if you follow me, I will shoot you."

Deceased called to witness to come on. Prisoner walked further back into the woods. Witness got out of buggy and fastened mule. "Just as I got last trace undone, heard both shots fired at same time. I started in a run and met Nichols about ten steps on side next to road." Witness described condition of deceased, his language in regard to the extent of his wounds, that he was bound to die, etc., and, further, that he said: "Defendant, Horner, shot first, and he shot next; that Horner ran after he shot; that they were not five steps apart. He said he did not try to hit defendant, and that defendant just flung his gun around and shot." He further testified in regard to seeing the warrant and finding pistol in pocket of deceased, one chamber empty, etc. It was in evidence that defendant had gone to prisoner's house with warrant before, but had not arrested him. Prisoner testified: "I was in the woods; dog had treed a squirrel. Nichols and Breez came on down the road. Nichols called to me and I answered. He said come on and go with me; had a warrant; he read it. I said I am not going to do it; he said if I would promise to be at Squire Terry's tomorrow at three o'clock I will go. I refused. He came on me and said to me (with an oath), if you do not go with me, I am going to shoot you. Then I picked up gun and walked off; he shot at me; I ran about fifty yards; he shot again and I threw gun around and shot. I was going away from him; was out there for a squirrel. I ran against a tree when he was after me; knew that deceased was a deputy sheriff." Witness also testified: That deceased came to his house that morning with the warrant, and that he (prisoner) said that he had done nothing; wanted to see the prosecutrix who had sworn out the warrant and fix it up. That he went into the house to get his shoes and came back; deceased drew his gun on him and cursed him, saying that he was going to kill him. Prisoner had no gun when he came out of the house; deceased had a gun. There was other testimony in regard to the conduct and language of the parties at the prisoner's house in the morning, also by witnesses who heard the two shots in the woods.

Taking the testimony of the prisoner to be true, and we find nothing in the other testimony more favorable to him, we concur with his honor that the plea of self-defense cannot be sustained. He admits the homicide with a deadly weapon, thereby taking upon himself the burden of showing that he was acting in self-defense. The deceased was acting strictly in the line of his duty in endeavoring to make the arrest, and the prisoner was, upon his own showing, avoiding, if not resisting, arrest. The principle governing the case is thus stated by Pearson, C. J., in *State v. Garrett*, 60 N. C. 145, 84

Am. Dec. 359: "When a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and set up the excuse of self-defense." The application of this principle to prisoner's testimony sustains his honor in saying to the jury that he was guilty of manslaughter at the least. 21 Am. & Eng. Enc. 122; *Tolbert v. State*, 71 Miss. 179, 14 South. 462, 42 Am. St. Rep. 454; *State v. Shaw*, 73 Vt. 149, 50 Atl. 863. *State v. Alford*, 80 N. C. 445. The prisoner knew that deceased was a deputy sheriff and that he had the warrant for his arrest. It was his duty to submit to arrest, and in resisting it, with a gun in his hand, it is not open to him to say that he acted in self-defense. Conceding that as he was going away from the officer, refusing to submit to arrest, the officer was not justified in shooting him to make the arrest, does not affect his right to kill. If there was a necessity to shoot the deceased to save his life, it was the result of his unlawful act in resisting the mandate of the law. The position of the prisoner is similar in this respect to one who brings on or provokes a difficulty and in the progress of it kills. It is not *se defendendo*, because he brought on the necessity. This is elementary and uniformly sustained by numerous cases in our own and other jurisdictions. The learned counsel for the prisoner calls to our attention many authorities, discussing and defining the power and right of the officer in making arrests. We concur with his views upon that question, but, as we have said and his honor held, that is not the test of the prisoner's guilt. It may be that the prisoner was right in saying that both acted hastily, but he was in the wrong in refusing to submit to arrest, and the law fixes the responsibility for the homicide upon him. If the killing is of malice, it is murder; if premeditated, it is murder in the first degree. In no aspect is it in self-defense.

This view renders it unnecessary to consider the numerous exceptions to the refusal of his honor to give special instructions, many of which were correct propositions of law, but not applicable to the testimony. His honor correctly instructed the jury in respect to the difference between manslaughter and murder and the different degrees of murder. We have examined the record with the care which the result of our conclusion demands. His case was argued by counsel by a wealth of learning and ability. He chose to resist arrest for a misdemeanor, and brought upon himself the awful crime of which, upon his own testimony, he stands properly convicted. It must be certified that there is no error.

No error.

(139 N. C. 442)

LANE v. ROWAN COUNTY COM'RS.

(Supreme Court of North Carolina. Nov. 7, 1905.)

LICENSES — OCCUPATION TAX — EMIGRATION AGENTS.

An officer of a foreign corporation, who comes into the state to procure laborers to work under himself in another state on work which he superintends and manages for the corporation, and who receives no consideration or compensation for carrying the laborers out of the state, and the laborers procured by whom are not employed in any other business or under the management of any other person than himself, is not engaged in the business of an emigrant agent, within the statute exacting a license tax from persons engaged in such business.

Appeal from Superior Court, Rowan County; Peebles, Judge.

Action by C. W. Lane against the commissioners of Rowan county. From a judgment for plaintiff, defendants appeal. Affirmed.

Civil action begun in justice's court, and upon appeal heard in the superior court on an agreed statement of facts. The plaintiff is, and was at the times hereinafter mentioned, a resident of the state of Virginia. He is, and was at said times, one of the four stockholders, and a director, and the secretary of Lane Bros. Company, a corporation doing railroad construction work in the states of Virginia and West Virginia. The work of the company at —, W. Va., is, and was at said times, under the immediate control and management of the plaintiff. He alone hired employees to labor for the company at —, W. Va., and he alone had authority to discharge them. The three other members of the company severally had entire charge of the construction work in three different places in said states. On July 18, 1905, the plaintiff was in Rowan county, N. C., and then and there procured laborers for employment for Lane Bros. Company to work under himself at —, W. Va., on certain railroad construction which he superintended and managed for the company. None of the laborers were used or employed in any other business, or under the management of any person other than the plaintiff. The plaintiff came to Rowan county for this purpose. They were not carried to West Virginia for any other purpose. The plaintiff received no consideration or compensation for carrying the laborers out of the state from any person or corporation. He received, as such manager and secretary, a regular salary from Lane Bros. Company, and the company paid the transportation of the laborers to West Virginia. He has not solicited laborers to leave this state to be employed in any business, and under no management, except as above. At the time he paid the emigration license tax, as hereinafter set forth, it was not his purpose to carry laborers from North Carolina, except to be used as above and under his personal direction. The plaintiff is not an emigrant agent, unless the above facts con-

stitute him such. Before taking the laborers away, the sheriff of Rowan county required him to pay an emigration license tax of \$200. The tax was paid under written protest, and to avoid being detained and interrupted in his business; the plaintiff contending that the collection thereof was illegal, invalid, and unauthorized, and that the tax impairs the privileges and immunities of the citizens of one state in another state. Within 30 days after paying the \$200 license tax, he demanded in writing of the proper state and county officers that the amount be refunded to him, in accordance with section 30, c. 558, Pub. Acts 1901, and the officers refused to refund it or any part thereof. Judgment for plaintiff. Appeal by defendant.

T. C. Linn, for appellants. Overman & Gregory, for appellee.

CONNOR, J. (after stating the case). The defendants contend that the facts set forth bring the case within the decision in *State v. Roberson*, 136 N. C. 587, 48 S. E. 595. It will be noted that the jury in that case found by a special verdict that the defendant "did engage in the business of procuring laborers for employment out of the state, to wit, for one R. H. Jones, in the state of Georgia, without having paid," etc. This finding brought the defendant clearly within the language and spirit of the statute. This case in our opinion, comes within the principle of *Carr v. Commissioners*, 136 N. C. 125, 48 S. E. 597; the only difference between the two cases being that in one the plaintiff hired hands for himself, while in the other he hired for a corporation of which he was director and manager in respect to the work for which the hands were employed. In neither case can it be said the plaintiff was "engaged in the business of hiring hands," etc. We cannot perceive any distinction between the cases, because of this difference. As we said in both cases (following *Moore's Case*, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472, and *Hunt's Case*, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758), the statute is a revenue measure, imposing a tax upon the business of hiring hands, etc. Its validity can be sustained only upon this view. We do not intend to hold that a corporation, engaged in business in another state, may employ an agent to come into this state and "engage in the business" of hiring hands without being amenable to the tax. We simply hold that an officer of a foreign corporation, coming here under the circumstances set forth in this record and hiring hands for employment by himself as the officer of the corporation, is not "engaged in the business," etc. It may be difficult to draw the line in advance, so as to make the demarcation clear. We can only decide each case as it comes to us, keeping in view the general principle announced in *Moore's Case* and in *Hunt's Case*, supra.

We concur with his honor. The judgment must be affirmed.

(1st N. C. 1)

WRIGHT v. COTTEN.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. TRIAL—SUBMISSION OF ISSUES—FORM.

In the submission of issues it is only requisite that the court submit issues in such form as, when decided either way, they may be the basis for its judgment.

2. BANKRUPTCY—ACTION BY TRUSTEE—SUFFICIENCY OF ISSUES.

In a suit by a trustee in bankruptcy to recover a sum which it was alleged the bankrupt, when insolvent and within four months of the filing of the petition, had paid to another, who had knowledge of the insolvency, there being an intention to give an unlawful preference, the court submitted as issues whether the payment was with intent on the part of the bankrupt to delay or defraud creditors, whether defendant received or purchased in good faith for a present fair consideration, whether the bankrupt while insolvent and within four months before the filing of the petition paid such sum, and whether the one receiving the payment had reasonable cause to believe that the bankrupt intended by such payment to make a preference over other creditors, and the sum plaintiff was entitled to recover. *Held*, that the issues submitted were fully sufficient to develop the whole case.

3. SAME—PREFERENCE—FRAUD AS ELEMENT.

The bankrupt act (Act Cong. July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) defines a preference to consist in the payment by a debtor to one creditor of a greater percentage of his debt than he is able to pay to all other creditors of the same class, and denounces the penalty imposed on the giving of a preference to be that, if such preference has been made and the person receiving it or his agent acting in the matter for him had reasonable cause to believe that a preference was intended, the same is voidable and made recoverable by the trustee. *Held*, that the making of the preference and incurring its penalty are independent of any actual fraud.

4. SAME—TRANSFER OF PROPERTY—PAYMENT OF MONEY.

A payment of money is a "transfer" of property within the bankrupt act.

5. SAME—CREDITOR'S KNOWLEDGE OF PREFERENCE—BELIEF IN INSOLVENCY.

A creditor must have reasonable cause to believe that his debtor is insolvent in fact as a foundation for reasonable cause to believe that an unlawful preference in favor of such creditor is intended within the bankrupt act.

6. SAME—KNOWLEDGE OF AGENT—AGENT'S INSOLVENCY.

The knowledge of a son, who acted as the general financial agent of his father, that the bankrupt was insolvent, was the knowledge of the father in receiving an alleged fraudulent preference.

Appeal from Superior Court, Stanly County; Bryan, Judge.

Action by J. C. Wright, trustee, against J. F. Cotten. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The following issues were submitted: "(1) Was the payment by the bankrupt, C. L. Cotten, of \$3,000 to his father, John F. Cotten, made with the intent and purpose on the part of C. L. Hinton to hinder, delay, or defraud his creditors, or any of them? A. Yes. (2) Did John F. Cotten, the defendant, receive or purchase in good faith the \$3,000 for a present fair consideration? A. No.

(3) Did C. L. Cotten, bankrupt, while insolvent and within four months before the filing of the petition in bankruptcy against him, pay to his father, John F. Cotten, or his agent acting in the matter for him, \$3,000? A. Yes. (4) If so, did the person receiving the payment, or the defendant, Cotten, or his agent acting in the matter for him, have reasonable cause to believe that the bankrupt, C. L. Cotten, intended by said payment to prefer his father over other creditors, as alleged in the complaint? A. Yes. (5) What sum, if any, is the plaintiff entitled to recover of the defendant? A. \$3,000 with interest." From the judgment rendered the defendant appealed.

Theo. F. Klutts and J. R. Price, for appellant. John N. Wilson and King & Kimball, for appellee.

BROWN, J. The plaintiff sues to recover \$3,000, which he alleges that C. L. Cotten, a bankrupt, at the time insolvent, and within four months of the filing of the petition in bankruptcy against him, paid to John F. Cotten, his father, in money, and that at the time John F. Cotten had knowledge that C. L. Cotten was insolvent, and intended thereby to give him an unlawful preference, and that his purpose in making said payment was to hinder, delay, and defraud his creditors. The defendant, administrator of John F. Cotten, denied the several material allegations of the complaint, but admitted that the \$3,000 was paid to John F. Cotten by C. L. Cotten in payment of a debt, and within the four months as alleged. The evidence discloses the following uncontradicted facts: On March 27, 1901, the bankrupt's store at Albemarle was destroyed by fire. His goods were insured in the sum of \$8,000—\$2,000 in the North Carolina Home, \$4,000 in the Traders' Insurance Company, and \$2,000 in the Virginia State. On February 21, 1902, he compromised the policy in the North Carolina Home for \$1,000 cash. On February 13th, previous, his attorney compromised the \$4,000 Traders' policy and received \$2,500. The attorney retained \$500 for services and paid the bankrupt \$2,000, which money or check for the same he deposited in the Cabarrus Savings Bank of Albemarle on February 19, 1902, to the credit of John F. Cotten and in his name. The cash the bankrupt received from the North Carolina Home he deposited in the Davis-Wiley Bank, Salisbury, on February 22, 1902, in the name of and to the credit of John F. Cotten. On April 7th an involuntary petition in bankruptcy was filed, and on April 25th he was adjudged a bankrupt and the plaintiff elected trustee in bankruptcy. There are several exceptions appearing in the record, which we have carefully examined, but deem it unnecessary to notice, except to say that they are without merit.

The only exceptions we desire to notice

more at length are those relating to the issues and the burden of proof. We think the issues submitted are more than sufficient to develop the whole case and give plaintiff and defendant full scope to present to the jury evidence upon every issue raised by the pleadings. Issues arise upon the pleadings, and not upon evidential facts. All that is requisite is that the court shall submit issues in such form as when, decided either way, they may be the basis for its judgment. *Cumming v. Barber*, 99 N. C. 332, 5 S. E. 903. In his very able argument, as well as in his brief, Mr. Kluttz, counsel for defendant, laid almost entire stress upon the alleged errors of the trial judge in charging upon the burden of proof in respect to the first and fourth issues. In the view we take of this case it is unnecessary to consider the charge in detail in reference to the three issues. The bankrupt act (Act Cong. July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) defines a preference (a) to consist in the payment by a debtor to one creditor of a greater percentage of his debt than he is able to pay to all other creditors of the same class; and (b) the same section denounces the penalty imposed on the giving of a preference to be that if such preference has been made, and the person receiving it or his agent acting in the matter for him had reasonable cause to believe that a preference was intended, then the same is voidable and made recoverable by the trustee. From the reading of this section it is clear that the making of the preference and incurring its penalty are wholly independent of any idea of fraud whatever, the statutes simply saying in plain terms what a preference is, and in terms equally plain the penalty of it.

A payment of money is a transfer of property under the definition of the word "transfer" as used in the sections of the bankrupt act. *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 908, 45 L. Ed. 1171; *In re Fixen*, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605; *Sherman v. Luckhart* (Mo. App.) 70 S. W. 388. To make a transfer voidable within the provisions of the act, it is necessary to establish four facts: (1) The insolvency of the transferor; (2) the obtaining by the creditor of a larger percentage of his debt than any other creditor of the same class; (3) the giving of a preference within four months before the filing of a petition in bankruptcy; (4) reasonable cause upon the part of the creditor to believe that a preference was intended. *Sebring v. Wellington*, 63 App. Div. 493, 71 N. Y. Supp. 788. We think his honor should have instructed the jury, upon the entire evidence and in any reasonable view of it, if found to be true, that the plaintiff is entitled to recover the \$3,000, and that they should answer the issues as the jury did answer them. The jury, having found all the issues in favor of the plaintiff, thereby declared that they found

the facts to be as testified to by the witnesses, inasmuch as the defendant offered nothing in contradiction. The uncontradicted evidence establishes each of the four essential facts necessary to a recovery, and we do not see that any other inferences can be reasonably drawn from it. The insolvency of the bankrupt at the time he made the alleged payment is an irresistible conclusion from the evidence. His indebtedness amounted to from \$12,000, to \$16,000, and his assets, "exclusive of property transferred or conveyed in fraud of creditors," amounted to \$18,000. Hence it follows that the admitted payment of the \$3,000 within the four months was a much larger percentage of John F. Cotten's debt than could be paid any other creditor of the same class.

This brings us to consider the fourth essential fact. We admit, as broadly as the defendant contends for, that the creditor must have reasonable cause to believe the debtor insolvent in fact as a foundation for reasonable cause to believe that an unlawful preference was intended. *In re Eggert*, 98 Fed. 843, 3 Am. Bankr. Rep. 541; *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971. We think the uncontradicted and unexplained evidence establishes that at the time of and before the preferential payment C. L. Cotten, the bankrupt, was the general confidential financial agent of his father, John F. Cotten, and that he practically made such payment to himself as his father's agent. The testimony of several witnesses tends to prove conclusively that for some time prior to his failure C. L. Cotten had charge of all the business of John F. Cotten in Albemarle, that he was his financial agent there, that people generally transacted business with C. L. Cotten for John F. Cotten, and that he collected and paid out money for his father. The evidence shows that C. L. Cotten had control of the bank account of John F. Cotten from 1900 till the latter's death, that he drew checks against it, and signed them "John F. Cotten, by C. L. Cotten," and that such checks were paid by the bank. The officers of the bank recognized him and did business with him for several years, and at the time when the payment was made, as the generally accredited financial agent of John F. Cotten. In fact, C. L. Cotten drew on this very insurance money, deposited to his father's credit by such checks, and they were always honored. A review of the entire evidence tending to prove the agency is unnecessary and would be tedious. Suffice it to say, it establishes the agency most conclusively, and there is nothing to contradict it. The only witness offered by the defendant was the daughter of John F. Cotten, whose evidence tended to contradict nothing and to prove no material fact, except that John F. Cotten learned speedily of the fire which destroyed his son's property. It being established that C. L. Cotten at the time of the payment was his father's general finan-

cial agent and that he practically paid himself for his father, it follows that his personal knowledge of his own utter insolvency is imputable to his principal, and that the father is affected by all knowledge possessed by the son, his agent.

It is not necessary for the plaintiff to show a fraudulent intent upon the part of John F. Cotten or that John F. Cotten did not give a present fair consideration for the \$3,000. Therefore the first and second issues were unnecessary, although found for the plaintiff. The two vital issues are the third and fourth. If the effect of this transaction is to give John F. Cotten a greater percentage of his debt than others of the same class get, it is voidable, and the money may be recovered, provided John F. Cotten had reasonable cause to believe that it was intended as a preference. *Crooks v. Bank*, (Sup.) 61 N. Y. Supp. 604, 8 Am. Bankr. Rep. 243; *Blakey v. Bank*, 95 Fed. 267, 2 Am. Bankr. Rep. 459. There is no evidence that John F. Cotten personally knew of or participated in this transaction. His son, who acted in the dual relation of debtor and general financial agent, did all that was done. In his capacity as financial agent he received the money for his father from himself as debtor, and as agent checked on it and paid it out. This agent debtor, C. L. Cotten, evidently knew he was hopelessly insolvent, and he therefore hurried to compromise his insurance policy and deposited the proceeds to his father's credit, and thereby gave him an unlawful preference over the other creditors. No other inference can be reasonably drawn from the uncontradicted evidence. It is an old and well-established rule that the principal is bound by any notice acquired by his agent during the course of the agency. It is a familiar maxim of the law that "notice to the agent is notice to the principal." *Reinhard on Agency*, § 354. This rule of constructive notice to the principal is based upon the identity of principal and agent, and upon the theory that the agent has discharged his duty by giving information to his principal. Therefore it is held that where the agent had reasonable cause at the time to believe the debtor insolvent, and knew that the transaction was in fraud of the bankrupt law, it is the same as if the creditor had himself taken part therein, with the same cause to believe and the same knowledge. *Sage v. Wyncoop*, 21 Fed. Cas. 147; *Id.*, 104 U. S. 819, 26 L. Ed. 740; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Collier on Bankruptcy*, 425. The authorities are uniform and abundant that any knowledge possessed by the agent of the creditor may be imputed to the latter.

We thus see that every essential element of proof necessary to a recovery is disclosed by the uncontradicted evidence. No counter-proof was offered, and no explanation, and as but one inference can reasonably be

drawn from all the evidence the court would have been justified in instructing the jury that in any view of the evidence, if the jury found it to be true, the plaintiff is entitled to recover the \$3,000.

Affirmed.

(129 N. C. 533)

SHEPPARD v. NEWTON.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. FRAUDS, STATUTE OF—COLLATERAL PROMISES—LIABILITY OF THIRD PERSON.

In order to bring a promise within Code, § 1552; requiring a special promise to answer the debt, default, or miscarriage of another to be in writing, it must be shown that the debt is that of a third person, who continues liable for the same; and if the debt is an original obligation of the promisor, or if the creditor, in accepting his promise and in consideration thereof, has released the original debtor, the statute is without application.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Frauds, Statute of, § 18.]

2. SAME—QUESTIONS FOR JURY.

In an action for rent, whether defendant was liable for the rent as the original or present debtor, so as to take his promise to pay the same out of Code, § 1552, requiring promises to answer for the debt of another to be in writing, *held*, under the evidence, a question for the jury.

Appeal from Superior Court, Forsyth County; Bryan, Judge.

Action by B. J. Sheppard against Jerry Newton. From a judgment of dismissal, plaintiff appeals. Reversed.

Civil action to recover \$81, alleged to be due for the rent of a house, tried on appeal from a justice of the peace. The defendant denied any and all liability on the issue as to indebtedness. Both sides offered testimony as follows: The plaintiff testified: "I claim \$81 and interest from the defendant as house rent. The defendant had rented the house for two or three years. The house was rented at first to Rufe Ogburn. He occupied it over a year, and then exchanged houses with the defendant, Newton, and Newton and his father's family went into the house. Ogburn and Newton exchanged houses in 1898. I never rented the house to the defendant's father. The defendant paid me \$200 or \$300 on account of rent, and no one else ever paid any rent. The house rented for \$9 per month. The defendant paid the rent. His last payment was December 4, 1901, and that was paid after the defendant gave up the house—two months after. Sometimes the defendant would pay in cash, and sometimes through Lipfert, Scales & Co. The defendant worked with them. I rented the house to Rufe Ogburn; never rented it to any one else, except through Ogburn. I never rented it to the defendant, except through an agent. The father and mother of the defendant lived there in the house, I suppose. I collected rent from the defendant, and he said

he would be responsible for it. There is still a balance of \$81 due from the defendant for rent." Frank Lipfert, for plaintiff, testified: "The defendant worked for me. I paid the plaintiff money for the defendant several times, and charged it to the defendant's account." Rufus Ogburn, for the defendant, testified: "I rented the house 12 months, and exchanged it with Mrs. Newton, and she went in there. I received the rent from Mrs. Newton. Jerry Newton lived there until he was married there. I never said a word to him about it." The defendant, as witness for himself, testified: "I never rented from Sheppard or promised to pay him anything; don't know who rented the house. I paid Sheppard for my mother. I boarded with her. I boarded there some time. I don't know that I paid the rent after I left there. I think I paid some after I quit boarding there. After I left there I paid, I think, what was paid. I don't know who rented the house from Sheppard, nor how much it rented for. I never promised to pay the rent. Sheppard kept writing to me about it so sharp I just concluded that I would not have any more to do with it." The plaintiff then testified as follows: "I would get after Newton and urge him to pay me this balance of \$81, and he would tell me he would pay it as soon as convenient. On one occasion he promised to pay me, but said he was then building a house and was hard up for funds." On motions made in apt time by the defendant, there was judgment dismissing the action as on nonsuit, and the plaintiff excepted and appealed.

Lindsay Patterson, for appellant.

HOKE, J. (after stating the case). His honor below directed a nonsuit, holding that on the foregoing testimony recovery by the plaintiff was prevented by the statute of frauds (Code, § 1552), which provides, among other things, that no action shall be brought to charge any defendant upon a special promise to answer the debt, default, or miscarriage of another person, unless the agreement shall be in writing. When a defendant has made a contract or promise of this character, otherwise binding, and seeks protection under the provisions of this statute, it must be shown that the debt is that

of a third person, and that such person continues liable for the same. If the debt claimed is an original obligation of the defendant, or if the creditor, in accepting the obligation or promise of the defendant, and in consideration therefor, has released a third person who was the original debtor, the statute has no application. This instance of the doctrine is well expressed by Butler, J., in *Packer v. Benton*, 35 Conn. 350, 95 Am. Dec. 248, where the promise to which this feature of the statute applies is thus defined: "An undertaking by a person not before liable, for the purpose of securing or performing the same duty, for which the party for whom the undertaking is made continues liable." A statement on the same subject, somewhat more extended and very satisfactory, will be found in *Clark on Contracts*, p. 67, as follows: "There must either be a present or prospective liability of a third person, for which the promisor agrees to answer. If the promisor becomes himself primarily, and not collaterally, liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person. If, for instance, two persons come into a store, and one buys, and the other, to gain him credit, promises the seller, 'If he does not pay you, I will,' this is a collateral undertaking, and must be in writing; but if he says, 'Let him have the goods, and I will pay,' or 'I will see you paid,' and credit is given to him alone, he is himself the buyer, and the undertaking is original. In other words, whether the promise in such a case is within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original; but it is collateral if any credit was given to the other party." To like effect are the decisions of our own court. *Whitehurst v. Hyman*, 90 N. C. 487; *White v. Tripp*, 125 N. C. 523, 34 S. E. 686.

Applying these principles to the foregoing statement of the evidence, the court is of opinion that there was error in directing a nonsuit, and the plaintiff is entitled to have his cause submitted to the jury on the question whether the defendant is not answerable as the original or present debtor on the plaintiff's demand.

New trial.

(124 Ga. 300)

**ARMOUR PACKING CO. v. CLARK,
Sheriff, et al.**

(Supreme Court of Georgia. Nov. 20, 1905.)

TAXATION—PROPERTY SUBJECT.

A New Jersey corporation, with its principal office in Missouri, had also a place of business in Richmond county, Ga., in charge of an agent of limited authority. The goods used in the business were shipped to Augusta from the Missouri headquarters, and were then sold, either in broken or unbroken packages. Some of the sales were on credit, and to parties living both in Georgia and South Carolina; the notes taken in the course of the business being forwarded to the principal office, and paid either there or through the Augusta agency; and when the notes and accounts were collected in Augusta the amounts realized were sent immediately to the principal office. *Held*, that these notes and accounts were subject to state and county taxation in Richmond county.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by the Armour Packing Company against J. W. Clark, sheriff, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Felder & Rountree and C. D. Dunbar, for plaintiff in error. Lamar & Callaway and O. R. Eve, for defendants in error.

CANDLER, J. The Armour Packing Company is a New Jersey corporation, having its principal office and place of business in Kansas City, Mo. It also has a place of business in Augusta, Ga., in charge of an agent, who, it is alleged, is clothed with no discretion whatever, "has no right to purchase property to be used in said business, or to exercise a general management of the same, * * * but is simply an employé of [the packing company], and acts in all matters pursuant to instructions received from" it. The products of the packing house are shipped to the Augusta agency in bulk, and are stored in bulk until they are sold. They are then shipped from Augusta, either in original packages or after the packages have been broken. A considerable portion of the business done by the Augusta agency is upon orders from South Carolina, and many of these orders are filled by the shipment of original packages which have not been broken since their shipment from the packing house. In the conduct of its business from its Augusta agency both cash and credit sales are made. When notes are taken, they are listed and forwarded to the principal office; payments being made either directly or through the Augusta office. When cash sales are made, the amounts realized are remitted promptly to the principal office in Kansas City; and when the sales are on credit the sums realized from collections are also immediately sent forward to the principal office. The question for our decision is whether the notes and accounts representing these credit transactions are liable for state and county taxation in Richmond county.

We do not hesitate to decide this question in the affirmative. The cases of *Armour Packing Co. v. Savannah*, 115 Ga. 140, 41 S. E. 237, and *Armour Packing Co. v. Augusta*, 118 Ga. 552, 45 S. E. 424, 98 Am. St. Rep. 128, decide squarely the question here presented, with reference to the right of a municipal corporation to tax notes and accounts such as are involved in the present case. It will not be contended that the power of a city to levy taxes is greater than that of the state which created it; so that the only question left to decide is whether, as a matter of fact, the state has exercised its power in this respect and made this class of property subject to state and county taxation. Pol. Code, § 767, declares that "all real and personal estate, whether owned by individuals or corporations, resident or nonresident, is liable to taxation." Section 769 declares specifically that all the property of nonresidents, whether real or personal, must bear its burden of taxation, not greater than that imposed on the property of residents of the state. Section 776 provides that "bonds, notes, or other obligations for money" of nonresidents, whether individuals or corporations, "are the subjects of return and taxation in this state." In the face of these plain provisions of the Code, it is difficult to see how it can seriously be contended that there has been no effort in this state to subject this class of property to taxation.

But it is contended by counsel for the plaintiff in error that the *Savannah* and *Augusta* Cases to which reference has been made are in conflict with the earlier cases of *Collins v. Miller*, 43 Ga. 336; *Cary v. Edmondson*, 44 Ga. 651, and *City Council of Augusta v. Dunbar*, 50 Ga. 387, and for that reason should not now be followed. In *Armour Packing Co. v. Augusta*, 118 Ga. 553, 45 S. E. 424, 98 Am. St. Rep. 128, those very cases were considered and discussed, and the court, speaking through Mr. Justice Cobb, said: "These cases have little bearing on the question now in hand. It is conceded, of course, that tangible personal property is taxable wherever it is situated, and that for purposes of taxation the maxim that personal property follows the owner does not apply. It is claimed, however, that it does apply in all cases to intangible personal property, such as notes, bonds, accounts, etc. We do not agree that this is a universal rule, even as applied to that class of property, and we are not, as was suggested by the able counsel for the plaintiff in error, alone in this opinion. * * * The ground upon which we rest our decision in this case is that when a nonresident goes into another state for the purpose of doing business, and employs an agent there to transact his business, receive money due him, contract debts for him, purchase property to be used in the business, and exercise a general management of such business, he cannot escape the burden of taxation, which his property of every descrip-

tion situated in this state ought to bear, by invoking the fiction that intangible property has its situs where the owner resides."

We do not lose sight of the fact that, according to the allegations of the petition in this case, the authority of the plaintiff's agent in the city of Augusta is much more restricted than that of the agent in the case from which we have quoted; but we fail to see that this alters the principle involved in any degree. The plaintiff shipped its meats from Kansas City, but its business was conducted in Augusta. Its agent had only a limited authority; but there is no escape from the important fact that, regardless of any considerations as to the point from which it obtained its stock of goods or the extent to which its agent was authorized to act for it, the plaintiff was engaged in conducting a business in the city of Augusta, and in the conduct of that business the fact of his nonresidence gave him no more favored position than that occupied by resident dealers of like character. The Savannah and Augusta Cases heretofore mentioned were both decided by less than a full bench, but the reasoning upon which they rest seems to us to be irresistible, and to apply with peculiar force to the case now under consideration. There was no error in the ruling of the court below, complained of in the bill of exceptions.

Judgment affirmed. All the Justices concurring.

(124 Ga. 84)

WRIGHT v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. JURY—COMMISSIONER DE FACTO—COLLATERAL ATTACK.

Even if a person be ineligible to hold the office of jury commissioner, yet, if he is appointed to such office and acts therein, he is, while so acting, a jury commissioner de facto, and the official acts of the board of jury commissioners wherein he participated are valid, and cannot be collaterally attacked upon the ground that such person was incompetent to hold the office of jury commissioner.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 269.]

2. CRIMINAL LAW—APPEAL.

The evidence fully warranted the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

Henry Wright was convicted of gaming, and brings error. Affirmed.

E. T. Moon, for plaintiff in error. Henry Reeves, for the State.

FISH, C. J. The plaintiff in error was tried by a jury in the city court of La Grange, under an indictment charging him with the offense of playing and betting at cards. When the panel of jurors was put upon him, he challenged the array, in writing, upon the ground that Olin Carlton, one of the jury

commissioners, "who helped prepare the jury list from which the jury box was prepared, from which said panel of jurors was drawn, was, at the time of his appointment as jury commissioner and at the time he helped prepare said jury list, a duly elected, qualified, and acting justice of the peace of said county," and that therefore the whole proceeding by the jury commissioners in preparing the list of jurors for the jury box was illegal. In answer to this challenge, the state, by its solicitor, admitted the facts alleged therein, but denied that they constituted any sufficient ground for challenge to the array. The court overruled the challenge, and the accused excepted pendente lite. Upon the trial the jury returned a verdict finding the accused guilty. He made a motion for a new trial upon the general grounds, which was overruled, and he excepted, assigning error in his bill of exceptions, both upon the overruling of this motion and upon the overruling of his challenge to the array of the jurors.

1. County officers are not eligible for appointment and service on the board of jury commissioners. Pen. Code 1895, § 813. It is contended that a justice of the peace is a county officer, and for the purpose of this decision this contention may be admitted. We assume, then, that Carlton, the justice of the peace, was, while holding that office, ineligible for appointment as a jury commissioner. The fact that he was ineligible to hold the office of jury commissioner did not prevent his being a jury commissioner de facto. A case precisely in point and conclusive of the question before us is *Smith v. Bohler*, 72 Ga. 546, where it was held that a person ineligible to hold a particular office is, while de facto in such office, competent to act therein. A ruling to the same effect was made in *Hinton v. Lindsay*, 20 Ga. 746, where it was held that "a justice of the peace who, notwithstanding his removal to an adjoining district, continues to act under his former commission, is an officer de facto, and his acts as such are not void, so far as the public and third persons are concerned. Neither can they be invalidated in a proceeding to which he is not a party." In *Pool v. Perdue*, 44 Ga. 454, it was held that one holding a commission from the Governor as notary public and ex officio justice of the peace, and acting as such, is a de facto officer, and his official acts cannot be collaterally attacked, on the ground that his appointment was not authorized by law. But, aside from these cases and other Georgia cases which are, in principle, to the same effect, the question presented in the present case is settled by *Pol. Code 1895, § 223*. Under the law as there laid down, although a person may be absolutely ineligible to hold any civil office whatever in this state, yet his official acts, while holding a commission as a public officer, are valid as the acts of an officer de facto. It is well settled that the acts of an officer de facto cannot be collaterally attacked, and the above-cited

cases so hold. It follows that there was no error in overruling the challenge to the array of jurors.

2. The evidence fully warranted the verdict, and there was no error in refusing to grant a new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 79)

PITTS v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

Where an indictment charged the accused with the offense of selling whisky without a license in a given county upon a named date, the state was not confined to proof of the commission of the offense upon the date named, but had the right to prove its commission in such county upon any date within two years prior to the finding of the indictment. *Green v. State*, 41 S. E. 642, 115 Ga. 254.

2. CRIMINAL LAW—CERTIORARI.

There was no error in refusing to sanction the petition for certiorari.

(Syllabus by the Court.)

Error from Superior Court, Putnam County; H. G. Lewis, Judge.

Dick Pitts was convicted of an illegal sale of liquor, and brings error. Affirmed.

Green F. Johnson, for plaintiff in error. J. B. Pottle, Sol. Gen., and S. L. Wingfield, for the State.

FISH, C. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 80)

PETERS v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. CRIMINAL LAW—NEW TRIAL—OBJECTIONS TO EVIDENCE.

A ground in a motion for a new trial, alleging that the court erred in admitting certain evidence, will not be considered when the motion fails to show that any objection was made to such evidence upon the trial of the case, or, if stating that objection was made, fails to disclose what such objection was.

2. SAME—MISCONDUCT OF PROSECUTING ATTORNEY.

Nor will a ground of such a motion, alleging error in allowing the prosecuting attorney to make, in the presence of the jury, a statement in reference to what he wanted to prove by a witness, be considered, when it does not appear what such statement was.

3. WITNESSES—CHARACTER—EVIDENCE.

A statement by a witness, tending to show the confidence reposed in his integrity by his employer, is irrelevant and inadmissible.

4. SAME—EVIDENCE.

The evidence was sufficient to support the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

One Peters was convicted of crime, and brings error. Affirmed.

W. A. James, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 91)

ELLIS v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. CRIMINAL LAW—NEW TRIAL—ARGUMENTS OF COUNSEL.

The refusal of the court to declare a mistrial because of the language used by state's counsel in argument to the jury was not cause for a new trial.

2. FORCIBLE ENTRY AND DETAINER—WHAT CONSTITUTES.

Where a tenant leaves the premises at the end of his term, the landlord, though not in actual occupancy, is to be regarded as in possession, and a third person who enters without the landlord's consent, and violently keeps possession, with menaces, force, and arms, and without authority of law, is guilty of forcible detainer. To constitute such offense it is not necessary that the person who has so taken possession should actually assault the landlord; but if, when the landlord seeks to re-enter, the conduct of such person in keeping possession and the circumstances connected therewith be such as are reasonably calculated to cause the landlord to believe that, if he should persist in the attempt to re-enter he would be subjected to physical violence the offense would be complete.

3. SAME—EVIDENCE.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Fayetteville; W. B. Hollingsworth, Judge.

Mrs. K. C. Ellis was convicted of forcible detainer, and brings error. Affirmed.

Mrs. K. C. Ellis was tried for the offense of forcible detainer, and the jury returned a verdict finding her guilty. She made a motion for a new trial, which was overruled, and she excepted. Upon the trial Mrs. L. B. Stewart, the prosecutrix, testified as follows: "My husband, W. B. Stewart, is dead. I know the land in controversy. My husband had tenants in possession of it about five years before he died, and he died on the 16th day of June, 1901, and since that time the tenants under me have been cultivating it and paying rents to me. W. J. Farmer was the first tenant put in by Mr. Stewart, and he stayed until about two years ago, and then H. Henson went in as tenant; making about seven years that Mr. Stewart, my husband, and I have received the rents from the place. Mr. Henson, the tenant for the last year, moved away from the place, and on or about the 30th day of December, 1904, I went to the place and found Mrs. K. C. Ellis in the house and her husband with her. She had one bedstead in the house and some other furniture, consisting of a bureau, chairs, etc., and I noticed that she

had a shotgun setting up by the front door and a rifle by the bed, near where she was. I asked her whose furniture it was, and she said it was hers; and I asked her where our folks were that were here, and she said they had moved over to G. W. Clark's. I asked her what the furniture was doing there, and she said it was her furniture, and that she had moved there; and I asked her why she did so, and she said the place was hers, and she intended to keep it until 12 men decided it was not hers. I asked her for the key, and she said she had the key, but would not give it to me. I then left her and told her I would see her again. I went back on the 4th day of January, 1905, and saw Mrs. Ellis again, the defendant, and asked her for the key, and she told me that I would never get the key until 12 men decided it was my place; said she would lie in jail six months before she would give it to me. I told her that I did not think she had treated me right, and she said it was her place, and she would die before she got out, and got excited, and when she said that she came down with one hand into the other, this way [witness holding one hand up and the other out, and bringing one hand down into the other]. Her husband walked up and told her to be quiet and not to get excited. The place is in this county. While I was talking to her, her husband and children came up, and I asked her husband why he did not have his wife move back to her place, and he said she claimed the place and was living there because she claimed it. I then told her she would regret this. I then went around and took some nails and nailed up the windows, and as I went around to nail them up she told me that she had saved me the trouble, as she had already nailed the windows down. I could not nail up the front door. I could not get her out. I did not put my hands on her, as I did not want any trouble. Mrs. Ellis did not make any effort to strike me, and I did not try to take hold of her to put her out, nor did I put any of the things out. My husband, W. B. Stewart, died the 16th day of June, 1901, leaving me and five children, all minors except one. When I first went to the house, Mrs. Ellis and one of her children were there, and in a short time the child left, and Mr. Ellis and the children came up, and all came in there. I had my little daughter with me, and of course I could not put them out. I had sent a man down, the man I rented to, over there before. So they went in without my consent or knowledge and hold the same against my will and consent." The husband of the accused testified that he slept in the house at night, and that the accused stayed there during the day, and sometimes with him at night. It was also shown that the property in question was, in February, 1902, duly set apart to Mrs. Stewart and her minor children, from the estate of her deceased husband, as a year's support.

J. F. Gollightly, for plaintiff in error. J. W. Culpepper, Sol., A. O. Blalock, and J. W. Wise, for the State.

FISH, C. J. 1. During his argument to the jury, counsel for the state remarked: "Gentlemen of the jury, if you fail to do your duty, it has a tendency to make people disregard the law and seek to protect themselves." Counsel for the accused at once moved for a mistrial on account of this language. A mistrial was refused, the court at the time directing state's counsel to confine himself to the law and the evidence in the case. The court also instructed the jury that the improper remarks of counsel should not influence their verdict, but that the verdict should be based on the law and the evidence. Granting that the remarks of the state's counsel were not within the legitimate bounds of argument, the action taken by the court relative to the matter, in the direction given to the state's counsel and the instructions to the jury, must have removed from the minds of the jury any influence harmful to the accused that the language objected to may have had. The court, therefore, did not err in refusing to declare a mistrial.

2. The other grounds of the motion for a new trial were that the verdict was contrary to the law and the evidence and to certain specified charges of the court. As will be seen from an examination of the statement of evidence which precedes this opinion, Mr. Stewart, and, after his death, his widow, through their tenants, had been in possession of the premises in question for some seven years or more; and when Mrs. Stewart's tenant, Henson, moved out in the latter part of 1904, Mrs. Ellis, the accused, soon thereafter took possession, without the consent of Mrs. Stewart. When Henson removed from the premises, Mrs. Stewart, his landlord, though not in actual occupancy, was in law deemed to be in possession. *Porter v. Murray* (Cal.) 12 Pac. 425; *Walser v. Graham*, 60 Mo. App. 323. Mrs. Stewart on two occasions, December 30, 1904, and January 4, 1905, went to the premises and demanded possession of Mrs. Ellis, by asking for the key of the house, which was then occupied by Mrs. Ellis, who refused each time to surrender the possession. On the last occasion she declared, very emphatically and excitedly, that she would die before she would get out of the house, accompanying the declaration by bringing one hand down into the other. She had nailed down the windows. From the small amount of furniture in the house and the fact that, while Mrs. Ellis stayed there during the day, only her husband usually occupied the house at night, the jury could infer that Mr. Ellis and family did not occupy the house as their regular home, but that the husband and wife stayed there, by turns, to prevent Mrs. Stewart from taking

possession. When Mrs. Stewart first went to the house, only Mrs. Ellis and one of her children were there. In a short while this child left, and Mr. Ellis and the children came up, and all went into the house. From these facts it might be inferred that Mr. Ellis and the children came to assist Mrs. Ellis in keeping possession. On the first occasion there were two guns in the house, one near the front door and the other by the bed, near where Mrs. Ellis was. Mr. Ellis, who appears to have testified for the accused without objection on the part of the state, swore that one of these guns was a single-barrel shotgun, which belonged to one of his boys, and the other gun had no tubes in it and could not be used, and his wife made the same statement to the jury. Still the question arises, why, if the family had not moved to this house and were not occupying it as their regular home, were both of these guns carried to this house and kept there? Considering all the circumstances, and the conduct and declarations of Mrs. Ellis when she refused to surrender possession of the premises to Mrs. Stewart, we cannot say that the jury were not authorized to find that they were reasonably calculated to impress Mrs. Stewart with the fear that, if she should attempt to take possession, she would be subjected to severe physical violence. If this were true, it would suffice to warrant a conviction. In order to make out the offense of forcible detainer, it is not necessary to prove that the accused made an actual assault upon the former possessor, to prevent him from re-entering. If, at the time the effort to re-enter is made, there be an exhibition, by words, acts, or circumstances calculated to intimidate the former possessor, and to impress on him an intention on the part of the person unlawfully detaining the premises to hold possession of them by force and violence, the offense is complete. Only a show of force is necessary. *Minor v. Duncan*, 54 Ga. 517. See, also, *Williams v. State*, 120 Ga. 488, 48 S. E. 149, and cases cited.

3. As the evidence warranted the verdict, the court did not err in refusing a new trial. Judgment affirmed. All the Justices concurring.

(124 Ga. 100)

POLLARD v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—MUTUAL COMBAT.

Where, in the trial of one charged with offense of assault with intent to murder, there was evidence from which the jury would be authorized to find mutual intent to fight, though no mutual blows were exchanged, it was not error to give in charge to the jury section 73 of the Penal Code.

2. SAME—VOLUNTARY MANSLAUGHTER.

And when upon that trial there was, beside the evidence tending to establish the existence of a mutual intent to fight, further

testimony that the party who was shot started towards the accused, threatening at the same time to make him jump from the train, the court properly charged the law of voluntary manslaughter.

3. CRIMINAL LAW—INSTRUCTIONS—HARMLESS ERROR.

Inasmuch as death did not result from the assault with which the accused was charged, of course the jury should not have been charged, "If you believe, from the evidence in the case and the law given you in charge, that the defendant is guilty of the offense of murder, you should so find." But this instruction was so manifestly inapplicable to the facts in the case that the jury could neither have been misled nor influenced by the same, and the error committed was harmless.

4. SAME—ASSIGNMENTS OF ERROR.

In a ground of a motion for a new trial complaining that the court erred in charging section 73 of the Penal Code in such a way "as to confuse it with the other law of homicide and make it applicable to the same theory or state of facts, the theory of the defense being that he shot under the fears of a reasonable man," the movant should specify and point out how the law contained in said section is in the charge confused with the other law of homicide, and he should also point out or indicate with what other law of homicide the court's charge confused section 73; otherwise, the assignment of error is too general and indefinite to raise any question for decision.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. O. Hammond, Judge.

Henry Pollard was convicted of assault with intent to kill, and brings error. Affirmed.

Pollard was charged with the offense of assault with intent to murder. Upon the trial of the case substantially the following evidence was introduced: "Henry Pollard was standing near the water cooler, and Capt. Thomas told him to take a seat, and he and the fellow that was shot commenced quarreling, and a woman asked me to hand her her satchel, and I heard this fellow that was shot say to Henry Pollard, 'I'll make you jump off this train,' and he says, 'No, you won't,' and the fellow raised up with his left hand towards me, and I could not see the other man. As the fellow raised up, Henry [the defendant] shot him one time. [The man wounded] turned and started toward Henry Pollard before Henry shot him." Other witnesses gave practically the same testimony, except the man who was shot, who testified that the accused started quarreling with him about a seat, and that he was just getting up out of the seat and out of the defendant's way when he was shot. He admitted that he had been drinking just prior to the time of the shooting. The defendant in his statement said that, after being told by the conductor to take a seat, he went to the nearest vacant seat, upon which there was a box. There was a man occupying half of the seat, and defendant requested him to move the box. The man replied it was not his, whereupon the man who was shot, who was sitting in an adjoining seat, exclaimed with an oath, "Don't you

move that box!" Defendant turned to him and said: "Capt. Thomas told me to come up here and get a seat. Move the box, whomsoever it belongs to." At this the man who was shot, after exhausting his powers of invective, assured the defendant that if he moved the box it would be at the peril of his neck. "When he said that," says the defendant, "he jumped up and threw his hand behind him like he had something to shoot me with, and I grabbed my pistol out of my breast coat pocket and shot him. * * * I didn't do it with the intention to kill him, but just to keep him from doing me injury." The jury returned a verdict of guilty, whereupon the defendant made a motion for a new trial upon the general grounds, and because the court erred in charging section 73 of the Penal Code in reference to mutual combat, such charge being irrelevant and not supported by the evidence, and tending to confuse the minds of the jury upon the law of homicide; the theory of the defense being that defendant shot while under the fears of a reasonable man. Error was further assigned because the court failed to charge the law of assault and battery, and because it did charge the law relating to voluntary manslaughter. Error was also alleged to have been committed because the court charged the jury as follows: "If you believe, from the evidence in the case and the law given you in charge, that the defendant is guilty of the offense of murder, you should so find. If you find that the defendant while not guilty of the offense of murder, yet is guilty of the offense of manslaughter, it would be proper, and you should so find"—the error of such charge being that it was not warranted by the indictment, and because it unduly influenced the minds of the jury. Upon his motion being overruled the defendant excepted.

Austin Branch and A. L. Franklin, for plaintiff in error. J. S. Reynolds, Sol. Gen., and Jno. M. Graham, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 95)

COX v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. WITNESSES—IMPEACHMENT—CONTRADICTIONARY STATEMENTS.

Where a witness has testified to a material fact, prior declarations of his which appear to be inconsistent with the facts related by him on the trial are competent for the purpose of impeachment.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1220-1227.]

2. CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF JUROR.

The judge occupies the place of a trier in passing on a ground of a motion for a new trial based on an alleged expression of opinion or other misconduct on the part of a juror; and where evidence is submitted in support of this ground of the motion, and also to dis-

prove the same and sustain the impartiality of the juror, a finding that the juror was competent will not be disturbed, unless the facts show an abuse of discretion.

3. HOMICIDE—ASSAULT WITH INTENT TO KILL.

The evidence relied on by the state was sufficient to show the defendant's connection with the crime committed.

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

R. S. Cox was convicted of assault with intent to kill, and brings error. Affirmed.

J. W. Wise, M. W. Beck, and A. O. Blalock, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

EVANS, J. Bob Cox and two others were jointly indicted for the offense of assault with intent to murder upon the person of one John T. Hewell, Jr. The defendants severed, and on the trial of Cox it appeared from the state's evidence that Hewell, while traveling at night in a buggy with a companion, was attacked by the accused and shot. Hewell and his companion swore that the defendant did the shooting. It occurred about 8 o'clock at night, and the defendant was recognized by them. He set up the defense of alibi, and offered several witnesses, among them M. G. Cox, in support of the same. He was found guilty, and made a motion for a new trial, which was overruled, and he excepted.

1. One of the witnesses offered to prove the defense of alibi, M. G. Cox, a brother of the defendant, testified that the defendant was at his mother's house, some $3\frac{1}{2}$ miles distant from the scene of the shooting, at about 8 o'clock on the night the crime was committed. This witness denied that he ever said in the presence of one Woolsey, in front of his father's house, during the course of a quarrel with the defendant, that the defendant shot or shot at John Hewell, and ought to be in the chain gang. Woolsey, a witness for the state, was permitted to testify that on that occasion M. G. Cox did say to Bob Cox: "You shot or shot at John Hewell, and you ought to be in the chain gang." This testimony was objected to on the ground that it was immaterial and incompetent, because it was a mere declaration made by M. G. Cox in anger, and was inadmissible for any purpose. The court ruled that the evidence was competent to impeach the witness Cox and error is assigned on this ruling; the defendant insisting that, even if this evidence tended to impeach the witness, it was as to an immaterial fact. The purport of the testimony of M. G. Cox was that the defendant was $3\frac{1}{2}$ miles away from the scene of the crime at the time of its commission. This was equivalent to an assertion by the witness that he had personal knowledge of facts which excluded the possibility of the defendant's guilt. That the witness, during a quarrel with the defendant and when not actuated by a desire to shield him from

detection and punishment, charged him with having shot or shot at Hewell, was a circumstance wholly inconsistent with his testimony on the trial to the effect that the defendant could not have had any connection with the crime, because he was at the time of its commission in company with the witness at the home of his mother, several miles away. The accusation against the defendant, made by his brother in anger, indicated that he either knew or had some reason to believe that the defendant was one of the assailants of Hewell, and was irreconcilable with the testimony which the witness delivered on the stand, which, if true, showed conclusively that he knew positively that his brother was not one of these assailants. The testimony of the witness was exculpatory. His previous declaration was inculpatory. The two were in direct antagonism. What this witness swore bore directly upon one of the vital issues in the case, and the effort made to impeach him was, not to show that he had testified falsely concerning an immaterial matter, but to establish to the satisfaction of the jury that his testimony concerning that vital issue was not worthy of belief. 1 Gr. Ev. (16th Ed.) § 462a.

2. The fourth and fifth grounds of the amended motion for a new trial relate to the disqualification of one of the jurors impaneled to try the case; movant alleging that this juror had formed and expressed an opinion to the effect that the accused was guilty of the offense with which he was charged. Affidavits in support of these grounds of the motion were offered by the defendant, while the state submitted counter-affidavits tending to show that the juror was impartial and had neither formed nor expressed any opinion concerning the guilt of the accused. The court, after considering the conflicting evidence thus presented, announced the conclusion that the juror was competent, and overruled these special grounds of the motion. The evidence submitted in behalf of the state fully warranted this finding of fact. It has been expressly ruled that the judge occupies the position of a trier, in passing upon evidence submitted pro and con upon the question presented by a motion for a new trial in which complaint is made that one of the jurors was not impartial; and his finding that the juror was competent to serve will not be disturbed, unless it appears that the discretion of the judge was manifestly abused. *Jones v. State*, 117 Ga. 710, 44 S. E. 877; *Vann v. State*, 83 Ga. 59, 60, 9 S. E. 945, and cit.

3. The only disputed question in the case was that of identity; and the evidence on this subject being sufficient to show that the defendant was one of the persons guilty of the attempted assassination, and the judge being satisfied with the verdict returned by the jury, a new trial will not be ordered.

Judgment affirmed. All the Justices concurring, except BECK, J., disqualified.

(124 Ga. 162)

JOINER v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. LARCENY—EVIDENCE OF VALUE.

When a theft of money is charged, and a national bank bill is produced on the trial and identified as part of the money alleged to have been stolen, the bill itself is sufficient evidence that it is worth its face value.

[Ed. Note.—For cases in point, see vol. 82, Cent. Dig. Larceny, § 155.]

2. SAME—SUFFICIENCY OF EVIDENCE.

The evidence connecting the defendant with the crime, though circumstantial, was sufficient to establish his guilt.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Barney Joiner was convicted of theft, and brings error. Affirmed.

Jos. D. Boyd and Lucien P. Goodrich, for plaintiff in error. T. E. Patterson, Sol., for the State.

EVANS, J. The defendant was charged with the offense of larceny from the house, the subject-matter of the larceny being alleged to be "thirty dollars in lawful currency of the United States, of the value of \$30.00, to wit, one twenty dollar bill and one ten dollar bill." On the trial of the case a witness identified a \$20 bill issued by Potter's National Bank, East Liverpool, Ohio, No. 2,544, national currency of the United States, as one of the bills stolen. Upon this proof the bill was admitted in evidence.

1. It is urged that the verdict is not sustained by the evidence, because there was no proof of the value of the money alleged to have been stolen. There was no proof on this subject other than the production on the trial and identification of the \$20 bill issued by Potter's National Bank. National bank notes are redeemable in treasury notes, and treasury notes are lawful currency of the United States and legal tender for the payment of debts. Their value is fixed by law, and their introduction in evidence is sufficient proof that they are worth their face value. *Keating v. People*, 160 Ill. 486, 43 N. E. 724. As to United States coin, it has been held by this court that judicial cognizance will be taken of the value of the same, and that in a larceny case the value of such coin need not be specifically shown. *Ector v. State*, 120 Ga. 543, 48 S. E. 315. National bank notes are a part of the currency of the United States, and judicial cognizance will likewise be taken of their value.

2. The evidence connecting the defendant with the crime, though circumstantial, was sufficient to establish his guilt. No error of law having been committed, and the judge being satisfied with the verdict, it should be allowed to stand.

Judgment affirmed. All the Justices concurring.

(24 Ga. 121)

WATSON v. AUGUSTA BREWING CO.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. NEGLIGENCE—WHAT CONSTITUTES.

A manufacturer who makes and bottles for public consumption a beverage represented to be harmless and refreshing is under a legal duty not negligently to allow a foreign substance which is injurious to the human stomach, such as bits of broken glass, to be present in a bottle of the beverage when it is placed on sale; and one who, relying on this obligation and without negligence on his own part, swallows several pieces of glass while drinking the beverage from a bottle, may recover from the manufacturer for injuries sustained in consequence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 25.]

2. DAMAGES—MENTAL SUFFERING.

One who, under the circumstances stated in the preceding headnote, swallows several pieces of glass, which are subsequently removed from his stomach, leaving apparently no permanent injuries, may recover on account of mental suffering caused by the fear of death while the glass was in his stomach; but a vague fear, after the removal of the glass and he has been restored to health, that at some time in the future he may again suffer as a result of his injuries, cannot be made an element of damage in a suit against the manufacturer of the beverage.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by E. W. Watson against the Augusta Brewing Company. Judgment for defendant, and plaintiff brings error. Reversed.

The allegations of the petition were substantially as follows: The Augusta Brewing Company is a Georgia corporation engaged in the manufacture of certain drinks, among them soda water, which it sold as a refreshing and harmless drink. On a named date it sold to a merchant in Thomson, Ga., some of its soda water, which the merchant placed on sale, "relying on the implied warranty of defendant that said soda water was suitable for salable purposes as a refreshing and harmless drink. Some of this soda water was, with the permission of the merchant mentioned, taken from his stock by the plaintiff and drunk from the bottle. "While drinking said soda water, * * * plaintiff swallowed three pieces of glass, or perhaps more, without knowing it, and one large piece of glass lodged in plaintiff's throat. * * * Said glass which plaintiff swallowed and the said piece of glass which lodged in plaintiff's throat were in the said soda water which plaintiff was drinking." Plaintiff immediately went to a physician, who extracted from his stomach three pieces of glass; plaintiff having previously ejected from his throat the piece of glass which had lodged therein. The bottle from which plaintiff drank the soda water was in good condition, and had no rough edges or other peculiarities which could put plaintiff on notice of the presence of the glass inside the bottle. The pieces of broken glass which he swallowed were in the bottle when it was filled, and the de-

fendant was grossly negligent in leaving fragments of glass in the bottle and in offering for sale for drinking purposes soda water containing pieces of broken glass. The defendant, by the exercise of ordinary care, could have known of the presence of the glass in the bottle, while plaintiff did not know and had no means of knowing it. Plaintiff was entirely free from fault, and drank the soda water, thinking it was safe to do so. Plaintiff suffered great physical pain while the glass was in his stomach and in having it extracted therefrom, "and plaintiff suffered untold mental agony between the time he drank the soda water, when he swallowed the said glass, and before he could have the said glass taken from his stomach, fearing that an untimely death would be the result of the glass cutting him on the inside; and plaintiff still fears that he may yet suffer torture from injuries sustained by the glass cutting him on the inside, or, perhaps, from some of the glass which might not have been taken from his stomach and which is still in plaintiff's stomach, and which may yet cause plaintiff's death. The suspense and agony which plaintiff suffers from what may yet be the dreaded results of this injury are great, and render plaintiff almost paralyzed with fear." Damages were laid in the sum of \$2,000. By amendment it was alleged that it was customary to drink bottled soda water from the bottle, and that the defendant was aware of this custom. The defendant demurred generally and specially—the grounds of special demurrer being that the petition endeavors to join inconsistent causes of action, one an action on an implied warranty and the other an action in tort; that no physical injury is alleged; that the petition fails to allege the size or kind of glass that it is alleged was swallowed; that it does not appear whether the plaintiff was a purchaser or a donee of the bottle of soda water drunk by him; that there is no allegation as to the manner, time, or place of defendant's negligence, nor that the defendant intended the bottles containing the soda water to be used as drinking vessels; and that the allegations as to the plaintiff's apprehensions of what might have existed or developed, or might in the future exist or develop, "were irrelevant and illegal." The court sustained the demurrer generally, and dismissed the petition, whereupon the plaintiff excepted.

J. L. Callaway Thomson, for plaintiff in error. W. H. Barrett, for defendant in error.

CANDLER, J. (after making the foregoing statement). 1. When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be in-

jurious. The case of *Woodward v. Miller*, 119 Ga. 618, 46 S. E. 847, 64 L. R. A. 932, 100 Am. St. Rep. 188, is hardly in point; for in that case the manufacturer knew of the defect and fraudulently concealed it from the purchaser. *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324, while differing somewhat as to its facts, furnishes strong reasoning to support the principle announced. The composition of patent or proprietary medicines is usually shrouded in mystery, and it is generally understood that many such remedies contain ingredients which, if taken in sufficient quantities, will produce injurious results upon the person taking them. If, then, one who buys a patent medicine may rely upon the obligation of the manufacturer not to place therein ingredients which, if taken in the prescribed doses, will injure his health, certainly the purchaser of an alleged harmless and refreshing beverage should have the right to rest secure in the assumption that he will not be fed on broken glass. It does not matter that the plaintiff in the present case did not buy the soda water from the defendant, or that there was no privity of relationship between them. The duty not negligently to injure is due by the manufacturer, in a case of the particular character of the one under consideration, not merely to the dealer to whom he sells his product, but to the general public for whom his wares are intended. On this subject, see, also, *Blood Balm Co. v. Cooper*, supra.

2. It follows from what has been ruled that the court below erred in sustaining the general demurrer. We are equally clear that many of the grounds of the special demurrer are without merit. While the petition contains the wholly unnecessary allegation that the dealer who purchased the soda water from the defendant relied upon its implied warranty that the drink was harmless, the suit cannot by any possibility be construed as one upon a warranty, as it is plainly an action in tort. While there is no distinct allegation of permanent disability, the physical suffering of the plaintiff, growing out of the swallowing of the glass and its removal from his stomach, was set out with sufficient definiteness to furnish a basis of recovery; and there was no lack of the required definiteness as to the time, place, and manner of the defendant's negligence. In the latter particular the case differs from *Hudgins v. Coca Cola Bottling Co.*, 122 Ga. 695, 50 S. E. 974, in that there the petition was entirely silent as to what constituted the negligence complained of, while here it is distinctly alleged that the defendant was negligent in leaving glass in the bottle when it was filled. A somewhat peculiar ground of demurrer is the one which seeks to place upon the plaintiff the onus of showing "the size and kind of glass" that he swallowed. Courts have gone far in requiring particularity of pleading; but we are not aware of any rule which would require a

man who has unconsciously swallowed several pieces of glass to make a note of the shape, size, color, and character of the pieces after they have been removed from his stomach, in order to describe them in bringing suit to recover from the one who is responsible for his having swallowed them. It was not necessary to allege that the defendant intended that the bottles containing its soda water should be used as drinking vessels. It is sufficient for the purpose of this suit that such was the custom and it was cognizant thereof.

The only remaining point to be considered is whether or not the plaintiff in this case can recover for mental suffering growing out of his injury, and, if so, to what extent. It is a familiar principle that, where a physical injury has been sustained, the person injured may recover for mental suffering caused by or growing out of his bodily hurt. One may not recover, however, for mental suffering which is not reasonable, or which is merely fanciful. It can hardly be disputed that a reasonable fear of death constitutes mental suffering of a very keen sort. It is not unreasonable, we think, for one who has swallowed several pieces of glass to entertain a very vivid and poignant apprehension of an untimely end; and the mental anguish caused by this dread may constitute an element of damage in a suit for damages on account of the physical injury. But after the glass has been removed from his stomach, and he is apparently restored to his former condition of health and vigor, his fears, so far as a damage suit are concerned, should cease. He may not continue for an indefinite period to vex his soul with dread on account of having been "cut on the inside," and hold the defendant liable for his apprehensions. It follows, therefore, that so much of the petition as seeks to recover on account of mental suffering endured since the glass was removed from the plaintiff's stomach should be stricken; and direction is given that, when the case is tried again, the special demurrer be sustained in so far as it attacks this portion of the petition.

Judgment reversed, with direction. All the Justices concurring.

(124 Ga. 131)

WILSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Georgia. Nov. 10, 1905.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER TELEGRAM—ACTION FOR DAMAGES—PROXIMATE CAUSE.

In a suit for compensatory damages, where the damages alleged were not proximately caused by an act of the defendant, a demurrer to the petition was rightly sustained.

(Syllabus by the Court.)

Error from City Court of Waycross; J. O. Reynolds, Judge.

Action by J. H. Wilson against the Western Union Telegraph Company. Judgment

for defendant, and plaintiff brings error. Affirmed.

A suit for damages was brought by J. H. Wilson against the Western Union Telegraph Company, the plaintiff basing his right to recover upon the following allegations of fact: During the year 1904, he resided at No. 51 Jane street, in the city of Waycross, about 800 yards from the office of the defendant company in that city, and was employed in the shops of the Atlantic & Birmingham Railway Company at that place. The defendant is a corporation engaged in the business of receiving and transmitting telegraphic messages, and charged with the duty of promptly delivering the same, having an office and agent in the city of Waycross during the year 1904, as well as an office and agent at Burlington, N. C., and a continuous line for the transmission of telegraphic messages between these points. During the past 25 years plaintiff has been engaged in the regular occupation of a bridgeman, in which work he is skilled and his services have been in demand. He had been previously in the employ of the Carolina Steel Bridge & Construction Company, a thoroughly reliable and responsible corporation of Burlington, engaged in the manufacture and construction of steel bridges and other structural work, and its officers and agents were well acquainted with his competency for doing the kind of work in which that company was engaged. This company, desiring to again employ plaintiff to engage in performing the work of constructing certain railroad bridges then being erected by the company in North Carolina, did, on March 12, 1904, file in the office of the defendant company, at Burlington, with its agent or operator, a message bearing that date and addressed to "J. H. Wilson, Bridgeman, Waycross, Georgia," duly signed and containing this inquiry: "Can you commence work next week? Answer." There had already been an understanding between plaintiff and the sender of this message that "his services could be procured in connection with said work, when wanted, at a salary of \$80" per month, together with board for himself, worth \$20 per month. The message addressed to the plaintiff was immediately transmitted by the operator at Burlington, and was on the same date duly received at the office of the defendant at Waycross; but, notwithstanding the plaintiff resided within a short distance of its office in that city, and was at the time engaged at work in the railroad shops where he was employed, the message, owing to the neglect of the company's employes, was not delivered to the plaintiff with promptness and dispatch, as the duty imposed and devolving upon the company required it to do, either at his residence or at his place of business, although the message could and should have been delivered to him within a few minutes after it was received by the

operator at Waycross. On account of the negligence of the company and its failure to diligently perform the duty then and there required of it, the message was not delivered to plaintiff until 10 days had elapsed from the date of its reception. Immediately upon getting the message, plaintiff notified the Carolina Steel Bridge & Construction Company that he accepted its offer of employment and stated that he was ready to at once commence and enter upon the work that company desired him to engage in, upon the terms as understood between them; but the company informed him, by another message sent from Burlington, dated March 23, 1904, that the position in its service he had expressed his willingness to accept had been filled. The plaintiff alleged that, because of the want of diligence on the part of the company in delivering to him the original message from the Carolina Steel Bridge & Construction Company, he lost employment with that company on the terms above stated; and, inasmuch as such employment would have continued for the period of at least nine months after entering into its service, he had suffered actual loss and damage in the difference between the amount of \$2 per day, or \$52 per month, received from the Atlantic & Birmingham Railway Company for his work in its shops, and the total sum of \$100 per month for that period, covering his salary and board, which he would have received from the Carolina Steel Bridge & Construction Company, amounting in the aggregate to \$432, in which sum the defendant company was liable to him on account of his loss and damage aforesaid. To this petition the defendant filed a general demurrer, which was sustained by the court, and the plaintiff excepted.

J. L. Sweat, for plaintiff in error. Osborne & Lawrence, for defendant in error.

EVANS, J. (after stating the facts). In support of the judgment sustaining the demurrer, it was urged that in no case can an addressee recover of a telegraph company damages resulting from a negligent delivery of the message. The case of *Brooke v. W. U. Tel. Co.*, 119 Ga. 694, 46 S. E. 828, is cited to sustain this contention. This case was not decided by a full bench, and therefore is not conclusive of the question. The present action is not based on contract, but is founded on a breach of duty owing by the telegraph company to the addressee. The writer thinks that both on principle and authority an addressee of a telegram may recover of a telegraph company damages for injury proximately caused by its negligent delay in delivery. But it is not necessary to pass on this question; for, conceding the right of the addressee to recover damages in a proper case, the petition does not set forth a cause of action.

Where a breach of duty is alleged, the addressee cannot recover compensatory dam-

ages unless the facts show an injury proximately resulting from the tortious act. The plaintiff does not allege a binding contract between himself and the bridge and construction company, but only an understanding that the bridge company could procure his services, when wanted, at a stated salary. The telegram, in connection with his averments on this subject, would not evidence a closed deal. The telegram was interrogative. Suppose it had been promptly delivered, and the addressee had replied in the affirmative; still there would have been no contract between the bridge company and the plaintiff. All the transaction could amount to would be an inquiry as to the preparedness and willingness of plaintiff to work with the bridge company at that particular time. The bridge company was under no obligation to hire the plaintiff, even had the company received a prompt affirmative response to its telegraphic inquiry. This being so, the plaintiff had no contract with the bridge company, and it cannot be presumed that it would have made one, had the telegram been promptly delivered. The failure to get employment with the bridge company was not proximately caused by the delay in the delivery of the telegram. See *Clay v. W. U. Tel. Co.*, 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316; *Richmond Hosiery Mills v. W. U. Tel. Co.*, 123 Ga. 216, 51 S. E. 290; *W. U. Tel. Co. v. Watson*, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151. In *W. U. Tel. Co. v. Hines*, 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159, it appeared that the plaintiff had an understanding with his former employer that, should the latter secure a contract then in contemplation, the former was to return and engage in the same work under the new contract, until it was completed, at a certain salary. His employer secured the contract and telegraphed him: "Have work. Come at once." This telegram would have closed the contract with the plaintiff's former employer, and it was accordingly held that the telegraph company was liable to the plaintiff in such damages as arose from its negligence in failing to deliver the message to him in due time. The dissimilarity in the facts of this case and the one in hand is glaringly apparent. The allegations set out in the plaintiff's petition did not entitle him to recover compensatory damages for the injury alleged to have been sustained.

Judgment affirmed. All the Justices concurring, except BECK, J., who did not preside.

(124 Ga. 135)

JACKSON v. STATE.

(Supreme Court of Georgia. Nov. 10, 1905.)

TRESPASS — CRIMINAL PROSECUTION — EVIDENCE.

An indictment for trespass, under Pen. Code 1895, § 220, charging that the accused did enter upon the lands of A., after being personally prohibited so to do by the said A., the person entitled to the possession of the land

for the time being, is not supported by evidence that the accused trespassed upon the lands of B., that A. had no title or estate in the land, and that he was in possession merely in a representative capacity as agent or manager for B.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespas, § 181.]

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

William Jackson was convicted of trespass, and brings error. Reversed.

Hines & Vinson, for plaintiff in error.
J. E. Pottle, Sol. Gen., for the State.

CANDLER, J. The accused was convicted in the county court of Baldwin county of the offense of trespass. He took the case to the superior court by certiorari, which was overruled, and he excepted. The indictment on which he was tried charged that he did "enter, go upon, and pass on the cultivated lands of C. J. Booker, after being personally prohibited so to do by C. J. Booker, the person entitled to the possession of the said land for the time being." The evidence was to the effect that the accused went upon the cultivated land of Bowen, Jewel & Co.; that Booker was in possession of the land only as the agent and manager of Bowen, Jewel & Co., under a contract which provided for the payment of a salary to him as manager and for a commission on all profits of the plantation above a specified sum; and that Booker had previously notified the accused not to go upon the land.

We are clear that the certiorari should have been sustained. There was a total failure to support the allegations of the indictment that the trespass charged was committed upon the land of C. J. Booker, or to show that Booker was the person entitled to the possession of the land for the time being. It is unnecessary to consider whether the conviction would have been warranted, had it appeared that Booker was in possession as tenant under Bowen, Jewel & Co. What does appear from the undisputed evidence is that Booker individually was not in possession at all. He was merely the agent of the owners, with no estate whatever in the land, and whatever physical occupancy or control he may have exercised was in his representative capacity, and merely went to constitute the possession of his principals. In *Mitchell v. Georgia & Alabama Ry.*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622, it was held that, while mere possession of a chattel will give a right of action for any interference therewith, such possession must be in the plaintiff's own right, and not as servant of another. Certainly a less rigid rule should not apply in criminal than in civil cases, nor in regard to real than personal property.

Judgment reversed. All the Justices concurring.

(124 Ga. 136)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Nov. 10, 1905.)

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—VIOLATION.

Where an accusation in a city court, under the act of 1903, charged that the accused did, "after contracting with Mrs. M. E. Drake to perform services for her as wood cutter, procure from her money and goods," etc., a conviction was not sustained by evidence showing that the defendant was employed by W. E. Drake, and that loss or damage was done to the latter. Nor is the evidence satisfactory as to whether this minor procured advances with a fraudulent intent, or in good faith, and was afterwards compelled to abandon his contract by his mother.

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Crosland, Judge.

Joe Williams was convicted of a breach of a contract of employment, and brings error. Reversed.

Clayton Jones, for plaintiff in error. Jno. D. Pope, for the State.

LUMPKIN, J. Judgment reversed. All the Justices concurring.

(124 Ga. 136)

SINGLETON v. STATE.

(Supreme Court of Georgia. Nov. 10, 1905.)

1. CRIMINAL LAW—NEW TRIAL—INSTRUCTIONS.

A charge to the jury, which intrenches upon their province with reference to determining the facts in the case and the credibility of the witnesses, is error, requiring the grant of a new trial.

2. INFANTS—CAPACITY TO COMMIT CRIME.

An infant under the age of 10 years cannot be convicted or found guilty of any crime or misdemeanor. If the accused is over 10, but under 14, years of age, he may be capable of crime; but the burden is upon the state of establishing the fact of his capacity therefor.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 172.]

(Syllabus by the Court.)

Error from City Court of Cartersville; A. M. Fonte, Judge.

Pearce Singleton was convicted of larceny, and brings error. Reversed.

The accused, Pearce Singleton, was tried in the city Court of Cartersville on an indictment charging him with the offense of simple larceny. The property alleged to have been stolen was "two bushels of coal, of the value of thirty cents, the property of the Seaboard Air Line Railroad Company." There was much evidence for and against the defendant. His mother and father testified as to the time of his birth, and their testimony, if taken as true, would have established the fact that he was not 10 years old at the time of the alleged unlawful act. But there was evidence from which the jury might have inferred that the prisoner was between 10 and 14 years of age. The defendant was convicted, and he made a mo-

tion for a new trial, based upon the general grounds and also upon the further grounds: "(4) Because said verdict was rendered in the face of and in defiance of section 34 of the Criminal Code of Georgia, the uncontradicted [evidence] of the father and mother of said defendant being that said defendant was not 10 years of age at the time said alleged offense was committed by him, as movant alleges. (5) Because movant alleges that it was error in the court not to have directed a verdict finding said defendant not guilty, as soon as it appeared from the evidence that the defendant was under the age of 10 years at the time it was alleged that he committed said offense. (6) Because it was manifest error in the court to submit the issue of the guilt or innocence of the defendant to the jury when it appeared from the uncontradicted evidence of the father and mother of said defendant that he was under 10 years of age at the time it was alleged that he committed said offense, as movant alleges; and movant alleges that the action of the court in submitting the question of the guilt of said defendant to said jury was in violation of and disregard of section 34 of the Criminal Code of Georgia under the instructions as given by the court. (7) Because the court erred in refusing to give in charge to said jury the following written request of defendant, without qualification, to wit: 'If you believe from the evidence the defendant was under the [10] years of age at the time he was charged with having committed said offense, then I charge you that he was incapable of committing any crime, and you should find him not guilty.' (8) Because movant alleges that the court, after reading to the jury as a part of its charge section 34 of the Criminal Code of Georgia and charging as follows, to wit: 'In connection with that, gentlemen, I charge you that, if you believe from the evidence that this defendant was under the age of 10 years when the alleged crime was committed, then you would not be authorized to convict'—erred in adding the following language, to wit: 'But you will consider, in connection with this, all the evidence, the interest of the principal witnesses for the defendant, the appearance for the defendant, and all the circumstances incident to the case.' The main question for your determination is this: Under the evidence, was this defendant 10 years old at the time of the commission of the alleged crime? If he was, and you believe from the evidence that he is guilty as charged in this bill of indictment, you ought to find him guilty.' Movant alleges that the part of said charge herein excepted to is not the law of Georgia, and it was hurtful error for the court to give such a charge to the jury. Movant alleges the reference by the court to the principal witnesses for defendant was calculated to discredit said

witnesses before the jury, whom movant alleges were his father and mother, and did have that effect, and was therefore error. Movant further alleges that said charge herein excepted to is and was error in instructing said jury: 'If you believe the defendant was 10 years old, and you believe from the evidence that he is guilty as charged in the bill of indictment, you ought to find him guilty.' Movant alleges that said charge last quoted is not the law of Georgia, and it was therefore error to give it as it was given, even if said defendant had been proven to be 10 years old and under 14 years of age. Movant alleges that it was not true that every person, whose acts would amount to a crime, that is 14 years of age, is a crime when committed by a person between the ages of 10 and 14 years. Movant alleges that children between the ages of 10 and 14 years must be shown by the evidence for the state to possess sufficient intelligence to know good from evil before they can be convicted of any crime charged against them." The court overruled the motion, and the defendant excepted.

Jas. B. Conyers, for plaintiff in error. L. C. Milner, Sol., for the State.

BECK, J. (after stating the facts). 1. As we view this case, it is necessary to consider and discuss only one ground of the motion for a new trial. It will be observed that movant does not allege positively that the court refused the written request to give the charge set forth in the seventh ground, but the complaint is that he did not give it without qualification. What qualification the court added is left to conjecture, unless we search for it in other parts of the record; and this we will not undertake to do. But it seems to us that in the extract from the court's charge set forth in the eighth ground of the motion manifest error appears. The court, after instructing the jury correctly as follows: "I charge you that, if you believe from the evidence that this defendant was under the age of 10 years when the alleged crime was committed, then you would not be authorized to convict"—added the following, to wit: "But you will consider, in connection with this, all the evidence, the interest of the principal witnesses for the defendant, the appearance of the defendant, and all the circumstances incident to the case. The main question for your determination is this: Under the evidence was the defendant 10 years old at the time of the commission of the alleged crime. If he was, and you believe from the evidence that he is guilty as charged in this bill of indictment, you ought to find him guilty." In the first place this part of the court's charge is open to the criticism that it is repugnant to the law forbidding the court in the trial of any case to intimate to the jury his opinion "as to what has or has not been proved." The language,

"You will consider, in connection with this, all the evidence, the interest of the principal witnesses for the defendant," not only singles out and calls attention to the infirmity in the testimony of the father and mother of the accused, but would necessarily be construed by the jury as an intimation by the court that that testimony was the testimony of interested witnesses; and while every man of sense and experience knows full well that each juror was as fully aware as the judge himself of the intense interest that the "principal witnesses for the defendant" had in the result of this case, the vice in the instruction objected to is not thereby cured, for the jury are apt to be influenced by any intimation of opinion by the court even in regard to matters about which their own experience has been as thorough, as long, and as varied as that of the judge. Besides, the law is imperative that, where there has been a violation of the rule that the court should not intimate or express an opinion of what has or has not been proved, a new trial must be granted.

2. Counsel for the state contended that by the evidence it successfully carried the burden incumbent upon it of proving that the accused had sufficient mental capacity to commit crime, because the father of the prisoner testified that the defendant knew the difference between right and wrong. But, with this evidence in, it was still a question for the jury to determine whether the boy on trial had the capacity ascribed to him by his parent and the determination of that question was completely taken from them when the court instructed them without qualification that "if he was 10 years of age, and you believe from the evidence that he is guilty as charged in this bill of indictment, you ought to find him guilty." This charge the jury no doubt construed to mean that if the accused was 10 years of age and committed the acts alleged in the indictment, he was guilty of the crime charged without reference to his mental capacity, while the law is that, if the accused was between 10 and 14 years of age, *prima facie* he was incapable of crime, and the jury should be instructed that the burden is on the state to establish his capacity therefor, it being their privilege alone to pass upon this evidence; and their province was directly invaded when the judge directed them, after correctly instructing as to their duty in case they found the defendant to be under the age of 10 years, in the language of the charge complained of in the ground of the motion now under consideration and last quoted. The jury should have been informed in terms direct and clear that, if the infant on trial was between 10 and 14 years of age, his capacity to commit crime must be made to appear from the evidence, or from the facts and circumstances of the case; and this is not going as far as some courts and many text-writers have gone, where they have laid down the

rule that the capacity to commit crime in infants under the age of 14 years should be made to appear "only by the strongest and clearest evidence." "There is uncontradicted evidence in the record that plaintiff in error was little more than 11 years of age when the homicide was committed. This evidence was not contradicted, but was virtually conceded by the eighth instruction asked and given for the people. If this was true, and the evidence tended to prove it, the rule required evidence strong and clear, beyond all doubt and contradiction, that he was capable of discerning between good and evil; and, the legal presumption being that he was incapable of committing the crime for want of such knowledge, it devolved on the people to make the strong and clear proof of capacity before they could be entitled to a conviction." *Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 134, and cases cited. See, also, *Bish. New Cr. L.* 219.

3. Except in the grounds already noticed, no material error is made to appear in the various grounds of the motion for a new trial.

Judgment reversed. All the Justices concurring.

(124 Ga. 150)

NUGENT v. WATKINS.

(Supreme Court of Georgia. Nov. 10, 1905.)

EASEMENT — PRESCRIPTIVE RIGHT — ACTION FOR OBSTRUCTION.

Where one has acquired a prescriptive right to a private way, whether the prescription be of common-law or statutory origin, the right to the way presumably passes with the land to which it is appurtenant; and in an action by one holding the land under a deed from the prescriber, to require the removal of obstacles erected in the way, it is not necessary to allege that the way was laid out by the petitioner, or that the defendant had knowledge that the way was laid out, used, and enjoyed.

(Syllabus by the Court.)

Error from Superior Court, Richmond County H. C. Hammond, Judge.

Action by E. A. Nugent against Sarah E. Watkins. Judgment for defendant, and plaintiff brings error. Reversed.

Mrs. Nugent filed her petition in the court of ordinary of Richmond county, alleging that Sarah E. Watkins, of said county, had obstructed a private way running on, over, and between certain improved lands of said Sarah E. Watkins and certain other improved lands formerly belonging to Wilson Watkins and now the property in part of petitioner and in part of Salem Dutcher; that continuously, for more than seven years prior to the obstructions referred to, the lands on, over, and between which the way ran were, and now are, improved lands, and the way has occupied, and now occupies, one and the same location, and has been and is of the same width, to wit, a width not exceeding 15 feet, and has been continuously kept open and in repair by Wilson Watkins and peti-

tioner, his grantee; and that the obstructions referred to have injured petitioner in a manner and to an extent set forth. The petition prayed an order directing Sarah E. Watkins to remove the obstructions, or, in the event of her failure to do so, that a warrant issue requiring the sheriff to remove them. By amendment it was alleged that the lands of Wilson Watkins were conveyed to him in the years 1866, 1867, and 1868; that in 1897 he conveyed to petitioner his improved lands, together with all and singular the rights, easements, ways, members, and appurtenances thereunto belonging, reserving to himself a life estate in the property so conveyed; that continuously and uninterruptedly, for more than seven years prior to this deed, the private way in controversy ran on, over, and between the lands of Wilson Watkins and Sarah E. Watkins, during all of which time the lands in question were improved, and occupied one and the same location, and was of the same width, to wit, not exceeding 15 feet, and was worked and kept open by Wilson Watkins, and was in constant and uninterrupted use, without any steps being taken to abolish the way; that Wilson Watkins remained continuously in possession of the life estate referred to until his death in February, 1902; and that on the death of Wilson Watkins Mrs. Nugent became the owner in fee of all the property conveyed by the deed executed in 1897. Mrs. Watkins demurred to the petition generally, and on the grounds (1) that it was not alleged that the way was ever laid out by the petitioners; (2) that it was not alleged that the defendant ever had knowledge that the way was laid out, used, and enjoyed; and (3) that it appears that Salem Dutcher is one of the owners of the property appurtenant to which the way is claimed, but it does not appear how much or in what manner he owns, or why he is not a party to this suit. The ordinary sustained the demurrer and dismissed the petition, whereupon the plaintiff carried the case by certiorari to the superior court of Richmond county. The certiorari was overruled, and the plaintiff excepted.

Salem Dutcher, for plaintiff in error. Austin Branch, for defendant in error.

CANDLER, J. (after making the foregoing statement). In the able brief of counsel for the defendant in error a distinction is drawn between private rights of way by prescription at common law and under the Georgia statute. It is insisted that at common law a private right of way could be acquired by prescription only by reason of adverse possession accompanied by a claim of right while under the act of 1872, as codified in Pol. Code, § 678 et seq., prescription may ripen through the permissive use of the way for the required seven years; and it is contended that on this account the statutory prescriptive

way is personal to the prescriber, and expires with the limitation of his estate. Applied to the case at bar, the contention is that, even if Wilson Watkins had a prescriptive way over the lands of Sarah E. Watkins, it ceased to exist at his death, and that his successor in title could not tack Wilson Watkins' prescription to her own occupancy of the way, so as to set up a prescriptive title in herself. We cannot concede the soundness of this position. Granting that the act of 1872 changed the common law in making more liberal provisions for the acquisition of a private way by prescription, we fail utterly to see how it can be said to follow that the prescriptive right, when once acquired as provided by the statute, is any less complete than it would have been if obtained under the more rigid requirements of the common law. Prescription is prescription, whether it be acquired at common law or by statute. The right itself has not been changed, but merely the method of obtaining it.

The argument that section 672 of the Political Code, providing that "when a person has laid out a private way, and has been in the use and enjoyment of it as much as seven years, of which the owners have had six months knowledge without moving for damages, his right to use becomes complete, and such owners are barred of damages," was intended as a check, or balance, against the greater liberality allowed by the act of 1872, is, we think, untenable. A complete answer to it is that the alleged "check" was in existence before the act which it is claimed it was intended to check. This section was carefully construed and fully explained by our present Chief Justice in the case of *Watkins v. Country Club*, 120 Ga. 47, 47 S. E. 538, wherein it was held that the section in question was intended to apply only to private ways and laid out under statutory proceedings, and not to a prescriptive way, such as the one now under consideration. While we recognize that what was there said is not binding in the present case, for the reason that it was not necessary to the decision rendered, the argument made is entirely convincing, and we are satisfied with the correctness of the conclusion there announced. It follows, then, that under the allegations of the petition a prescriptive right to the private way in controversy had ripened in Wilson Watkins before his death, and presumably this right passed with the land to the plaintiff; for, as was held in *Taylor v. Dyches*, 69 Ga. 456: "Private ways are never presumed to be personal when they can be construed to be appurtenant to the land. They are in the nature of covenants running with the land." See, also, *Duggan v. Cox*, 78 Ga. 158, 1 S. E. 428; *Cunningham v. Elliott*, 92 Ga. 160, 18 S. E. 365.

In this view of the case, it was not necessary, as contended by counsel for the defendant in error, that the petition should allege that the way was laid out by the

plaintiff, or that the defendant had six months' notice that the way was laid out used, and enjoyed. It follows that the position that it is necessary to set out the nature of the title of all the adjacent landowners, and make them parties to the suit, in order for the plaintiff to assert her right to the way, is untenable. Our conclusion is that the ordinary erred in sustaining the demurrer to the petition, and that the superior court should have sustained the certiorari.

Judgment reversed. All the Justices concurring.

(124 Ga. 216)

HALEY v. STATE.

(Supreme Court of Georgia. Nov. 13, 1905.)

INDICTMENT—ALTERNATIVE ALLEGATIONS.

An accusation which charges, in the alternative, that on a certain day the person accused did "unlawfully play and bet for money or other thing of value at a game of skin or other game played with cards," is bad as against a special demurrer.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 195.]

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Tom Haley was convicted of gambling, and brings error. Reversed.

Haley was tried in the city court of Elberton on an accusation which charged him and others with the offense of misdemeanor, for that on a day named they did "with force and arms unlawfully play and bet for money or other thing of value at a game of skin or other game played with cards." The defendant demurred to the indictment because it was in the alternative and did not with sufficient certainty charge the defendant with a single offense. The court overruled the demurrer, but stated in his order that the state should be restricted to proof of the game alleged to be "skin" and also to the proof of betting for money. After conviction the defendant excepted.

Sam L. Olive, for plaintiff in error. T. J. Brown, Sol., for the State.

LUMPKIN, J. (after stating the facts). The accusation employs the alternative form of expression in describing the offense. It charges that the persons accused did play and bet "for money or other thing of value." Where an offense can be committed in more than one way, it is not good pleading to charge it as having been committed in one method or the other, in the alternative. *Sanders v. State*, 86 Ga. 717, 12 S. E. 1058; *Grantham v. State*, 89 Ga. 121, 14 S. E. 892; *Langston v. State*, 109 Ga. 153, 35 S. E. 166, 779; *Henderson v. State*, 113 Ga. 1148, 39 S. E. 446. Wharton's *Crim. Pl. & Pr.* §§ 161-162. As to the employment of the conjunctive or disjunctive form of expression, see *Hubbard v. State*, 123 Ga. 17, 51 S. E. 11. The decision in *Brand v. State*, 112 Ga. 25, 37 S. E. 100, furnishes no

authority for the contention on behalf of the state in regard to this ground of the demurrer. In that case the indictment charged that the accused "played and bet for money and other things of value," conjunctively. It has been held that "the cases of Johnson v. State, 8 Ga. 453, and Hinton v. State, 68 Ga. 322, are no authority to the contrary; the precise question not being made and determined in either of those cases." *Grantham v. State*, supra. See, also, *Oglesby v. State*, 123 Ga. 506, 51 S. E. 505. The accusation was subject to the special demurrer on the ground that it stated the offense in the alternative. The accusation being demurrable, it could not be cured by the statement of the court that he would confine the state to proof to show that the game was "skin" and the thing bet was money.

Judgment reversed. All the Justices concurring.

(124 Ga. 141)

SCANDRETT v. STATE.

(Supreme Court of Georgia. Nov. 10, 1905.)

1. SUNDAY — VIOLATION OF SUNDAY LAW — EVIDENCE.

Where it appeared from the evidence that the defendant sold on the Sabbath day articles of refreshment, such as candy and "coca cola," at a "stand," and it further appeared that several times on Sunday at different churches he had conducted a similar business, the jury trying the case would be authorized to find the defendant guilty of a violation of Pen. Code 1895, § 422.

2. NEW TRIAL — DEFECTS IN INDICTMENT — MOTION IN ARREST.

"Defects in an indictment afford no ground for a new trial. Exceptions which go merely to the form should be made before the trial. For matters affecting the real merits, the remedy, after trial, is by motion in arrest of judgment."

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2152-2153, 2445-2462.]

(Syllabus by the Court.)

Error from City Court of Griffin; H. W. Hammond, Judge.

Lump Scandrett was convicted of violation of a Sunday law, and brings error. Affirmed.

Thos. W. Thurman, for plaintiff in error.
T. E. Patterson, for the State.

BECK, J. The defendant was tried in the city court of Griffin on an accusation in which it was charged that he, "on the 23d day of July, 1905, did with force and arms unlawfully pursue his ordinary business, or the work of his ordinary calling, on the Lord's day, and did sell a quantity of coca cola and candy." The defendant was convicted, and moved for a new trial upon the general grounds, and also on the further ground that the "state did not charge or prove the work or business was not a work of necessity or charity." The court overruled the motion for a new trial, and the defendant excepted.

1. There was no evidence in this case to show that during the week the defendant

had any other business or calling than that of a farmer, but the undisputed testimony conclusively proved that on the Sunday set out in the accusation the defendant did, at a "stand" kept by him, vend articles of refreshment, such as candy and "coca cola," and that he had on other Sundays conducted a similar business. It is not necessary, under the issues made in the case, for us to pass upon the question as to whether or not the proof of a single sale on the Sabbath day would support a charge of violating Pen. Code 1895, § 422; but where there is a series of acts, of the nature of those charged in this accusation, the jury would be authorized to find the defendant guilty under that section. *Reed v. State*, 119 Ga. 562, 46 S. E. 837.

2. Besides the general grounds, plaintiff in error based his motion for a new trial upon the ground that the "state did not charge or prove the work or business was not a work of necessity or charity." It is true that the state did not allege that the acts charged were not works of necessity or charity; but, if this allegation was necessary to make a perfect indictment, a failure so to charge should have been taken advantage of by a special demurrer to the accusation. But the defendant did not demur to the accusation, and permitted evidence to go to the jury which showed conclusively that the acts charged were neither works of charity or necessity. "Defects in an indictment afford no ground for a new trial. Exceptions which go merely to the form should be made before trial. For matters affecting the real merits, the remedy, after trial, is by motion in arrest of judgment." *White v. State*, 93 Ga. 47, 19 S. E. 49. See, also, *Wise v. State*, 24 Ga. 31.

Judgment affirmed. All the Justices concurring.

(124 Ga. 143)

NEW v. STATE.

(Supreme Court of Georgia. Nov. 10, 1905.)

CRIMINAL LAW — APPEAL — CIRCUMSTANTIAL EVIDENCE.

The evidence against the accused was entirely circumstantial, and at most authorized a mere suspicion of his guilt; whereas, to warrant a conviction, the evidence should have been sufficient to exclude every reasonable hypothesis save that of his guilt. The court, therefore, erred in refusing a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2297, 2298.]

(Syllabus by the Court.)

Error from City Court of Carrollton; W. O. Hodnett, Judge.

Howard New was convicted of crime, and brings error. Reversed.

Hamrick & Smith, for plaintiff in error.
C. E. Roop, Sol., and W. F. Brown, for the State.

FISH, C. J. Judgment reversed. All the Justices concurring.

(124 Ga. 142)

CENTRAL OF GEORGIA RY. CO. v. COX.

(Supreme Court of Georgia. Nov. 10, 1905.)

RAILROADS — KILLING STOCK — ACTION FOR DAMAGES—EVIDENCE.

There was no error in the admission of testimony, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from City Court of Sandersville; P. R. Talliaferro, Judge.

Action by S. H. Cox against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Howard & Jordan, for plaintiff in error.
Evans & Evans, for defendant in error.

EVANS, J. 1. Ordinarily, on the trial of an action for damages growing out of the killing by a railway company of stock upon its track, the fact that the same train ran over other stock at a different point on the track cannot illustrate the question whether or not the servants of the company in charge of the train exercised due care in endeavoring to prevent injury to the stock for the killing of which suit is brought. But when the engineer testifies, in effect, that he neither saw nor could have seen any stock on the track until his engine rounded a curve and approached to within 200 yards of the plaintiff's cattle, when he immediately applied brakes and used every effort to prevent injury to them, it is competent for the plaintiff to prove that the version of the occurrence given by the engineer is untrue, by introducing testimony tending to show that the engineer in fact saw a cow belonging to another upon the track, some 130 yards above the point where the plaintiff's cattle were standing, and between the engineer and the plaintiff's cattle; that the engineer blew the whistle of the locomotive when he saw this cow, but made no attempt to check the speed of his train at that time, or even after his engine had rounded the curve and he could have seen plaintiff's cattle upon the track. Whether the engineer did or did not see the cow on the track was material to the issue on trial, as throwing light upon his conduct subsequently, inasmuch as the company insisted he was maintaining a lookout and observed the plaintiff's cattle as soon as the engine rounded the curve and he came in view of them, whereupon he did everything in his power to prevent injury to these cattle; whereas, the plaintiff's theory of the case was that the engineer's attention was distracted by the killing of this cow, which he saw on the track before he rounded the curve, and that he did not give heed to the presence of plaintiff's cattle, which were 130 yards beyond where this cow was run over, nor did he make any effort to prevent injury to them at any time after they could have been seen.

52 S.E.—11

2. In view of the testimony upon which the plaintiff relied as overcoming the evidence introduced by the defendant company to establish its diligence, a verdict in his favor was warranted, and the court below did not commit any abuse of discretion in refusing to grant a new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 147)

ANDERSON v. ANDERSON.

(Supreme Court of Georgia. Nov. 10, 1905.)

1. ERROR—RECORD—WHAT CONSTITUTES.

Affidavits and documents introduced in evidence on the hearing before the trial judge must be incorporated in the bill of exceptions seeking to review his judgment, or attached thereto as exhibits, duly and properly identified, or be embraced in an approved brief of evidence and brought up as record. The mere filing of affidavits and documents in the office of the clerk of the court does not make them parts of the record in the case. Civ. Code, §§ 5528, 5529; *Hancock v. McNatt*, 42 S. E. 525, 116 Ga. 297, and citations; *Sayer v. Brown*, 46 S. E. 649, 119 Ga. 539; *Griffin v. Baxter*, 46 S. E. 840, 119 Ga. 612; *Eubanks v. Eastman*, 48 S. E. 426, 120 Ga. 1048; *Kelsoe v. Oglethorpe*, 48 S. E. 366, 120 Ga. 957, 102 Am. St. Rep. 138.

2. SAME—REVIEW—ASSIGNMENTS.

Where the questions made by the assignments of error in the bill of exceptions necessarily involve a consideration of the evidence, and none of the methods above indicated have been adopted, but copies of affidavits and documents have been sent up as parts of the record, they cannot be considered.

(Syllabus by the Court.)

Error from Superior Court, Bulloch County; B. L. Rawlings, Judge.

Action between C. E. Anderson and D. E. Anderson. From the judgment, C. E. Anderson brings error. Dismissed.

J. J. E. Anderson and G. S. Johnston, for plaintiff in error. H. B. Strange, for defendant in error.

FISH, C. J. Writ of error dismissed. All the Justices concurring.

(124 Ga. 229)

HODGES v. WATERS.

(Supreme Court of Georgia. Nov. 13, 1905.)

LANDLORD AND TENANT—DISPUTING LANDLORD'S TITLE—ESTOPPEL—ATTORNEY.

One who goes into possession of land as the tenant of another cannot set up title adverse to the landlord, from whom he thus obtained possession, until there has been a surrender of the premises by the tenant to the landlord. However, if a tenant thus in possession expressly agrees to pay rent to another for a given time, he will be bound by these terms, if founded upon a sufficient consideration; but, after the expiration of the time fixed in the express agreement, no promise to pay rent will be implied, and such person may deny liability for rent after that time, although he still remained in possession of the premises as the tenant of the person who placed him in possession.

(Syllabus by the Court.)

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Action by R. B. Waters against C. W. Hodges. Judgment for defendant, and plaintiff brings error. Reversed.

R. B. Waters sued out a distress warrant against C. W. Hodges, claiming the sum of \$100 as rent for the described premises. A counter affidavit was interposed; and the case, coming on for trial in the superior court on appeal, resulted in a verdict for the plaintiff for the amount claimed. The defendant made a motion for a new trial, which, in addition to the general grounds, assigned error on two special grounds: (1) That the court erred in charging the jury as follows: "If you find that C. W. Hodges ever at any time recognized or acknowledged R. B. Waters as his landlord, he cannot now attorn to any other person, if his possession was continuous from that time; that is to say, he cannot be heard to deny his obligation to pay rent to said R. B. Waters." (2) The second special ground assigned error upon the failure to charge the defendant's theory of the case, that he was the tenant of Mrs. Sarah Waters, and not the tenant of R. B. Waters, and also the failure to charge the provisions of section 8116 of the Civil Code of 1895, which declares: "When the title is shown in the plaintiff and occupation by the defendant, an obligation to pay rent is generally implied; but if the entry was not under the plaintiff, or if possession is adverse to him, no such implication arises." The motion for a new trial was overruled and the defendant excepted.

The evidence was in substance as follows: A warranty deed from Sarah Waters to the plaintiff, dated March 1, 1877, conveying the premises involved. A warranty deed between the same parties, conveying the same premises, dated February 4, 1896. The plaintiff testified that the defendant owed him the amount claimed in the distress warrant for rent of the place therein described for the year 1903; that he did not have a separate contract for that year, but the place was worth the amount it brought in the years 1896 and 1897; and that the land was worth \$100 per year. Defendant had been in possession as tenant for about 23 years, and had never paid any rent until about 1896. That year he paid \$100 under a written agreement under seal, which was renewed in writing under seal for the year 1897. These documents were introduced in evidence. There has been no written contract since 1897, but defendant has paid rent along since, but only in one year as much as \$100. Plaintiff agreed with his mother, Mrs. Sarah Waters, that she was to have a home on the place as long as he owned it. She remained in possession, and had the use of the place as a home under this agreement, until the place was sold,

which was in the latter part of 1903. Plaintiff did not claim any rent for 14 years, but paid the taxes. The defendant supported plaintiff's mother most of that time, but plaintiff contributed to her support. The defendant testified that he did not owe Waters any rent, and did not agree to pay him anything; that he held the place under Mrs. Sarah Waters; that the agreement between Mrs. Waters and the plaintiff was that she was to have control and possession of the place as long as she lived, and defendant held under her. Defendant supported Mrs. Waters for the use of the place. This was the agreement between them. He had been in possession 23 years continuously under this arrangement. His wife was her youngest daughter. Waters never demanded rent until 1896. He attempted to sell the place about that time, and on account of Mrs. Waters objecting to the sale, she claiming that she had a right to occupy it during her life, the sale was not consummated; and plaintiff, being mad, demanded rent of defendant, threatening to eject him from the place unless he paid rent. He agreed to pay rent rather than have a lawsuit. He could not read or write, and signed the contract by his mark. He paid the rent for that year, and renewed the contract for the next year. Since that time he has not paid one cent; has not agreed to pay anything; denies any promise of making payment as testified to by defendant. Mrs. Sarah Waters testified that the agreement between her and the plaintiff was that she was to have the possession and use of the place during her life; that there was a mortgage on the place, and the plaintiff agreed that, if she would make him a deed, he would pay the mortgage and allow her the possession and control as long as she lived. She was in possession under this agreement until the plaintiff sold the place and put her off. He never denied the agreement until recently. He now claims that the agreement was that she was to have the place as long as he owned it; but that is not correct. No rent has ever been demanded of her, and none has ever been paid. The reasons for demanding rent from Hodges are stated by her substantially the same as by him. The deed of 1896 was made because plaintiff said it was necessary on account of an old homestead which had been taken years ago. He repeated his agreement to allow her the use of the place as long as she lived when the deed of 1896 was made. She objected to the defendant's paying rent, and did not consider him under any obligation to pay it. The defendant also introduced the answer of Waters in an equitable suit brought against him by Mrs. Waters, in which he stated that his mother was entitled to remain on the place as long as plaintiff owned it and was in possession of it; that he had demanded no rent, and had expected none from her.

Mrs. Anna Hodges testified that she knew of the agreement between the plaintiff and his mother, and that the same was to the effect that she was to have a home on the place as long as she lived, and was to be supported from the place.

Brannen & Booth, for plaintiff in error.
G. S. Johnston, for defendant in error.

COBB, P. J. The rule that one who goes into possession of land as a tenant of another is estopped to deny the title of him who occupies the relation of landlord in the agreement is familiar law. In the application of this rule it is immaterial whether the landlord is the owner or has any legal interest in the premises. It is sufficient, as between him and his tenant, that he claims ownership, and as a result of this claim the tenant is put in possession and allowed to occupy the premises. *Grizzard v. Roberts*, 110 Ga. 41, 35 S. E. 291. Upon the question as to whether this estoppel operates where the tenant, at the time the contract of rental is made, is already in possession through another and former landlord, or another claim of title, the authorities are at variance. In *Franklin v. Merida*, 85 Cal. 558, 95 Am. Dec. 129, the Supreme Court of California held that, if one in possession takes a lease from a stranger, the lessee so in possession is not estopped to deny the title of the lessor, since the latter parts with nothing, and the former has obtained nothing, by the transaction. This decision seems to follow an older decision, and in both cases one of the judges dissented. The better rule seems to be that laid down by the Supreme Court of Colorado, in *Lyon v. Washburn*, 3 Colo. 201, where it is said that an attornment by one in possession estops the tenant from denying his landlord's title, unless the attornment was brought about by fraud, force, or mistake of fact. In the opinion *Wells, J.*, says: "To avoid the assertion of a hostile title, one may lawfully contract to pay for his own, and, if the threatened litigation be forborne, he is bound by his promise; and so the tenant, holding under a landlord whose title is unimpeachable, may, if he will, undertake to pay rent to every stranger who demands it. Such demand implies the threat of litigation and dis-possession if the demand be refused; and if made in good faith, and without fraud or other improper practice to induce concession, and if the tenant yield to it with a full understanding of all the facts which are material to the question of his liability, it is difficult to see why he should not be bound by his promise, even though he should become liable thereby to pay triple rent for the same premises." See, also, *Carter v. Marshall*, 72 Ill. 609; *Lucas v. Brooks*, 85 U. S. 436, 21 L. Ed. 779. In *Hamilton v. Pittock*, 158 Pa. 457, 27 Atl. 1079, an instruction that "a man may, if he sees fit, where there are conflicting titles, take a lease from each of the owners of it,

and, if he is not deceived by assertions in regard to the matter, he would have to pay both," was approved as sound law.

Hodges, under his admissions, was a tenant of Mrs. Waters; the contract being that he was to have the use of the place, and the rent was to be paid by furnishing her with support. It is immaterial whether Mrs. Waters had any interest in the premises as between her and Hodges. He recognized her as his landlord, and he obtained possession from her; and as between them he cannot raise any question as to her title. By express agreement under seal, in the year 1896 as well as the year 1897, he recognized the plaintiff as his landlord, and agreed to pay him a stipulated amount as rent; the written agreement between the parties having all the formalities required to create the technical relation of landlord and tenant. So far as those years are concerned he occupied the relation of tenant to both plaintiff and his mother, and as against each he was estopped to deny this relation, certainly so far as the payment of rent was concerned. He could not defeat the claim of Mrs. Waters for rent by showing that the agreement between her and her son was invalid for any reason. Neither could he defeat the claim of her son for the rent of those years by showing that the title of the mother was superior. Having received possession of the land from Mrs. Waters, he could not by any act of his place himself in a position where, as against her, he could deny her title. So long as the possession thus acquired continued, he was estopped from denying her title as landlord. To deny her title it was necessary for him to surrender to her that possession which he had received from her, and re-enter after such surrender under some other person. Therefore an agreement to pay rent from year to year would arise between Hodges and Mrs. Waters until there had been an actual surrender of the premises to her. Hodges' possession having been in no way dependent upon any act of the plaintiff, to what extent the agreement between him and the plaintiff would create a liability for rent of the premises would depend upon the terms of the agreement. If Hodges, upon a sufficient consideration, agreed to pay the plaintiff rent for 1896 and 1897, he would be bound by this agreement, and must pay the rent. But after the expiration of the term fixed in the agreement, his obligation to pay rent depending upon the agreement alone, and his possession not having been obtained through the person to whom the promise was made, there would be no obligation upon him to attempt a vain and idle thing; that is, to surrender the premises belonging to one person to another who was not entitled to it. He was not compelled at the end of the year 1897 to abandon possession of the premises, which he at all times held under Mrs. Waters, in order to prevent a liability on his part to pay to her son rent in the future. Not having acquired possession from

her son, the estoppel raised by the contract to pay rent was no broader in its operation than the contract provided for; and he was therefore not estopped from denying after 1897 that he was no longer liable to pay rent as a tenant to the son of Mrs. Waters. If, at the time the defendant had made the contract to pay rent to the plaintiff, the plaintiff had been in possession claiming title to the property as his own, and no other person's rights were to be affected, then his entering into a contract to pay rent would have made the defendant a tenant of the person to whom the rent was payable, and render him liable to all the incidents of such a tenancy. See *Johnson v. Thrower*, 117 Ga. 1007, 44 S. E. 846; *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794 (9).

The defendant was liable to the plaintiff for the rent of the years 1896 and 1897, which he expressly agreed to pay; the consideration for such promise being the quieting of his possession from the threat of eviction made by the plaintiff. The defendant having testified that he had never agreed to pay rent for any other year than those named, the judgment must be reversed upon that assignment of error which complained that the court erred in charging the jury that, if at any time the defendant had recognized the plaintiff as his landlord, he could never thereafter be heard to deny his obligation to pay rent so long as he remained in possession of the premises.

Judgment reversed. All the Justices concurring.

(124 Ga. 236)

OVERSTREET v. SYLVANIA WATER SUPPLY CO. (two cases).

(Supreme Court of Georgia. Nov. 18, 1905.)
INJUNCTION—HEARING—AMENDMENT OF PETITION—NOTICE.

Where, upon the hearing of a rule upon a petition for injunction, the judge reserves his decision, it is error for him, pending the consideration of the case and before his decision is made, to permit the plaintiff to amend the petition in a material particular and submit affidavits in support of the petition as thus amended, without giving notice to the opposite party of such amendment and affidavits, in order that said party may meet the same if he should so desire.

(Syllabus by the Court.)

Error from Superior Court, Screven County; B. T. Rawlins, Judge.

Suit by G. M. Overstreet against the Sylvania Water Supply Company. Judgment for plaintiff, and defendant brings error. Reversed.

Overstreet applied to the judge of the superior court for an injunction against the Sylvania Water Supply Company, alleging in substance as follows: The defendant company, when it first commenced operations in the year 1904, gave notice to the citizens of Sylvania that its terms for supplying water would be "seventy-five cents per month for the

first hydrant installed, and twenty-five cents for each additional hydrant used on the premises of the citizens of said city, with the privilege of using them as they should see fit around and in their dwellings, lots, and premises." Before putting in pipes or connecting with the waterworks of the defendant company, petitioner was informed by said company "that the water could not be used for watering flowers." Upon petitioner informing defendant company that he would not use its water without such privilege, it was agreed that he could use the water in his yard and for the purpose of watering flowers, "as petitioner should see fit," upon the terms stated above, provided petitioner would put in the pipes. Acting upon this agreement, petitioner alleges, he put in pipes and fixtures at an expense of \$150 and also a hydrant in his yard, from which he has been watering his flowers, paying for the water according to the aforementioned terms. The defendant, shortly before the filing of this bill, gave petitioner notice that its rates for hydrants used to water flowers had been increased to \$5 a month, and unless petitioner would pay that amount his pipes would be disconnected from the defendant's waterworks system. Petitioner alleges that, if the defendant company should be allowed to cut off his water, his loss would be irreparable. He prays that the said company be restrained from so doing. The judge granted a temporary restraining order, and required the defendant to show cause upon a certain date. On the day named the defendant appeared and demurred generally to the petition, on the ground that it was without equity and set forth no cause of action, and especially to the allegations in reference to the contract set out in the petition, for the reason that it was not therein alleged "the time for which the alleged rate was to be charged," and because the contract was not alleged to have been in writing, nor was the length of time "for which the alleged contract was to run" stated. Defendant further demurred on the ground that the petition did not show that the alleged damages would be irreparable, or that the defendant is insolvent. After filing its demurrer the defendant answered the petition as follows: It denied having made any contract with Overstreet, "but at the urgent solicitation and request of the plaintiff's wife defendant did put in a hydrant at that place for the purpose of watering flowers. * * * It was not a part of defendant's published rates that it would furnish water for the use of flower gardens, gardens, or lawns, but, on the contrary, defendant had stated generally that it would not furnish water for such purposes." Defendant admitted that its rates for water in dwellings was 75 cents per month for the first hydrant installed and 25 cents monthly for each additional hydrant, but denied that this rate applied to hydrants in flower gardens, etc. Defendant also ad-

mitted that it had received only 25 cents per month in payment for the hydrant in petitioner's flower garden, but averred that it rendered a statement charging \$1.50 for the yard hydrant, which complainant's wife refused to pay, and that, "rather than have contention about the matter, defendant did not insist upon said charges. * * * The water to this hydrant was supplied at a cost to this defendant far in excess of the amount received; but, as defendant had only one other hydrant for the purpose of watering flowers, it voluntarily bore the expense and submitted to the injustice rather than have a difference with these two customers." Defendant further averred that, by reason of the hydrant in petitioner's yard being left running all night, as well as a great portion of the day, "the supply in the tank would become exhausted before daylight, to the injury and inconvenience of other customers and this defendant." After the filing of the answer a hearing was had, whereupon the judge announced that he would reserve his decision until further consideration of the case, and requested counsel for both parties to furnish him with additional legal authorities. Some time after the hearing the plaintiff offered an amendment to his petition and affidavits to support the amendment, the substance of which appear in the opinion, which were allowed by the judge without any notice whatever being given to the defendant. Shortly after this amendment was allowed the judge rendered his decision restraining the defendant until the final hearing of the case, to which the defendant excepted upon the grounds that the judgment was contrary to law and the evidence, and because the court erred in allowing the amendment and affidavits after the hearing and without notice to the defendant.

Phil P. Johnston and H. J. Fullbright, for plaintiff in error. E. K. Overstreet, for defendant in error.

BECK, J. (after stating the facts). No extended argument is required to show that the defendant in the court below was deprived of a material right. We do not know, in view of the state of the pleadings and the evidence when the case was closed at the time of the hearing at chambers, what the judge's decision in the exercise of his discretion would have been, had he rendered it upon the case as then made. But, instead of rendering his judgment then, he reserved his decision, and, pending the consideration of the cause, permitted defendant in error to file an amendment containing new and material averments. In the petition as it stood before the amendment was allowed the plaintiff below alleged and complained that the defendant company commenced operations in the year 1904, giving notice to the citizens of Sylvania at that time as to what its terms and charges would be, fixing them at a certain amount according to the num-

ber of hydrants used, fixing a charge for the first hydrant and a lower charge for each additional hydrant used on the premises of those citizens who should take water from said company. The plaintiff alleged, further, that before putting in pipes upon his premises, and before connecting with the waterworks system of the defendant company, he was informed by the company that the water could not be used for the purpose of watering flowers, whereupon petitioner informed the company that he would not take the water without the privilege of using it in his yard and for watering his flowers. The defendant company then, through its president, informed petitioner that, if he would put in pipes and take the water, he should have the privilege of using it in his yard and for the purpose of watering flowers as petitioner should see fit according to the terms already stated. The defendant company denied a part of the above allegations, but admitted that through its president it did say the charge for water would be 75 cents per month for the first hydrant and 25 cents per month for each additional hydrant; these charges, however, applying only to hydrants used in residences, and not to such as might be put in yards, flower gardens, etc. Both parties submitted evidence to support their contentions. In the amendment to the petition, the allowance of which is complained of, it is alleged that the defendant company, by its president, agreed to furnish water at "said rates" as long as the artesian well from which it obtained water would afford sufficient water for "such purpose" and for drinking purposes, only reserving the right to cease furnishing water in the event the well should fail to furnish a sufficient quantity for "such purposes; * * * that said well affords more than ample and sufficient quantity of water for the enjoyment of petitioner of his rights under said contract, as well for watering flowers as for all other purposes. In point of fact said well affords a sufficient quantity of water to more than many times supply the demands of the various customers of the Sylvania Water Supply Company." Affidavits were submitted to support the new averments in this amendment, and upon the case as made by the original petition, the defendant's demurrer and answer, and the amendment to the original petition, with all of the aforesaid affidavits, the judge made and rendered the decision now complained of. The effect of allowing this amendment was to open the case for further demurrer or answer. The opposite party should have been given notice of the amendment and allowed reasonable time to answer the same and to submit evidence supporting his answer. "An amended bill is considered as an original bill" (Carey v. Smith, 11 Ga. 540), and the right to contest the averments of the former is as complete as the right to answer and contest those of the latter. We

must also agree with the contention of counsel for plaintiff in error that the judge erred in receiving and considering the affidavits filed after the hearing, for the reason that no application was made to have the case reopened for this purpose and no notice was given to the opposite party. In the case of *Jowers v. Lott*, 96 Ga. 333, 23 S. E. 189, this court reversed the judgment of the lower court, for receiving and considering an affidavit and denying to the opposite party an opportunity to submit counter affidavits. "The ruling of this court has gone to the extent of rejecting all affidavits not filed and of which no notice has been given to the adverse party." *Huff v. Markham*, 70 Ga. 284.

The plaintiff in error further excepts to the order allowing the amendment to the petition, on the ground that it sets forth a new cause of action, and to the three affidavits submitted after the hearing, on the ground that they were not entitled in the cause pending. We do not consider the questions raised by these exceptions as properly here for consideration, as the objections are here made for the first time; they not having been made before the trial judge. And that reason for not passing upon them is a valid one, although the plaintiff in error was denied an opportunity of making them below; for the presumption is that, when the objection is urged at the hearing, the ruling thereon will be in accordance with the law.

Judgment reversed. All the Justices concurring.

(124 Ga. 250)

LOUISVILLE & N. R. CO. et al. v. KOHLRUSS.

(Supreme Court of Georgia. Nov. 18, 1905.)
RAILROADS—FIRES—DAMAGES.

The measure of damages for the negligent firing and destruction of the fencing and ornamental trees on the plaintiff's land by the railroad company in the operation of its train was the diminution in value of the premises resulting from the injury caused by such firing. The charge of the court could not have been reasonably misunderstood by the jury as presenting a different rule. The evidence fully supported the verdict.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1737.]

(Syllabus by the Court.)

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Action by C. F. Kohlruss against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Jos. B. & Bryan Cumming, P. B. Johnson, and G. M. Beasley, for plaintiffs in error. Henry C. Roney, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concurring.

(104 Va. 619)

COSMOPOLITAN LIFE INS. ASS'N v. KOEGEL.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. INSURANCE—POLICY OF INSURANCE—WHAT CONSTITUTES.

A certificate issued by a fraternal mutual benefit society to a member, which provides that on the death of the member a specified sum will be paid to his wife out of the mortuary fund on condition of the payment by the member of fixed sums at fixed periods, is a life policy, within Code 1887, § 3251 [Va. Code 1904, p. 1711], providing what shall be a sufficient declaration in an action on a policy, and is not merely a certificate of membership in a beneficial society, within Acts 1897-98, p. 784, c. 688, defining and regulating fraternal beneficiary associations.

2. SAME—MUTUAL BENEFIT INSURANCE—RE-INSURANCE.

A fraternal mutual benefit society issued a certificate to a member, providing for the payment of \$2,000 on his death to his wife. After the death of the member an insurance company agreed for a certain consideration to assume all liabilities of the society on its certificates of membership on which death had been reported and were unpaid, and specifically assumed the payment of the certificate issued to the deceased member and contracted to carry out the provisions of the certificate. Held, that the insurance company's agreements were a reinsurance directly to the several holders of certificates, and especially a contract of reinsurance to the beneficiary in the certificate of the deceased member, and the certificate became its contract and the measure of its liability, and Code 1887, § 3251 [Va. Code 1904, p. 1711], providing what shall be a sufficient declaration in an action on a policy, was applicable.

3. SAME—STATUTORY PROVISIONS—CONSTRUCTION.

Acts 1897-98, p. 784, c. 688, defining and regulating fraternal beneficiary associations, and declaring that they shall be governed by the act and shall be exempt from the provisions of the insurance laws, does not apply to associations doing a life insurance business by issuing certificates providing for the payment of a specified sum to the beneficiary on the death of the members on the members paying fixed sums at fixed periods.

4. SAME.

Acts 1897-98, p. 784, c. 688, defining and regulating fraternal beneficiary associations and exempting them from the provisions of the insurance laws, does not impliedly repeal Code 1887, §§ 3251, 3252 [Va. Code 1904, pp. 1711, 1712], providing what shall be a sufficient declaration in an action on a policy, and declaring when a failure to perform conditions of the policy shall not be a defense; sections 3251, 3252, being no part of the insurance law and being enacted to meet cases where companies seek to escape liability on technicalities in pleading.

5. SAME—ACTIONS—DECLARATION—SUFFICIENCY.

Code 1887, § 3246 [Va. Code 1904, p. 1708], provides that no action shall abate for want of form where the declaration sets forth sufficient matter for the court to proceed on the merits. Section 3272 [page 1722] requires the court on a demurrer to disregard any defect in the pleadings, whether deemed misleading or insufficient pleading, unless there be omitted something essential to the action. The declaration in an action for the amount of a benefit

certificate set forth the undertaking of defendant to pay the certificate issued by a beneficiary association on the life of a member, alleged his death, and the consideration for defendant's undertaking and the failure to pay the amount of the certificate. *Held*, that the declaration was a sufficient declaration in assumpsit as against a demurrer.

6. CONTRACTS — PARTIES — RIGHTS ACQUIRED BY THIRD PERSON.

A beneficiary association issued a certificate to a member, binding it to pay a specified sum on his death to a beneficiary designated. The member died, and subsequently defendant agreed, in consideration of the assets of the association turned over to it, to pay, among other debts, this certificate, and thereafter it specifically agreed to pay this certificate. *Held*, that the beneficiary in the certificate was entitled to sue defendant, though she was a stranger to the consideration for the agreement.

7. INSURANCE — MUTUAL BENEFIT CERTIFICATE — ACTIONS — DEFENSES — SUICIDE OF MEMBER — EVIDENCE — SUFFICIENCY.

Where, in an action on a mutual benefit certificate stipulating that no benefit should be payable on account of the death, accident, or disability of a member by his own hands, whether sane or insane, the evidence did not show a single circumstance surrounding the death of the member that was not as consistent with accident as with suicide, a finding that the member did not commit suicide would not be disturbed on appeal.

Error to Circuit Court, Roanoke County.

Action by Mrs. Louie M. Koegel against the Cosmopolitan Life Insurance Association. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Archer A. Phleager, for plaintiff in error.
Smith & King, for defendant in error.

CARDWELL, J. On the 12th day of October, 1897, the Royal Tribe of Joseph, calling itself a fraternal mutual benefit society, incorporated by the laws of Missouri, issued a certificate of membership to John Jacob Koegel, which provided that upon satisfactory proof of his death and surrender of the certificate \$2,000 would be paid to Louie M. Koegel, his wife, out of the Ideal Division of the Mortuary Fund of the Royal Tribe of Joseph, upon condition that the laws of the society relating to such certificate were complied with, and that it was issued and accepted upon the terms and conditions of the laws of the society then in force or which might thereafter be adopted.

John Jacob Koegel died August 29, 1903, in the county of Roanoke, Va., from a wound inflicted by a pistol in his hand, whether intentionally or accidentally is unknown. Before and at the time of his death, section 233 of the laws of the society was in force, and provided among other things, that "no benefit shall be payable on account of the death, accident, or disability of any member by his own hands, whether sane or insane."

On the 17th of October, 1903, after the death of Koegel had been reported to the society, the Royal Tribe of Joseph and the Cosmopolitan Life Insurance Association, a corporation of Illinois, entered into a contract in writing "for consolidation of the two

societies," as stated in the contract, whereby, in consideration of the transfer to it of the assets of every kind, business, and good will of the Royal Tribe of Joseph, the Cosmopolitan Life Insurance Association, among other things, assumed "all liabilities of the said Royal Tribe of Joseph on certificates of membership upon which death had been reported and which were at the date of said contract unpaid"; and this assumpsit included the liability, if any, upon the certificate of Koegel. Thereafter the Cosmopolitan Life Insurance Association in writing specifically assumed the payment of certificate No. 7,216, issued by the Royal Tribe of Joseph on the life of Koegel, and contracted to carry out the provisions thereof in accordance with its terms, etc.

On the first Monday in March, 1904, Louie M. Koegel filed in the circuit court of Roanoke county a complaint in writing against the Cosmopolitan Life Insurance Association, such as is provided by section 3251 of the Code of 1887, as amended by Acts 1895-96, p. 707, c. 649 [Va. Code 1904, p. 1711], and filed therewith the said certificate issued by the Royal Tribe of Joseph.

The said complaint sets out the foregoing facts and also avers that for a valuable consideration the Royal Tribe of Joseph issued the said certificate as an insurance policy on the life of John Jacob Koegel, by which the Royal Tribe of Joseph agreed to pay, on the death of said John Jacob Koegel, to the plaintiff, who was the wife of said John Jacob Koegel, the sum of \$2,000; that in consideration of the transfer to the defendant of the assets, business, and property of the Royal Tribe of Joseph the defendant expressly agreed to pay and did assume to pay all liabilities which the said Royal Tribe of Joseph on its policies of insurance was under to its policy holders, and especially assumed and agreed to pay the liability of the Royal Tribe of Joseph to the plaintiff under said policy No. 7,216; and that the plaintiff thereby became and is entitled to demand and recover of the defendant the sum of \$2,000, with interest thereon from the 29th day of August, 1903, which by the terms of said policy of insurance the said Royal Tribe of Joseph did agree to pay her, and which, by the terms of the agreement and transfer aforesaid between said Royal Tribe of Joseph and the defendant, the defendant did agree to pay her. It further avers that the said John Jacob Koegel and she, the plaintiff, have performed all the conditions of said policy and violated none of its prohibitions; yet, notwithstanding this, neither the Royal Tribe of Joseph nor the defendant has paid to the plaintiff the said sum of \$2,000 and interest aforesaid, nor any part thereof, but, on the contrary, although requested so to do, hath hitherto wholly refused to pay the said sum, or any part thereof, and that therefore the plaintiff files this her complaint, and prays that judgment may be entered against the

defendant for the sum of \$2,000, with interest as aforesaid, etc.

To this complaint the defendant demurred, assigning as grounds of demurrer (1) that the certificate filed with the complaint was not a policy of insurance within the meaning of sections 3251 and 3252 of the Code of 1887 [Va. Code 1904, pp. 1711, 1712], and (2) that the assumption by the defendant of the liabilities of the Royal Tribe of Joseph did not give a right of action against the defendant under section 3251, but it could only be sued on its undertaking to pay the debt of the Royal Tribe of Joseph, if it was indebted to the plaintiff.

The demurrer was overruled, and thereupon the defendant tendered three pleas, which, on motion of the plaintiff, were rejected; and thereupon the defendant pleaded non assumpsit and filed with its plea a statement of its grounds of defense, the third of which was the same matter in different form as was alleged in one of the pleas rejected, and on motion of plaintiff this ground of defense was stricken out. The defendant then filed two other pleas, issue was joined on these pleas and the plea of nonassumpsit, and a trial resulted in a verdict and judgment against the defendant for \$2,000, with interest as claimed in the complaint.

We are asked to review and reverse this judgment on the grounds (1) That the court erred in overruling the demurrer to the complaint; (2) the rejection of pleas Nos. 1 and 2; and (3) because of the refusal of the court to set aside the verdict and grant a new trial as being contrary to the law and the evidence.

All that need be said as to pleas Nos. 1 and 2, rejected, is that they raise the same questions presented by the demurrer to the complaint or declaration, viz.: (1) Does section 3251 of the Code of 1887 apply to suits on certificates of membership such as was filed in this case? and (2) whether, if the certificate is a policy of insurance, the defendant could be sued thereon, as it was no party thereto?

Was the certificate filed with the complaint or declaration a policy of insurance, such as is contemplated by section 3251 of the Code of 1887 as amended? is the first question to be considered.

In *Logan v. Fid. & Gas. Co.*, 146 Mo. 114, 47 S. W. 948, the opinion says: "The calling of a contract of insurance by any other name that may be adopted for business or conventional uses cannot make an agreement to pay to another a sum of money designated, upon the happening of an unknown or contingent event depending upon the existence of life, less a policy of insurance on life." See, also, *Toomey v. Sup. L. K. of P.*, 147 Mo. 129, 48 S. W. 936; *Aloe v. Fid. Mut. L. Ass'n*, 164 Mo. 675, 55 S. W. 993.

In *Goodman v. Jed. Lodge, etc.*, 67 Md. 117, 9 Atl. 13, 13 Atl. 627, it is said: "If a company organized for social purposes

chooses to go into the insurance business, they must expect courts to deal with and adjudicate the rights of the policy holders upon the same principles they apply in the usual cases of life insurance."

"In some societies, the certificate issued by the supreme authority is to pay a certain amount to a designated beneficiary upon the death of a member. Where this is the case the certificate is in legal effect a policy of life insurance, governed by the rules of pleading applicable to ordinary actions on policies." *Elkhart N. B. & A. Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 516.

After reviewing a great number of decisions distinguishing benefit societies from life insurance companies, Bacon, in his work on *Benefit Societies & Life Insurance* (Section 52, vol. 1), says: "It follows from the foregoing adjudications that all benefit societies, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations whenever, in consideration of periodical contributions, they engage to pay the member, or his designated beneficiary, a benefit upon the happening of a specified contingency. Although they may also partake of the nature of clubs or fraternal societies, and although they are often technically not called insurance companies, we must admit that, whether the benefit be paid for sickness, or to provide burial, or to accumulate a fund out of which payments are to be made to beneficiaries of deceased members, the contract falls within the definition of an insurance contract, viz.: 'An agreement by which one party for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.' It may also be asserted as a general principle that wherever or whenever a benefit society, paying a benefit to the beneficiaries of its deceased members, claims to be exempt from the operation of certain laws applicable to persons or companies doing a life insurance business, it can only safely base such claim upon express provisions of its charter or of the statutes exempting similar organizations from such liability. The association may be benevolent and charitable, and only incidentally provide benefits for its members or their beneficiaries, but nevertheless, when it contracts to pay a certain sum to the appointees of its members upon their decease while in good standing, in consideration of certain contributions made by such members while living, it is doing a life insurance business. We shall find, as we proceed further to discuss the questions concerning the contracts and liabilities of benefit societies, that many of the principles of the law of life insurance are applied to these societies because they are in some respects simply life insurance

companies doing business on a plan only partially different from that of regular life insurance organizations." See, also, *Commonwealth v. Wetherbee*, 105 Mass. 149; *Bank of Washington v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 375.

The rule sanctioned by the foregoing authorities in defining what is a life insurance policy, and not a mere certificate of membership in a purely benevolent society, is that a contract by which a company or association agrees to pay a certain sum of money on the death of a member, in consideration of the payment by the member of fixed sums at fixed periods, is a life insurance policy, by whatever name it may be called; and, measured by this rule, the certificate filed with the complaint in this cause is clearly a policy of insurance, within the meaning of section 3251 of the Code, as amended, and not merely a certificate of membership in a benevolent society or beneficial association, within the purview of chapter 688, p. 734, Acts 1897-98.

With reference to the second ground of demurrer, while the defendant was not a party to the contract between the Royal Tribe of Joseph and John Jacob Koegel, as evidenced by the certificate filed with the complaint or declaration in this case, the complaint or declaration sets out the contract between the defendant and the Royal Tribe of Joseph of October 17, 1903, whereby the defendant specifically and definitely agreed in writing, for a certain consideration, to assume all liability of the Royal Tribe of Joseph on its certificates of membership upon which death had been reported and were unpaid at that date, and further avers, as we have seen, that the defendant thereafter in writing specifically assumed payment of the said certificate issued to John Jacob Koegel and contracted to carry out the provisions thereof in accordance with its terms, etc.

In *Johannes v. Phenix Ins. Co.* (Wis.) 27 N. W. 414, 57 Am. Rep. 249, A. was insured in the Standard Fire Insurance Company of London, and that company, desiring to withdraw from business in the United States, sold and turned over to the Phenix Insurance Company its entire business and the good will of that business in the United States, together with a large amount in bonds and other property, in consideration of which the Phenix Company reinsured all the risks of the Standard Company upon the property situated in the United States, and agreed that all losses arising under the policies of the Standard Company on such property after the date of the contract should be borne and paid and satisfied by the Phenix Company, and the Supreme Court of Wisconsin held that A. might maintain an action against the Phenix Company to recover a loss on the property covered by his policy in the Standard Company. That was a fire insurance policy, but upon a review of a number of authorities

cited the conclusion is reached that the principle applies as well in cases where the contract is an insurance of property as where it is an insurance of life.

Among the cases cited in the opinion in that case is *Glen v. Hope Mut. L. Ins. Co.*, 56 N. Y. 379, where the defendant had agreed with the Craftsmen's Assurance Company to reinsure the latter company on all its risks "for which policies of the said party of the second part (Craftsmen's Assurance Company) are outstanding at this date, and hereby agree to insure all such policies and to pay the holders thereof all such sums as the party of the second part may, by force of such policies, become liable to pay, * * * the liability for death losses to be limited to such deaths as may occur on and after this date." It was held that the defendant was liable on the contract of reinsurance directly to the several holders of the policies for the whole amount insured thereby, and the action in that case was on the policies, and not on the contract of reinsurance. In that case, also, the death of the insured occurred after the reinsurance, while in the case under consideration it occurred prior to the contract entered into by the defendant assuming to pay the claim originally against the Royal Tribe of Joseph, based on the certificate of membership which the deceased held at the time of his death. The opinion says that on the death of the insured the Craftsmen's Company became liable to pay all its three policies, and the defendant, the Hope Mutual Life Insurance Company, by reason of its agreement also became liable for the same amount to the plaintiffs, who had made demand upon the defendant therefor, and that on the facts of the case it was the settled law that the plaintiffs might maintain their action against the defendant on the three policies which by its agreement it had assumed.

The contract of October 17, 1903, was but a reinsurance directly to the several holders of the policies or certificates of membership in the Royal Tribe of Joseph, and specifically a contract of reinsurance directly to the beneficiary of the holder of the policy held by John Jacob Koegel and sued on in this cause; and we are of opinion that the said policy or certificate became the contract of the defendant and the measure of its liability to the plaintiff the moment it signed the agreement of October 17, 1903, and that therefore section 3251 of the Code is applicable to a suit on that certificate or policy.

But it is argued on behalf of the defendant that by reason of the provisions of chapter 688, p. 734, Acts 1897-98, which defines and regulates fraternal beneficiary associations, orders, or societies, section 3251 does not apply, as the first section of that act provides that such orders or associations shall be governed by this act, and shall be exempt from the provisions of the insurance laws of this state, and that the Royal Tribe of Joseph

was a fraternal beneficiary association within the provisions of the act.

We think that the contention is not well founded, as the definition of fraternal beneficiary associations excludes from the operation of the act associations of the class to which the Royal Tribe of Joseph belonged; it having been an association doing a life insurance business, and not a purely fraternal beneficiary association, within the definition of the act. Furthermore, sections 3251 and 3252 are no part of the insurance laws of Virginia, referred to in that act, but simply relate to the form of declarations and defenses in a certain class of actions. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487. The said act does not in terms repeal sections 3251 and 3252, nor are the two acts inconsistent. It was without doubt the object of the Legislature, in enacting sections 3251 and 3252 of the Code of 1887, to meet cases where insurance companies sought to escape liability upon technicalities in pleading.

But, whether this action is founded upon the original policy of insurance issued by the Royal Tribe of Joseph to John Jacob Koegel or not, we are of opinion that the demurrer to the so-called complaint filed by the plaintiff was properly overruled, as the complaint contains every essential averment of a declaration in assumpsit. It sets forth the undertaking of the defendant to pay the policy No. 7,216 on the life of John Jacob Koegel, his death, the consideration for the undertaking of the defendant, and the breach or failure to pay, and demands the amount of the policy.

In *Austin v. Richardson*, 3 Call, 205, 2 Am. Dec. 543, the opinion says: "As he [defendant] had entered into an express undertaking, if he failed to perform it, the general allegation of the demand and refusal was sufficient."

"The test of the sufficiency of a declaration is to inquire whether it contains sufficient matter for the plaintiff to state and prove his case under it, and to afford defense to another suit brought for the same cause of action." 1 *Barton's Law Pr.* 296; *Roanoke National Bank v. Hambrick*, 82 Va. 135.

Section 3246 of the Code of 1887 [Va. Code 1904, p. 1708] provides: "No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause."

And section 3272 [page 1722] is as follows: "On a demurrer (unless it be to a plea in abatement) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense, that judgment, according to law and the very right of the cause, cannot be given."

The Royal Tribe of Joseph promised and agreed to pay to the plaintiff \$2,000 on the death of her husband. Her husband died

August 29, 1903, and the debt then became due and payable. Subsequently, on October 17, 1903, as the complaint of declaration avers, the defendant promised and agreed, in consideration of the assets of the Royal Tribe of Joseph turned over to it, to pay, among others, this debt, and, further, at a subsequent date, specifically promised and agreed to pay this debt to the plaintiff, evidenced by the certificate No. 7,216 of the Royal Tribe of Joseph.

But the defendant insists that, as the plaintiff is a stranger to the consideration for which that promise and agreement was made, she cannot maintain this action, and that it could be maintained by the Royal Tribe of Joseph alone, and this upon the theory that there must be a privity between the plaintiff and defendant in order to render the defendant liable to an action by the plaintiff on the contract. This is undoubtedly the general rule; but it has its exceptions, like many other general rules.

That rule, as stated by Metcalf, J., in *Mellin v. Whipple*, 1 Gray, 321, and *Ross v. Milne*, 12 Leigh, 204, 37 Am. Dec. 646, and many other cases which need not be referred to, was recognized with express approbation by Mr. Justice Gray in *Carr v. National Security Bank*, 107 Mass. 45, 9 Am. Rep. 6, and in *Exchange Bank of St. Louis v. Rice*, 107 Mass. 41, 9 Am. Rep. 1; but he also carefully considers the exceptions to the rule, and they were regarded to be as firmly established as the rule itself. The principal exception referred to consists of those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, by his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors. See note to 1 Chitty on Pl. p. 5, where a number of cases are cited as belonging to a class in which it is said "the law [in such cases] creates the privity and implies the promise."

In a lengthy note by Hare & Wallace, in 2 Am. Leading Cas., the authors, dealing with the rule of which we are speaking and the exceptions thereto, and citing a number of cases, as authority for the conclusion they reach, say, at page 182: "The authorities as a whole would seem to indicate that, when the intention of the parties is to confer a right of action on a third person who will be injured by the breach, the law will imply a promise in his favor, if the loss will fall primarily and exclusively on him, and the circumstances are such that a judgment in assumpsit will cover the whole ground and be adequate to the ends of justice."

Among the cases there reviewed as laying down the rule that privity is not essential in actions *ex contractu* is *Brewer v. Dyer*, 7 Cush. (Mass.) 339, where it is said by

Bigelow, J.: "It is well settled in this commonwealth that when one person, for a valuable consideration, engages with another by simple contract to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. *Felton v. Dickinson*, 10 Mass. 287; *Hall v. Marston*, 17 Mass. 575; *Arnold v. Lyman*, Id. 400, 9 Am. Dec. 154; *Carnegie v. Morrison*, 2 Metc. 382. In the latter case all the authorities are fully reviewed in the opinion of the court, and the rule of law clearly vindicated and established. It does not rest upon the ground of actual or supposed relationship between the parties, as some of the early cases would seem to indicate (*Dalton v. Poole*, 1 Vent. 218; 2 *Walford on Parties*, 1144), nor upon the reason that the defendant by entering into such an agreement has impliedly made himself an agent of the plaintiff, * * * but upon the broader and more satisfactory basis that the law operating on the acting parties creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded."

In *Hall v. Marston*, supra, *Parker, C. J.*, states that "it seems to have been well settled, heretofore, that if A. promises B. for a valuable consideration to pay to C., the latter may maintain assumpsit for the money," and further says: "The principle of this doctrine is reasonable, and consistent with the character of the action of assumpsit for money had and received."

In *Dearborn v. Parks*, 17 Am. Dec. 206, it was held that, if one person for a valuable consideration makes a promise to another for the benefit of a third, the latter may maintain an action upon it; the opinion saying that in cases of this description, although the promisor undertakes to pay the debt of another, yet he thereby pays his own debt, and that constitutes the operative mode and inducement by which he is actuated. To him it must be a matter of indifference whether he pays directly to his creditor or to his assignee. He pays no more, and he can be holden to pay but once.

The principle applied in the authorities just referred to is but analogous to that often applied by this court in that class of cases which *Langhorne v. McGhee*, 103 Va. 281, 49 S. E. 44, and the cases there cited belong, viz.: "Wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received."

Says the opinion by *Keith, P.*, in *B. & O. R. Co. v. Burke & Herbert*, cited in *Langhorne v. McGhee*, supra: "When the fact is found that the defendant has the plaintiff's money, and he can show neither legal nor equitable grounds for keeping it, the law creates the privity necessary to support an action on the part of the plaintiff to recover it." See, also, *Gaines v. Miller*, 111

U. S. 395, 4 Sup. Ct. 423, 28 L. Ed. 466

In the one class of cases the principle is applied where it is money that the defendant has which equitably belongs to the plaintiff, and in the other where the defendant has either money or property in consideration of which he has promised to pay the debt due the plaintiff by his debtor, from whom the defendant acquired such money or property and to whom the promise was made, and in either case the law creates the privity and implies the promise necessary to support an action on the part of the plaintiff to recover his debt of the defendant. The principle and reasoning applied in both apply with equal force to the case at bar.

A number of decisions by the appellate courts of the state of New York, in harmony with the decisions of the Supreme Court of Massachusetts which we have cited, might also be cited, but we deem it unnecessary to do so.

It follows that the plaintiff is entitled to recover in this action, unless the defendant is relieved from liability for the debt sued for by the breach of some condition upon which it entered into the contract of October 17, 1903, with the Royal Tribe of Joseph, and the only breach relied on is that clause of the by-laws of the Royal Tribe of Joseph which we have quoted above, the effect of which was to relieve the Royal Tribe of Joseph and the defendant from the payment of the amount due to the plaintiff if John Jacob Koegel met with his death by suicide.

This brings us to the consideration of the last assignment of error, which is to the refusal of the circuit court to set aside the verdict of the jury on the ground that it is contrary to the evidence; the suicide of Koegel being the only defense relied on, on the merits of the case.

It is not denied that the burden of proving the defense of suicide was on the defendant, and the law is well settled that, "where the evidence of self-destruction is circumstantial, the defendant fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another." *Leman v. Man. of Life Ins. Co. (La.)* 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; *Cox v. Royal Tribe of Jos. (Or.)* 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752.

"The mere fact of the body of the insured being found with a pistol in his hand and a bullet wound in his head is not sufficient to prove suicide." *Union Mut. L. Ins. v. Payne*, 45 C. C. A. 193, 105 Fed. 172.

The defense of suicide, to avail, must show that every hypothesis of accidental death is excluded by the evidence." *Boyn-ton v. Equitable L. A. Co. (La.)* 29 South. 490, 52 L. R. A. 687; *Brown v. Sun L. I. Co. (Tenn. Ch. App.)* 47 S. W. 415, 51 L. R. A. 252.

In *Standard L. & A. I. Co. v. Thornton*,

100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 118, it is said: "Accidental death will be presumed, and this presumption must be overcome by the proof of facts which exclude every hypothesis of death except by suicide."

And in *Mut. L. I. Co. v. Wiswell* (Kan.) 44 Pac. 996, 35 L. R. A. 258: "Where the evidence as to whether the death was accidental or suicidal leaves the question in doubt, the presumption is in favor of accident."

To the same effect is 2 Bac. Ben. S. p. 849, where it is said that "the presumption of law is that, where a dead body is found and there is no direct evidence as to the cause of death, the death was not by suicide."

We only deem it necessary to say with reference to the evidence that it does not show a single circumstance connected with or surrounding the death of John Jacob Koegel that is not as consistent with accident as with suicide, and therefore it is clearly a case in which this court would not be warranted in disturbing the verdict of the jury.

Upon the whole case, we are of opinion to affirm the judgment of the circuit court.

(104 Va. 416)

GREAT FALLS POWER CO. v. GREAT FALLS & O. D. R. CO.

(Supreme Court of Appeals of Virginia.
Sept. 14, 1905.)

1. EMINENT DOMAIN—EXTENT OF POWER—STATUTES—CONSTRUCTION.

Before the land of a corporation possessing the power of eminent domain can be taken under the right of eminent domain by another corporation under Va. Code 1904, p. 576, c. 46a, § 1105e, subd. 52, which provides that no corporation shall take by condemnation property belonging to another corporation possessing the power of eminent domain, unless the State Corporation Commission shall certify that a public necessity or public convenience shall so require and shall give its permission thereto, and in no event shall one corporation condemn any property owned by and essential to the purposes of another corporation possessing the power of eminent domain, it must be made to appear that public necessity or an essential public convenience requires that the land shall be taken and that the land is not essential to the purposes of the corporation owning it.

2. SAME.

Since, prior to Va. Code 1904, p. 576, c. 46a, § 1105e, subd. 52, authorizing one corporation to condemn the land of another corporation possessing the power of eminent domain, it could not be done, the right conferred by the statute should not be extended beyond the explicit requirements thereof.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 107.]

3. SAME—PUBLIC USE—TAKING OF LAND BY A RAILROAD FOR A PARK.

A taking of land belonging to a corporation possessing the power of eminent domain by a railway company for a park at its terminal, attractive to pleasure seekers because of its scenic features, is not taking of land for a public use within Va. Code 1904, p. 576, c. 46a, § 1105e, subd. 52.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 60.]

Appeal from State Corporation Commission.
Application by the Great Falls & Old Dominion Railroad Company for leave to acquire by condemnation proceedings lands owned by the Great Falls Power Company. From an order granting the application, defendant appeals. Reversed.

William H. White, for appellant. R. Walton Moore and D. S. Mackall, for appellee.

HARRISON, J. This is an appeal from an order of the State Corporation Commission, granting an application made by the appellee railroad company to be allowed to acquire by condemnation proceedings certain lands owned by the appellant power company situated in the county of Fairfax.

The Great Falls Power Company was incorporated by an act of the General Assembly of Virginia approved March 3, 1894, as amended by an act approved March 5, 1894 (Acts 1893-94, pp. 669-782), for the purpose of acquiring, holding, improving, and using water power at the Great Falls in the Potomac river, and for constructing dams therein, canals, and other hydraulic and auxiliary steam works, and for the selling and leasing of water power and using the same for manufacturing, etc., generating, transmitting, selling, and leasing electricity, electric power, and light for railway and canal, as well as other purposes.

The appellant owns on the Virginia side of the Potomac river a tract of land containing between 700 and 800 acres, procured at a cost of \$500,000, for the purposes contemplated by its incorporation and has expended a large sum in perfecting elaborate plans for contemplated improvements. This tract of land is shown by the appellee to be "as wild as the Rocky Mountains."

The Great Falls & Old Dominion Railroad Company was incorporated by an act of the General Assembly of Virginia, approved January 24, 1900, as amended by an act approved March 29, 1902 (Acts 1899-1900, p. 148; Acts 1901-02, p. 457), with power to locate, build, and operate a railroad, commencing at some point on the Potomac river, in Alexandria county, opposite the District of Columbia, and running thence by the most practicable route to a point on the Potomac river in Fairfax county or Loudoun county, Va. The record shows that this railroad line has been located from the Aqueduct Bridge, in Alexandria county, opposite the District of Columbia, to a point in Fairfax county on the Potomac river at the Great Falls, a distance of some 14 miles, and that the work of building an electric railway has been begun and prosecuted to the extent of reconstructing the Aqueduct Bridge and making roadbed, bridges, and culverts in Alexandria county at an outlay of about \$300,000. Both of these companies, the appellant and the appellee, are given under their respective charters the power of eminent domain.

This proceeding was inaugurated, under

section 52 of the act concerning corporations, to obtain from the State Corporation Commission a certificate, in accordance with the provisions of that section, authorizing the appellee to condemn the following three several parcels of land belonging to the appellant, located in the county of Fairfax, at the Great Falls, on the Potomac river, namely: Parcel No. 1, containing .98 acres; No. 2, containing 7.68 acres; and No. 3, containing 9.4 acres: The point sought to be condemned is shown to be "very rough and rugged—rocky; about as wild a piece of property as there is anywhere in the state of Virginia."

Section 52 provides as follows: "No corporation shall take by condemnation proceedings any property belonging to any other corporation possessing the power of eminent domain, unless after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto; and in no event shall one corporation take by condemnation proceedings any property owned by and essential to the purposes of another corporation possessing the power of eminent domain." Va. Code, 1904, p. 578, c. 46a, § 1105a, subd. 52.

It is clear from this statute that before the land of the appellant can be condemned by the appellee two facts must be made to appear: (1) That a public necessity, or that an essential public convenience, requires that the land shall be taken; and (2) that such land is not essential to the purposes of the appellant.

Prior to the present law, under which this proceeding was taken, the land of appellant could not have been condemned by the appellee, because it had no legislative permission to take the property of another corporation. *Alexandria, etc., R. R. Co. v. A. & W. R. R. Co.*, 75 Va. 780, 40 Am. Rep. 743; *R. F. & P. R. R. Co. v. Johnston*, 103 Va. 456, 49 S. E. 496.

The right, therefore, of one corporation to condemn property already devoted to the public use by another, should not be extended by construction beyond the explicit requirements of the statute giving that power.

The evidence tends very strongly to show that the land sought to be condemned is essential to the appellant for the development of its water power and that, if taken, the power company would be compelled to change its plans entirely; that there is a physical conflict between the use contemplated by the appellee and that designed by the appellant. It is not necessary, however, in the view we take of the case, to pass upon or to consider this question.

Its legislative grant of power authorized the appellee to establish a railroad from some point on the Potomac river in Alexandria county to some point on that river in either the county of Fairfax or the county of Loudoun. It would meet the require-

ments of the charter for the terminal of the road to be located at any point on the river within the limits of the counties mentioned. The appellee owns land on the river above and adjoining that owned by the appellant. Above and adjoining the land of appellant it owns a tract of 30 acres, which appears to have been bought with a view to the use now sought to be made by condemnation of the land of appellant. The property in question, however, covers a commanding view of the Great Falls of the Potomac river, which is shown to be one of the grandest pieces of natural scenery in this country, second only in beauty and attractiveness to the Falls of Niagara.

It clearly appears that this land is sought by appellee as a terminal point on account of the rare scenic features it affords, and because of the attractions it would hold out to pleasure seekers from the city of Washington. In other respects the location possesses none of the advantages ordinarily accruing to a railroad, and but for the beauty of the scene would most likely have been avoided as offering no inducements to such an enterprise. It is further clear from the record that the quantity of land sought to be condemned is far beyond any necessity for mere terminal purposes of an electric railway extending a distance of 14 miles from the city of Washington. It is manifest from the evidence that the location was selected with no reference to the public use of the road in the matter of freight or the accommodation of the traveling public along the route, but that the real purpose of the condemnation is to establish a park overlooking the Great Falls of the Potomac, for the comfort and pleasure of sight-seers and curiosity seekers, and to thereby add to the revenues of appellee by making the point an attractive place of resort.

To justify the Corporation Commission in taking the action here complained of, it must not only appear that the land sought to be condemned is for public use, but it must affirmatively appear that a public necessity or an essential public convenience requires that the land of the appellant shall be taken.

What is a public use is said to be incapable of exact definition; that it is easier to define by negation than by affirmation. Whatever rule may be formulated on the subject as a result of the adjudged cases, it cannot, we think, include the condemnation here sought as one made for a public use. Looking to the charter of the appellee, we find that the company was organized for "public use" in transporting persons and property along its line; in other words, has undertaken an ordinary railroad enterprise. The ground upon which private property may be taken for railroad uses without the consent of the owner is primarily that railroads are highways furnishing means of communication between different points and promoting traffic and commerce. The taking of

property for these purposes must always be limited to the lawful necessities of the enterprise. The moment the appropriation goes beyond such necessity, it ceases to be justified on the principles which underlie the right of eminent domain. *Gooley's Const. Lim.* pp. 779, 780.

The charter of appellee furnishes no warrant for condemning property for the purpose indicated by the record. It is doubtless an attractive point, on account of its inspiring scenery, for the location of a park, and such a terminal would very probably increase the revenues of appellee; but to gratify the senses of the pleasure seeker and thereby incidentally to increase revenues is without the domain of a public use for which private property may be taken under the power of eminent domain.

In a well-considered case in New York, where the railroad company was given power to condemn private property for public use, it applied for the condemnation of a part of the land belonging to De Veaux College, which commands a view of the "Whirlpool Rapids." Its purpose was to give visitors a view of those rapids. It was held that this was not a public use for which private property could be taken, the court saying in part: "The fact that the road of petitioner may enable the portion of the public who visit Niagara Falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one, so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an act of the Legislature, to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or convenience of those who may visit the Falls." *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429.

This case is very much in point, and the authorities there cited and the reasons given apply with equal force to the case at bar; for it is clear from the record that the part of the railroad running through the land of the appellant is not intended for ordinary traffic, but only for sight-seers.

We have seen that the use here sought to be made of appellant's property is not a public use in the sense that it can be taken under the power of eminent domain. The case at bar is, however, very much stronger than the Niagara Falls Case, because, granting that the use sought to be made by appellee of the land in question came within the meaning of a "public use" justifying condemnation, still the land could not be taken; for, the appellant being a corporation with the power of eminent domain, its land could not be condemned by another corporation possessing that power, unless the public use sought to be made of it reached the measure

of a public necessity or an essential public convenience. This is the express mandate of the recent statute under which this proceeding is had, and without which the application of appellee could not be entertained.

Scenic advantages were held in the Niagara Falls Case not to reach the measure of a public use justifying condemnation proceedings; a fortiori must such advantages fail for insufficiency when subjected to the test of the public necessity contemplated by our law. Spending a pleasant day in the midst of wild and rugged surroundings on the banks of the Potomac, viewing its "Great Falls" while strolling in a beautiful park, would doubtless be both inspiring and invigorating to those who had the time and opportunity to enjoy it. That sight-seers should be furnished such an opportunity may be desirable, but it cannot be said to be a public necessity, demanding the displacement of appellant from its private ownership by the compulsory proceedings here invoked.

For these reasons we are of opinion that the State Corporation Commission erred in awarding appellee the certificate complained of, and therefore its action must be reversed, the order appealed from set aside, and the cause remanded to the State Corporation Commission for such further proceedings in the premises as the appellee may be advised to take, with a view to condemning land for its uses through the lands of the appellant, not in conflict with the views expressed in this opinion.

(104 Va. 533)

DONABLE'S ADM'R v. TOWN OF HARRISONBURG.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. MUNICIPAL CORPORATIONS—POWERS IN GENERAL.

A municipal corporation possesses and can exercise only those powers granted in express words, those necessarily or fairly implied or incidental to the powers expressly granted, and those essential to the declared objects and purposes of the corporation.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 144, 148, 149.]

2. SAME—RESTRICTION TO CORPORATE LIMITS.

A municipal corporation is, as a general rule, restricted to its corporate limits in the exercise of its corporate powers.

3. SAME.

A municipal corporation is not, by virtue of its express power to keep its streets in order, to provide workhouses, etc., and to establish and operate a sewer system, waterworks, etc., empowered to conduct a rock quarry outside of its corporate limits.

4. SAME—ULTRA VIRES ACTS—INCIDENTAL LIABILITY.

A municipal corporation is not liable in damages for the death of a servant working on a rock quarry operated by it without authority outside of the corporate limits of the municipality.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1546.]

Error to Circuit Court, Rockingham County.

Action by John A. Switzer, sheriff of Rockingham county, and as such administrator of Grant Donable, deceased, against the town of Harrisonburg. There was a judgment in favor of defendant, and plaintiff brings error. Affirmed.

Sipe & Harris, D. O. Deckert, and O. A. Hammer, for plaintiff in error. T. N. Haas, for defendant in error.

CARDWELL, J. This is an action on the case against the town of Harrisonburg, to recover damages for the death of plaintiff's intestate, caused by an explosion of dynamite at a rock quarry operated by the defendant outside of its corporate limits, at which quarry the decedent was employed as a laborer.

The defendant demurred to the declaration upon the ground that the operation of a rock quarry by the defendant outside of its corporate limits was an ultra vires undertaking, and therefore the defendant was not responsible in damages for the injuries to the decedent, which demurrer was sustained, and to that judgment of the circuit court this writ of error was awarded.

It is sought to distinguish this case from that of *Duncan v. City of Lynchburg*, decided by this court February 8, 1900, and reported in 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331, by the fact alleged that the stone gotten out by the decedent and others was to be for use on the streets of the defendant town, whereby this getting out of the stone was a mere incident of the work in which the town was engaged in the repair and maintenance of its streets, a work not only authorized, but imposed upon the town as a duty, by its charter; in other words, the work in progress being primarily the repair and maintenance of the streets of the town, which is not only within the powers of the town, but one of its absolute duties, and one of the considerations for the granting of its charter, for the failure in the performance of which duty the town is liable to respond in damages to any person injured in consequence of such failure, it is within the discretion of the town council, so long as the means adopted by it are such as to meet the requirement that the streets shall be kept in proper and safe condition for travel, to determine what means of repair and maintenance shall be used.

If that proposition could be maintained, a municipality might engage in limitless undertakings not authorized by its charter in express words, or necessarily and fairly implied in or incidental to the powers expressly granted, the result of which would be to expose the resources of the municipality to constant danger of exhaustion.

The following statement of the law by Dillon, in his work on *Municipal Corporations* (section 89), has been often quoted with approval by this court, viz.: "It is a general and undisputed proposition of law that a municipal corporation possesses and can ex-

ercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied." *Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822; *Wallace v. Richmond*, 94 Va. 217, 26 S. E. 586, 36 L. R. A. 554; *Railway Co. v. Dameron*, 95 Va. 545, 28 S. E. 951; *Duncan v. Lynchburg*, supra.

It is equally well-settled law that a municipal corporation is, as a general rule, restricted to its corporate limits in the exercise of its corporate powers. *Duncan v. Lynchburg*, supra; *Becker v. La Crosse (Wis.)* 75 N. W. 84, 40 L. R. A. 829, 67 Am. St. Rep. 874; *Mayor of Detroit v. Park Com'rs*, 44 Mich. 602-605, 7 N. W. 180; *Teideman on Mun. Corp.* § 62; 2 *Dillon on Mun. Corp.* § 565.

In *Duncan v. Lynchburg*, supra, the city of Lynchburg was operating a rock quarry outside of the city limits, in the course of which a nuisance was created, and suit was brought to recover damages of the city by reason of the nuisance; but it was held that the operation of the rock quarry was ultra vires, and therefore the city was not liable in damages, the grounds upon which the undertaking was held to be ultra vires being, first, because neither the charter nor the general law gave the city authority to operate a rock quarry, and, second, because the operation of the quarry was carried on outside of the corporate limits.

The general law was the same at the time of the accident out of which this suit arises at it was when the case of *Duncan v. City of Lynchburg*, supra, arose, and the charter of Harrisonburg grants no power to operate a rock quarry, either within or without the town, unless it arises by implication out of the powers granted to keep its streets in order, to provide workhouses and houses of correction and reformation, and to establish and operate a sewer system, waterworks, gasworks, electric light works, etc., all of which powers were conferred upon the city of Lynchburg by its charter; so that the principle of law applied in the case of *Duncan v. Lynchburg* is clearly applicable to this case.

In the former case, speaking with reference to the opinion expressed by Judge Dillon that for some purposes, such as for the establishment of a pesthouse or a cemetery, a municipal corporation may acquire land outside of its territorial boundaries, the opinion by Buchanan, J., says: "If this be true, it must be because the lands are indispensably necessary to enable it to protect the health, and well-being of its people." And, further: "It might be convenient for a municipal corporation to own and operate

a rock quarry, but is manifestly not indispensably necessary that it should do so in order that it may accomplish the objects of its creation."

The case of *Becker v. La Crosse*, supra, is an authority in point here, not only for the proposition that a municipal corporation is not liable in damages for an ultra vires act, but also for the proposition that an undertaking carried on by a municipality outside of its limits is, in the absence of express authority, ultra vires. See, also, *Cavanagh v. Boston (Mass.)* 1 N. E. 834, 52 Am. Rep. 716, and *Albany v. Cundiff*, 2 N. Y. 165.

Authorities are cited by the plaintiff for the proposition that private corporations are liable for damages arising out of a tort, though the act in which the tort was committed be ultra vires, but they have no application here. While the powers of a private corporation are bestowed and limited by charter, they act for themselves, in their own right, and in the pursuit of gain. On the other hand, municipal corporations exercise delegated powers and act through their officials as a local agency for the exercise of governmental functions. With reference to the liability of municipal corporations for damages arising out of the negligence of its agents, Judge Dillon says: "To create such a liability it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers, as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must not be ultra vires in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances."

The argument of the learned counsel for the plaintiff in this case that "to hold that, although it is one of the imperative, unescapable duties of the town to keep its streets in repair, yet all the work and transactions incidental thereto must be wholly performed within the corporate limits of the town, would be to impose most unfortunate limitation upon the town," might be much more properly addressed to the law-making power of the state than to the courts. It might be convenient, and even profitable, for the defendant to operate a rock quarry outside of its corporate limits, in order to obtain material suitable for repairing and keeping in order its streets; but without legislative authority it has no power to do so, and clearly no such power is in express words conferred in its charter, nor necessarily or fairly implied in or incidental to the powers expressly granted.

It follows that the defendant was not liable in damages for the death of the plaintiff's intestate, that the demurrer was properly sustained by the trial court, and that the judgment must be affirmed.

(104 Va. 605)

WOLVERTON v. HOFFMAN.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

DEEDS—CONSTRUCTION—REPUGNANT CLAUSES.

Where a deed granted, bargained, and sold to the grantee, her heirs and assigns, certain described premises, a subsequent clause, by which the grantor requested that the property should be that of W. and descend to his children in case he survived the grantor and grantee, who were husband and wife, was repugnant to the fee conveyed to the grantee by the granting clause of the deed, and was therefore void.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 263, 439, 440.]

Error to Circuit Court, Shenandoah County.

Ejectment by W. S. Wolverton against S. J. Hoffman. A judgment was rendered in favor of defendant, and plaintiff brings error. Affirmed.

The deed referred to in the opinion was as follows: "Witnesseth, that for and in consideration of the sum of one dollar in hand paid by the said party of the second part to the parties of the first part, and in consideration of the natural regard that the said Wolverton has and bears for her, said Leannah Wolverton, said George Wolverton has granted, bargained, and sold, and by these presents does grant, bargain, and sell, to said Leannah Wolverton, her heirs and assigns, three pieces or parcels of land," including the land in controversy. Then followed the clause: "It is distinctly understood by and between the parties to this instrument that the foregoing conveyance is made to be free of and from all debts, claims, and demands against said George Wolverton, or any other husband that the said Leannah Wolverton may hereafter take (should she survive her present husband), and that said Leannah Wolverton shall have the right to sell and convey the property, or any part thereof, at any time that she deems proper, in the interest of herself and her husband, George Wolverton, and execute a title for the real estate so sold, such as is legal for a married woman to make, in uniting in a deed or other conveyance, by his joining in the deed. It is also distinctly understood by and between the parties to this deed that I request and desire that said property shall be the property of Winfield Scott Wolverton during his lifetime, and then to descend to his children; that is, should he (W. S. Wolverton) survive the said George and Leannah Wolverton."

M. L. Walton and Barton & Boyd, for plaintiff in error. Tavenner & Bauserman, for defendant in error.

KEITH, P. The plaintiff in error instituted an action of ejectment against S. J. Hoffman to recover a parcel of land lying in the county of Shenandoah, and to maintain the issue on his part introduced a deed from George Wolverton to Leannah Wolverton, his

wife, by which was conveyed certain real and personal estate. It is declared in this deed that "it is distinctly understood by and between the parties to this instrument that the foregoing conveyance is made to be free of and from all debts, claims, and demands against said George Wolverton, or any other husband that the said Leannah Wolverton may hereafter take (should she survive her present husband), and that said Leannah Wolverton shall have the right to sell and convey the property, or any part thereof, at any time that she deems proper, in the interest of herself and her husband, George Wolverton, and execute a title for the real estate so sold, such as is legal for a married woman to make, in uniting in a deed or other conveyance, by his joining in the deed. It is also distinctly understood by and between the parties to this deed that I request and desire that said property shall be the property of Winfield Scott Wolverton during his lifetime, and then to descend to his children; that is, should he (W. S. Wolverton) survive the said George and Leannah Wolverton. And the grantor hereby covenants that he has the right to convey the property herein and hereby conveyed, that the same is free from incumbrance, and warrants the title to the same generally."

George Wolverton died in the lifetime of his wife, and W. S. Wolverton survived her. By her will she devises the real estate in controversy to Samuel J. Hoffman; and the only question before us arises upon a construction of the deed above quoted.

The deed under consideration conveys in plain and unambiguous terms a fee simple to Leannah Wolverton. It then says that it is "understood by and between the parties to this deed that I request and desire that said property shall be the property of Winfield Scott Wolverton during his lifetime, and then to descend to his children; that is, should he (W. S. Wolverton) survive the said George and Leannah Wolverton." W. S. Wolverton did survive George and Leannah Wolverton, and the contention is, upon the part of plaintiff in error, that under this deed Leannah Wolverton took a fee, which, in the event of George Wolverton dying in her lifetime and W. S. Wolverton surviving her, was reduced to a life estate. In support of this contention, plaintiff in error relies upon the intent of the grantor, to be gathered from reading the entire instrument, and from which he contends that it is made to appear that it was the intention of George Wolverton, in the contingency mentioned—that is, that his wife survived the grantor and that W. S. Wolverton survived her—that she should take only a life estate, with remainder to W. S. Wolverton for life and to his children in fee.

In support of this contention he places great reliance upon the case of Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 188, where the will says: "I give and bequeath

to my said wife, E. M. Colton, all of the estate, real and personal, of which I shall die seised and possessed or entitled to. I recommend to her the care of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." The wife not having made any provision, the mother and sister brought suit, and the court held that "no technical language is necessary for the creation of a trust in a will, and no general rule can be formulated for determining whether a devise or bequest carries with it the whole beneficiary interest, or whether it is to be construed as creating a trust. * * * 'If a trust is sufficiently expressed and capable of enforcement, it is not invalidated by being called 'precatory.' * * * If the objects of the supposed trust are definite and the property clearly pointed out, if the relations between the testator and the supposed beneficiary are such as to indicate a motive on the part of the one person to provide for the other, and if the precatory clause, expressing a wish, authority, or recommendation that the donee shall apply the property to the proposed cestui que trust, warrants the inference that it is precatory, then it may be held that an obligatory trust is created, which may be enforced in a court of equity."

We are, however, in a court of law, where the plaintiff must recover upon the strength of his own title. We need not, therefore, consider whether or not the language creates a trust, for it would be unavailing if such were the case.

Plaintiff in error also relies upon what is without doubt true, that courts, whether of law or of equity, in the construction of written instruments, seek to gather the intention from an examination of the whole paper, and not merely from its disjointed parts, so as to give an effect to the whole. The intention of the grantor is to be sought after, and, when discovered, is to be carried into effect, if it can be done consistently with the rules of law. Courts will not only look through the entire deed, but will transpose words or sentences, if thereby they can effectuate the intent of the grantor without defeating the intent in any other part. But if, in a deed, there be two clauses so repugnant to each other that they cannot stand together, the first shall be received and the latter rejected, differing in this respect from a will: *Blackwell v. Blackwell* (N. C.) 32 S. E. 677.

The rule upon the subject is well expressed in *Devlin on Deeds*, § 837, where it is said: "The intent, when apparent and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect." But, like most rules, it has its exceptions. In section 832a, the same author says: "The question is not

always one of intent, but of enforcing established and well-defined principles of law." In that connection he cites *Maker v. Lazell*, 83 Me. 562, 22 Atl. 474, 23 Am. St. Rep. 795, where the court says: "The defendant invokes the broad proposition that, in considering written instruments, courts should always seek for the actual intent of the parties, and give effect to that intent when found, whatever the form of the instrument. The proposition has been stated perhaps as broadly as this in text-books and judicial opinions; but it is not universally true. It is hedged about by some positive rules of law, which the parties must heed if they would effectuate their intent, or avoid consequences they did not intend. Muniments of title, especially, are guarded by positive rules of law, to secure their certainty, precision, and permanency. If, in the effort to ascertain the real intent of the parties, one of these rules is encountered, it must control; for no positive rule of law can be lawfully violated in the search for intent."

In *Gaskins v. Hunton*, 92 Va. 528, 23 S. E. 885, this court said: "It is a settled rule of construction, both in deeds and wills, that if an estate is conveyed, or an interest given, or a benefit bestowed in one part of the instrument, by clear, unambiguous, and explicit words, such estate, interest, or benefit is not diminished nor destroyed by words in another part of the instrument, unless the terms which diminish or destroy the estate before given be as clear and decisive as the terms by which it was created."

We have seen that the fee simple is conveyed to Leannah Wolverton by the deed under consideration in clear, unambiguous, and explicit words. The language relied upon to reduce that interest from a fee simple to a life estate is not apt and proper for the creation of any estate whatsoever. It cannot be said that it diminishes the estate given by language as clear and decisive as that by which it was created.

The judgment of the circuit court is affirmed.

(58 W. Va. 334)

FRUM et al. v. FOX et al.

(Supreme Court of Appeals of West Virginia.
Nov. 21, 1905.)

1. EQUITY—BILL—MULTIFARIOUSNESS.

A bill by the heirs of a deceased person against a purchaser of the decedent's real estate at a sale thereof for nonpayment of taxes, to set aside the deed acquired under such purchases and to declare the dower of the widow of such decedent in the same land barred, is multifarious.

2. TAXATION—REDEMPTION—AGREEMENT BY PARTIES.

A purchaser at a tax sale of an entire tract of land, owned in separate parcels by himself and two others, one of whom, at the time of the purchase, contributes for the purpose thereof more money than the proportion which his share of the land bears to the whole tract, with the understanding and agreement that, as to the parts owned by the purchaser and the party

so contributing, the purchase shall operate as a redemption, acquires no title to the land owned by the party so contributing, as against him.

3. COSTS—ON APPEAL.

When a final decree, giving no costs in the court below, is affirmed in this court, and no necessity for remanding the cause exists, this court will give to the appellee his costs in the trial court as well as his costs in this court.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by H. L. Frum and others against A. N. Fox and others. Decree for plaintiffs, and defendants Margaret Fox and others appeal. Reversed in part.

W. B. Maxwell, for appellants. Jas. A. Bent, T. S. Engle, and J. L. Wamsley, for appellees.

POFFENBARGER, J. Margaret Fox, widow, and T. J. and James L. Fox, adult heirs at law, of A. N. Fox, deceased, ask reversal of a decree of the circuit court of Randolph county, by which a tax deed, acquired by said A. N. Fox in his lifetime, was set aside and annulled, at the instance of H. L. Frum and others, heirs of H. G. Frum, deceased. Prior to his death said H. G. Frum obtained by purchase from Lucy E. Corley 68 acres of land, part of a 200-acre tract, the residue of which was purchased of A. N. Fox and one Monohan. In December, 1899, the entire tract was sold by the sheriff of said county for nonpayment of the taxes thereon in the name of said Corley, and purchased by Nimrod Shiflett, for \$23.96. Before the purchase money was paid to the sheriff, said Frum and A. N. Fox appeared at his office, and some arrangement was made by which Shiflett relinquished the benefit of his purchase, and the sheriff reported and certified the land as having been sold to said Fox, who was a son-in-law of Frum. In March, 1901, Frum died, and in April following H. L. Frum, one of his sons, and a resident of Harrison county, was appointed administrator of his estate, and A. N. Fox became the surety on his bond, with the understanding that he (Fox) should, as agent of said administrator, take charge of the personal estate of the decedent and transact business and administer the estate as such agent, in the name of said administrator.

On the 15th day of February, 1901, Fox applied for, and received from the clerk of the county court of Randolph county, a deed for said tract of land, and on the 3d day of February, 1902, said H. L. Frum and other heirs of said decedent, brought this suit to set aside said deed, and such proceedings were had that, on the 5th day of February, 1904, it was annulled as aforesaid. The bill also prayed relief against M. F. Fitzwater, mother of the plaintiffs and widow of H. G. Frum. After the death of her husband, she had married ——— Fitzwater. The prayer against her, based upon certain allegations of the bill which need not be

mentioned, was that her dower be adjudged and decreed in this cause to be barred. H. L. Frum sued in his own right and as administrator, and the bill set out his relation to A. N. Fox, as agent as aforesaid, but did not pray any settlement with Fox, or decree against him, otherwise than for the cancellation of said deed. It did allege the duty of Fox, in view of such agency and custody of the personal estate, to pay the taxes and redeem the land from sale. Fox answered the bill, denying all fraud in the procurement of the deed, and averring notice to the heirs of his purchase and right to take the deed. Soon after the filing of this answer, he died, and the suit was revived against his administratrix, widow, and heirs. The appellants answered the bill by adopting as their own the answer filed by A. N. Fox. M. F. Fitzwater appeared and demurred to the bill, and the court sustained the demurrer and dismissed it as to her. Afterwards she set up a claim under the exemption statute to \$200 worth of the personal property of the estate of H. G. Frum as his widow, claiming the right to hold the same exempt from debts and liabilities contracted by the decedent in his lifetime. This claim she assigned to Sarah J. Smith, who brought a suit in chancery for the enforcement of it against the administratrix and distributees of the estate of A. N. Fox. She also conveyed her claim for dower in the real estate to F. W. Smith, who brought a suit against the widow and heirs of A. N. Fox for assignment of said dower. The court made one decree in all three cases, overruling demurrers to all the bills, setting aside said tax deed, referring all three causes to a commissioner of the court to take, state, and report an account, granting leave to the parties to file answers before the commissioner, and reserving for future adjudication all questions concerning the claim of Mary F. Fitzwater to have dower in the land and to share in the distribution of the personal estate.

In the petition for this appeal multifariousness in the bill was relied upon; but in the brief filed for appellants that ground of error is expressly waived. The court is requested to disregard it and pass upon the setting aside of the tax deed as if the cause were here on a sufficient bill for that purpose alone. Counsel for appellee say the bill is not multifarious in any respect. In view of this attitude of the parties, no inquiry as to the sufficiency of the bill in that respect will be entered upon. But one competent witness testifies concerning the transaction between Frum and Fox, in consequence of which the sale was reported as having been made to the latter. That witness is Shiffett, who says Frum and Fox came to him on the day after he made the purchase, and all went together to the sheriff's office, where the arrangement was consummated. Upon application to the sheriff to redeem, Frum was informed that

he could not do so, but that, if Shiffett would yield his rights, he would give him a receipt for the land, and that Frum gave Fox \$10 or \$11, and Fox transacted the business with the sheriff, and that both of them talked to the sheriff about redeeming the land, and told him (witness) they had come for the purpose of redeeming it. He further says that after retiring from the sheriff's office they said they had redeemed the land, and asked the witness how he had happened to buy it. On cross-examination, he said: "It was the understanding that day between me and them and George Leonard that I give away to Fox and let him take my place."

As the entire tract of 200 acres, of which Frum owned only 68 acres and Fox and Monohan the residue, in relative quantities not disclosed, was purchased, it is clear that Frum gave Fox an amount of money amply sufficient to pay his portion of the purchase money. He owned less than one-third of the land, and the whole amount of purchase money was a few cents less than \$24, so that Frum's share of it was less than \$10, the lowest amount mentioned by the witness as having been given by him to Fox. In view of this circumstance, the relationship of the parties, and the declarations made by them on the occasion of this transaction, we are of the opinion that there was no intention on the part of either Frum or Fox that a deed should ever be taken by the latter, and that they intended the payment of the money to operate as a redemption of the land from sale and delinquency, and that the court properly held that Fox had fraudulently and wrongfully procured the execution of the tax deed. The deed recites a sale of the entire 200 acres, including Fox's own land, as well as that of Frum and Monohan. At the time the deed was made, all except the 68 acres had been redeemed. Hence Fox must have redeemed from himself his own land and allowed Monohan to redeem his. The Monohan interest may have afforded some reason for treating the transaction as a purchase as to his land, but no reason is perceived why it should have been so regarded in so far as it affected the lands of Frum and Fox, since Fox was to pay the taxes on his own portion of the land and Frum had furnished him an amount amply sufficient to pay the taxes on the 68 acres. As no provision of the statute authorized the sheriff to allow a redemption of part of the 200-acre tract, by payment of part of the taxes thereon, it was necessary to take an assignment of Shiffett's purchase, in order to have the highest and best remedy against Monohan for the taxes on his part of the land. Neither Frum nor Fox could redeem part of the land at the sheriff's office. The sheriff had no authority to release the state's security for any of the taxes. *Smith v. Tharp*, 17 W. Va. 221. But, after purchase, redemption of part could be allowed by the purchaser to Monohan, if he desired to re-

deem, and, if not, his land could be held under the purchase, since there was no tenancy in common or other confidential relation.

Be this as it may, the situation in which these parties found themselves at the sheriff's office, respecting this land, makes it highly probable, if not certain, that there was no intention to effect a purchase otherwise than in trust, except as to the land owned by Monohan. As to Frum's land and his own, Fox's purchase from Shiffett was intended to operate as payment of the taxes, and as to Monohan's as a purchase, and it was never contemplated that Fox should take a deed for his own or Frum's land. Frum had a deed from Corley, fully describing his land and affording the means of a simple, easy redemption without any expense, and no money was due from him. Had Monohan failed to redeem, a deed for his land alone could have been taken, just as in the case of Frum's. It is not intended here to say an owner of part of a tract of land, sold as this one was, has a right to redeem his part by payment of part of the taxes or purchase money, but only that he may do so with the consent of the purchaser, and that such consent may be in the form of an antecedent agreement, contemporaneous with the purchase. Viewing the case in the light of all the circumstances and the testimony above quoted, our conclusion is that the purchase was intended to operate as a redemption as regards the land in question. A purchase by an agent is said to so operate. *Williamson v. Russell*, 18 W. Va. 612, 625; *Curtis v. Borland*, 35 W. Va. 124, 12 S. E. 1113; *Battin v. Woods*, 27 W. Va. 58; *State v. Eddy*, 41 W. Va. 95, 23 S. E. 529; *Cooley on Taxation*, 964; *Blackwell, Tax Titles*, § 566. Whether it does, or makes the purchaser a trustee for the owner, is ordinarily not very material, since the result is practically the same. *Cain v. Brown*, 54 W. Va. 656, 664, 46 S. E. 579. This decree canceled the tax deed, and thus left Frum's deed from Corley in force, and thereby put the title back in Frum's heirs as effectually as if a conveyance to them by Fox's heirs had been enforced.

Failure of the court to require repayment of the purchase money and expenses as a condition precedent to the annulment of the deed is assigned as error; but, as no purchase money is due and the expenses were incurred without necessity and in violation of the agreement of the parties, the court did not err in this respect. This is not the ordinary case of an adverse purchase under defective proceedings. In substance and effect it was a valid purchase to hold in trust, which the courts say amounts to a redemption, and a trustee is certainly not entitled to expenses incurred in the violation of his trust, and in no sense connected with the performance or execution thereof. The dismissal of the bill as to M. F. Fitzwater is made the sub-

ject of a cross-assignment of error by counsel for the appellee; it being insisted that the two objects disclosed by the bill, cancellation of the tax deed, and barring the dower right, were not inconsistent. They are undoubtedly wholly foreign to each other. The tax deed stood in the way of the claim of the widow, as well as that of the heirs. Against it they made common cause, for, in order to obtain any title or interest in the land, they must get rid of it. This made an issue between the widow and heirs, on one side, and Fox, on the other, involving pleadings and evidence which had no relation whatever to the claim to dower. The issue between the widow and heirs respecting the dower is wholly different, and with that Fox has nothing to do. When the matter demanded against one defendant is separate, distinct, and unconnected with the matter demanded against another, and neither is interested in the defense to be made by the other, the bill asserting such different demands is multifarious. *Stuart v. Coalter*, 4 Rand. 74, 15 Am. Dec. 731. Two distinct grounds of equitable relief between the same parties cannot be joined in one bill. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611. See, also, *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. 278; *Crickard v. Crouch's Adm'rs*, 41 W. Va. 503, 23 S. E. 727; *Petty v. Fogle*, 16 W. Va. 497.

As the matters of the settlements of the estates of Frum and Fox, decedents, are not germane to this bill, so as to make them properly cognizable in this suit, and, if they were, the pleadings in the cause show that the sole object of the suit is to get rid of the tax deed, no decree of reference could properly be made in this cause. Whether such decree is necessary or proper in either of the other two causes cannot now be determined; for there is no final decree, as yet, in either of them, and this appeal has not brought either of them up. The allegations of the bill, all considered, show clearly that the matters of administration, personal estate, and agency in Fox were set forth for the purpose of showing duty on his part to redeem the land from his own purchase at the tax sale. For this purpose, they were not necessary, and probably not sufficient, though we do not so decide.

For the reasons above stated, so much of the decrees aforesaid as dismisses the bill as to M. F. Fitzwater and sets aside and annuls said tax deed will be affirmed, and a decree entered here requiring the appellants to pay to the appellees their costs in the circuit court by them expended in and about the prosecution of this suit in respect to matters cognizable in it, as well as their costs in this court, and in all other respects the decree of February 5, 1904, in so far as it affects this cause, will be reversed, all of which will be certified to said circuit court.

(58 W. Va. 263)

STATE v. DOLAN.

(Supreme Court of Appeals of West Virginia.
Nov. 7, 1905.)1. CRIMINAL LAW—RENDITION OF JUDGMENT—
PRESENCE OF DEFENDANT.

It is error to render judgment of imprisonment in any case in the absence of the defendant.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2511.]

2. INDICTMENT—REQUISITES.

An indictment under a statute must state all the circumstances which constitute the definition of the offense in the statute, so as to bring the defendant precisely within it.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 286.]

3. CRIMINAL LAW—APPEAL—NECESSITY FOR
MOTION IN ARREST.

Anything which is good cause for arresting a judgment is good cause for reversing it, though no motion in arrest is made.

4. SAME—APPEAL—REVERSAL.

Although no demurrer was interposed or motion in arrest of judgment made, if the indictment is so defective that it could not be properly prosecuted, a judgment thereon will be reversed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2627.]

Brannon, P., and Sanders, J., dissenting.
(Syllabus by the Court.)

Error to Circuit Court, Tyler County.

James F. Dolan was convicted of violation of the liquor law, and brings error. Reversed.

John A. Howard, Matheny & Smith, V. B. Archer, and F. L. Blackmarr, for plaintiff in error. The Attorney General, for the State.

McWHORTER, J. At the April term, 1895, of the circuit court of Tyler county, three indictments were returned by the grand jury against James F. Dolan, numbered 1, 2, and 3, respectively, for misdemeanor, charging that "Jas. F. Dolan, on the — day of September, 1894, in the county of Tyler, aforesaid, and within one year next preceding the finding of this indictment, did unlawfully keep and maintain a common and public nuisance, by then and there knowingly permitting intoxicating liquors to be vended and sold contrary to law in a certain building known as the 'Arlington Hotel,' situate in the county of Tyler, as aforesaid, and then and there the property of the said Jas. F. Dolan, against the peace and dignity of the state." This is indictment No. 1, and the other indictments were the same, except the date therein alleged; No. 2 alleging "the — day of January, 1895," and No. 3 "the — day of February, 1895." On the 15th day of August, at the August term of said court, when the first case was called, "the defendant, by his attorney, pleaded not guilty"; to which the prosecuting attorney replied generally. A jury was impaneled and sworn and, having heard the evidence, returned a verdict finding the defendant guilty, as charged in the indictment. The court assessed the fine against the defendant upon

the verdict of the jury at \$100, and gave judgment accordingly, and also a judgment that the defendant be imprisoned in the county jail of Tyler county for the term of 30 days, and on the same day, August 15, 1895, on Nos. 2 and 3, the defendant, by his attorney, pleaded guilty in each of said causes; "whereupon the court, proceeding to render judgment against the defendant in each of said causes, upon his said confession, doth ascertain and fix the fine at one hundred dollars in each of said causes. Therefore, it is considered by the court that the state of West Virginia recover against the defendant one hundred dollars, fine in each of said causes, assessed and fixed, as aforesaid, and her costs of prosecution by her in each of said causes expended. And it is further considered by the court, and accordingly ordered, that the defendant, James F. Dolan, be imprisoned in the county jail of this county for the term of thirty days. And it is ordered that the terms of imprisonment imposed on the defendant, James F. Dolan, by this and the preceding judgment, shall be inflicted upon him in regular succession, according to the number of indictments upon which said judgment were rendered. And it is further considered by the court that the certain building mentioned in the indictments known as the 'Arlington Hotel,' situate in the county of Tyler, in the town of Sistersville, be abated and closed up as a place for the sale of spirituous liquors contrary to law; and the sheriff of said county, taking a copy of this order, shall abate and close up said building, in pursuance of this judgment, as a place for the unlawful sale of such liquors, and keep the same so closed for such purpose." This is all that appears from the record in the case. The defendant presented his petition to one of the judges of this court, praying for a writ of error and supersedeas to the said two judgments rendered on the 15th day of August, 1895, which were awarded. The defendant says the court erred in its judgment directing the imprisonment of defendant for a term of 30 days. It is also contended that the indictments, and each of them, are bad for uncertainty. No brief has been filed on behalf of the state in this case. In *State v. Campbell*, 42 W. Va. 248, 24 S. E. 875 (Syl., point 4), it is held: "A defendant may appear by counsel in any misdemeanor case, although it be punishable by imprisonment, but in no case can there be judgment of imprisonment without having the defendant present at its rendition." The authorities are uniform that judgment of imprisonment cannot be rendered in the absence of the defendant. *King v. Harrison & Duke*, 12 Modern Reports, 157; *Com. v. Crump*, 1 Va. Cases, 172, 175; 1 Chitty's Criminal Law, 695, and cases cited in note "b"; *People v. Taylor*, 3 Denio (N. Y.) 91, 98; *People v. Winchell*, 7 Cow. 525. See note "b" at the end of the case. In the last case cited it is said: "Sentence of the slight-

est corporal punishment cannot be given in absentia." *Son v. People*, 12 Wend. 344; *Tracy's Case*, 25 Vt. 93; *Rex v. Harris*, 1 Raymond, 267.

It is further claimed that the court erred in ordering the house closed as a nuisance. In section 277, 1 Bish. Cr. Proc., it is said: "The judgment to abate a nuisance can be rendered only when the defendant is present"; citing *Reg. v. Chichester*, 2 Den. C. C. 458, 8 Eng. L. & Eq. 284.

It is contended by plaintiff in error that the indictments are wholly insufficient, in that no offense is charged therein; that it is not sufficient to allege that the defendant kept and maintained a common public nuisance, by "then and there knowingly permitting intoxicating liquors to be vended and sold contrary to law." The indictments fail to allege in what respect the sale was contrary to law. This kind of indictment has been held insufficient in *State v. Brewing Co.*, 53 W. Va. 591, 45 S. E. 924, where the sufficiency of an indictment similar to the ones at bar is discussed. See, also, *Cohen v. King Knob Club* (W. Va.) 46 S. E. 799. "An indictment on a statute must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it." *Hampton's Case*, 3 Grat. 590; *State v. Whitter*, 18 W. Va. 306; *Glass' Case*, 33 Grat. 827; *Youngs' Case*, 15 Grat. 664. In *Matthews Case*, 18 Grat. 989 (Syll. point 3), it is held: "Anything which is good cause for arresting a judgment is good cause for reversing it, though no motion in arrest is made." This proposition was approved in *Randell's Case*, 24 Grat. 646, and in *Lemon's Case*, 4 W. Va. 755, 757, 6 Am. Rep. 293; also in *State v. Miller*, 6 W. Va. 600, and in *State v. McClung*, 35 W. Va. 280, 286, 13 S. E. 654. Although there was no demurrer or motion in arrest of judgment, the indictments being fatally defective, either a demurrer or motion in arrest of judgment must have been sustained if interposed; besides, the judgments, being illegal, must be reversed, and the indictments quashed.

BRANNON, P. (dissenting). Judge SANDERS and I dissent, for the reason that to two indictments the defendant pleaded guilty, and, as to the third, took no exception to the indictment by demurrer or motion in arrest of judgment. We grant that on demurrer the indictments would be bad, but only in a matter of specification. They change substantially an offense, only lacking in specifying the kind of sale, whether on Sunday, to an infant, to one intoxicated, or otherwise. It is going far to say that one confessing himself guilty under such an indictment should be let off. He waived such defect. We are unwilling to cast aside the confession on two indictments and the verdict on the other. We are willing to reverse the judgment, but not willing to quash the indict-

ments. We would reverse the judgment, and remand the causes to the circuit court, with direction to award writs of *capias ad audiendum judicium*, and proceed to render such judgments upon the confessions and verdict as the court may see proper. If a defendant is not in court when sentence of jail is made, what writ is there to hunt him and put him in jail? I do not know any. *State v. Campbell*, 42 W. Va. 247, 24 S. E. 875, says that no imprisonment can be imposed until he is brought into court under a *capias* to hear judgment.

(53 W. Va. 276)

ROBERTS v. HICKORY CAMP COAL & COKE CO.

(Supreme Court of Appeals of West Virginia. Nov. 7, 1905.)

1. JUSTICES OF THE PEACE—JURISDICTION.

Justice's courts in this state are statutory courts of limited jurisdiction, and are not courts of record.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 71.]

2. SAME—PARTIES DEFENDANT.

A justice is without jurisdiction in an action brought by him against a defendant who is a resident of this state, but not of the county in which the action is brought; the cause of action having arisen in the county of defendant's residence.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 143-147.]

3. SAME—ATTACHMENT.

And in such case, the justice, being without jurisdiction in the principal action, acquires no jurisdiction by attachment and garnishment of the debtor of the defendant in the justice's county.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 177, 178.]

4. SAME.

The justice being without jurisdiction, his judgment in the principal action, as well as that upon the attachment and garnishment, is void.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 374.]

5. GARNISHMENT—PAYMENT BY GARNISHEE—VOID JUDGMENT.

And the payment of the money due from the garnishee to the defendant on the order of the justice is no protection to the garnishee.

6. JUDGMENT—ATTACK ON VOID JUDGMENT.

A void judgment may be declared to be void in any court in which it may be presented, whether in a direct or collateral proceeding.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 919, 920.]

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County.

Action by William M. Roberts against the Hickory Camp Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. S. Laidley, for plaintiff in error. T. S. Clark and A. W. McDonald, Jr., for defendant in error.

McWHORTER, J. William M. Roberts brought his action against the Hickory Camp Coal & Coke Company, a corporation, before

Justice E. H. Ball of Kanawha county, for a balance of \$283.25, due on a contract, with interest from July 8, 1904. The defendant appeared and filed its answer, admitting the claim of plaintiff, but setting up the fact that it was served with a suggestion in a certain suit pending before J. B. Champe, a justice of Fayette county, in which the Imperial Colliery Company was plaintiff and the said Roberts was defendant, requiring it to show what was due from it to Roberts; that afterwards in said suit it was ordered to pay to the Imperial Colliery Company the sum of \$272.20, the amount of the judgment of the Imperial Colliery Company rendered against Roberts in said suit, which amount was paid by the defendant, Hickory Camp Coal & Coke Company, to R. R. Huddleston, deputy sheriff of Fayette county, on the 6th of February, 1904, under an execution then in his hands; and admitting that it still owed to plaintiff, Roberts, the sum of \$11, which it was ready to pay. Plaintiff, Roberts, filed a replication to the said plea or answer of defendant, averring that the payment set up by the defendant, claiming to have been made on a judgment rendered by the Fayette county justice, was no payment of the debt sued for, and admitted by the said plea to have been due and payable to plaintiff, because there was no valid judgment rendered against plaintiff by the Fayette county justice, in favor of the Imperial Colliery Company, for want of jurisdiction; that plaintiff, Roberts, had always been a resident of the state of West Virginia, and was then, and had been for years past, a resident of Kanawha county, W. Va.; that no summons or other process was ever served upon him at any time, or in any manner, in said action of the Imperial Colliery Company against him; that he never had any notice of said action or said judgment until the defendant set up the same as defense in this case; that the justice in Fayette county never obtained jurisdiction of said Roberts in said action, and could not render any valid judgment therein, and could not legally have directed the defendant in this case to pay such judgment without having such jurisdiction, and that all that was done by said Fayette county justice was without jurisdiction and without authority of law, and was null and void, and denied the existence of any valid judgment rendered against him by said justice in the action mentioned in defendant's plea, and denied that the payment claimed by the defendant in answer to the suggestion was any payment whatever of the debt here sued for, and denied that he ever authorized the defendant to pay anything whatever to the Imperial Colliery Company, and denied that he owed the Imperial Colliery Company anything, and prayed judgment for the amount sued for, and for which the defendant admitted it had owed him. Upon the hearing, Justice Ball held that the justice of Fayette county had

no jurisdiction to render any judgment, or to make an order for the Hickory Camp Coal & Coke Company to pay said judgment, and that the judgment and order against the garnishee were null and void, and that the payment claimed to have been made by the defendant was no payment of the Roberts' debt against it, and gave judgment for the amount sued for, \$283.25. The defendant took the case by appeal to the circuit court of Kanawha county, where on the 13th of June, 1905, the case was heard, and the following order entered: "This action came up on appeal taken by the defendant from the judgment of a justice of Kanawha county, and, neither party desiring a jury, the same is submitted to the court, and the same was heard upon the pleadings made up before the justice, to wit, the complaint of the plaintiff, the answer of the defendant, and the replication of the plaintiff, all in writing and filed herein. That the evidence adduced by the defendant was the record of the case of Imperial Colliery Co. v. Wm. Roberts, tried before Justice Champe, in Fayette county, W. Va., in which record is herein filed, and the evidence adduced by the plaintiff was the affidavit of W. Roberts, sworn to February 17, 1905, which is filed herein, and, by agreement between the parties to this cause, said affidavit was read as the testimony of said Roberts herein, and this was the only testimony adduced on the trial. The defendant objected to the testimony of Roberts, not because of its form in affidavit, but to the illegality thereof, which objection was overruled by the court, to which ruling the defendant excepted. That this action was for the sum of \$283.25, and the defendant admitted that it had been indebted to the plaintiff in that amount, but claims that it had paid the sum of \$272.20 on August 23, 1904, on a suggestion issued in the said case of the Imperial Colliery Co. v. W. Roberts on a judgment rendered by the justice in Fayette county, and which payment it was claimed by the plaintiff was no payment whatever. This court, upon consideration of the pleadings, the evidence, and the argument of counsel of both plaintiff and defendant, is of opinion that the said payment claimed to have been made was valid payment, and the defendant's indebtedness to the plaintiff should be reduced to that extent." Then follows judgment in favor of the plaintiff, Roberts, against the Hickory Camp Coal & Coke Company and Citizens' Trust & Guaranty Company of West Virginia, parties to the appeal bond, the sum of \$11.05, balance due plaintiff after deducting the sum of \$272.20. To which finding and judgment of the court plaintiff excepted, and procured a writ of error to said judgment from one of the judges of this court.

The crucial question involved in this case is whether Justice Champe had jurisdiction to enter judgment in the action of the Impe-

rial Colliery Company against Roberts in Fayette county. "The jurisdiction of justices of the peace is purely statutory. They have only such judicial powers as have been expressly conferred upon them by statute. The courts of justices not being courts of record or of general jurisdiction, there is no presumption in favor of jurisdiction when the record does not disclose it." 18 Am. & E. E. L. (2d Ed.) 17, and cases there cited. Section 16, c. 50, Code 1899, clearly defines the civil jurisdiction of justices, in which it provides: "Shall not extend to any action unless the cause of action arose in his county, or the defendant, or one of the defendants, resides therein, or being a non-resident of the state, is found, or has property or effects within the county." The return of the officer on the original summons shows that Roberts was not found in Fayette county, as also the return of the second summons, and the record contains not a word with reference to the residence of Roberts in Fayette county, or that the cause of action accruing to the Imperial Colliery Company against Roberts, or any part of it, arose in said county. The testimony of Roberts is, and the fact is conceded, that he resides, and has resided for the last eight or nine years, in Kanawha county, and that he was never a non-resident of the state of West Virginia; that no summons was served upon him in the suit, and he testified that he had no notice of the action against him in Fayette county; that the Imperial Colliery Company had its office and place of business in Kanawha county, and at which place he made a contract with said Imperial Colliery Company, which contract was the basis of its action. It is contended by counsel for defendant in error that the Hickory Camp Coal & Coke Company was located in Fayette county, "where Roberts was working, cutting timber, and was, in fact, most of the time. Even if it is true, as stated in his affidavit, that he was a resident of Kanawha county," this in no manner appears from the record. The only matter in the record that would indicate that the defendant, Hickory Camp Coal & Coke Company, was in Fayette county is the fact that the return of the sheriff of service of the summons on garnishee states that it was served on the company by delivering a copy "to G. P. Meadows, the president and general manager of said company; he being a resident of said county, and found therein at the time of said service." But it does not appear from the record that plaintiff, Roberts, was ever in the county of Fayette for any purpose; nothing in the record to show that the cause of action arose in Fayette county, but it does show that it arose in Kanawha county. In *Harvey v. Parkersburg Insurance Co.*, 37 W. Va. 272, 16 S. E. 580 (Syl., point 3), "the cause of action generally means the breach of duty by the defendant, complained of"; and in Syl. point 4, "the debtor, unless it be other-

wise provided, must, in order to make payment, seek the creditors." In this case Roberts would have to pay his debt to the Imperial Colliery Company at its place of business in Kanawha county.

It is contended by defendant in error that a justice has jurisdiction under the Constitution by virtue of section 28 of article 8, in the provision that, "The civil jurisdiction of a justice of the peace shall extend to actions of assumpsit, debt, detinue and trover, if the amount claimed, exclusive of interest, does not exceed \$300"; that this is a general jurisdiction, in which the justices are given original and concurrent jurisdiction over the actions named, the only limitation in such actions being that of the amount in controversy, which cannot exceed \$300. But said section 28 confines such jurisdiction of justices to their county. Under section 193, c. 50, Code 1899, a provision is made for attachments to be issued by justices against a defendant in an action where the ground for attachment exists, as set forth in said section; the last ground being: "If the defendant, or any of the defendants, is a foreign corporation, or a nonresident of the state, such justice having jurisdiction of the action." But there is no provision for an attachment against the property of a defendant who is a resident of the state, but not of the county in which the justice is proceeding. In *Mayer v. Adams*, 27 W. Va. 244 (Syl., point 4), it is held: "The jurisdictional facts necessary to give a court of special and limited jurisdiction a right to act must appear in the record of its proceedings, or such proceedings will be regarded as had without jurisdiction, and therefore as absolute nullities." Counsel for defendant in error make their contention on the theory that a justice's court is a court of record. In *Todd v. Gates*, 20 W. Va. 464 (Syl., point 1), "The summons in a justice's court, like the writ in a court of record, must be looked to, in order to determine the plaintiff's claim upon the question of jurisdiction." "The forms of actions now existing shall not apply to justices' courts, and there shall hereafter be but one form of action in said courts, which shall be denominated a civil action." Section 49, c. 50, Code 1899; *O'Connor v. Dills*, 43 W. Va. 54, 26 S. E. 354. In sixth clause of section 60, c. 50, Code 1899, it is provided that: "The action shall also be dismissed at plaintiff's cost, whenever it appears that it has been brought in the wrong county, or for any other reason the justice has not jurisdiction thereof." *Mill Co. v. Southern*, 46 W. Va. 754, 34 S. E. 782. "The plaintiff's right of action, the effectiveness of the judgment, and the protection of the garnishee from subsequent attack after payment under judgment, depends upon the principal action, its rightful institution, rightful judgment thereon, and rightful execution of the judgment." *Wap. on Attach. &*

Gar. § 474. Under the statute, Roberts, being a resident of the state, could not be sued before a justice without his county. The plaintiff, Imperial Colliery Company, knew his residence was in Kanawha county, and, the attachment being subsidiary to the main suit, the jurisdiction depended upon the principal action, and the defendant, Roberts, not being a resident of the justice's county or a nonresident of the state, the justice did not acquire jurisdiction by the attachment proceeding. *Dorr's Adm'r v. Rohr*, 82 Va. 359 (Syl., points 3 & 4), 3 Am. St. Rep. 106. The Hickory Camp Coal & Coke Company, the garnishee, having been brought into the case by service of process, was bound to take notice of the fact that its creditor, Roberts, had not been served with process, and it must have known that his residence was in Kanawha county, and not in Fayette, and it was clearly its duty, if practicable, to have brought to the notice of its creditor the fact that his debt in its hands was sought to be sequestrated, knowing that he had no notice of the proceeding, instead of paying out of its hands the fund that belonged to him, without objection or protest. *Stewart v. Assurance Co.*, 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101; *Dorr's Adm'r v. Rohr*, supra; *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023. The plaintiff Imperial Colliery Company had a complete remedy in the circuit court of Kanawha county against Roberts, including attachment against the property of Roberts in Fayette county, in case grounds for attachment existed. There Roberts would have been served with process, and could have made his defense, if any he had, both against the claim in the principal suit and also against the attachment. "If a court does not have jurisdiction, it is wholly unimportant how precisely certain and technically correct its proceedings and decision may have been. Its judgments and orders are mere nullities, and may not only be set aside at any time by the court in which they were rendered, but they may be declared to be void by every court in which they are presented. The void or voidable character of a judgment depends, then, upon whether the court by which it was rendered did or did not have jurisdiction; in other words, the distinction turns upon the defective or wrongful execution of the power to hear and determine a cause, which renders the judgment merely voidable, and the lack of power to hear the cause at all, which renders the judgment void." 17 Am. & E. E. L. (2d Ed.) 1048, and cases there cited, and 29 Am. & E. E. L. 1067, where it is said of a void judgment: "No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded on it are worthless." The Fayette justice had acquired no jurisdiction of the person of defendant, Roberts, and, Roberts not being a nonresident, he had by his pretended attachment no jurisdiction of his property. So, having neither jurisdiction of defendant's person or property, the justice was without power to render

any judgment in the case; hence the judgment is void, and the payment by the Hickory Camp Coal & Coke Company was without authority, and it is in no wise protected by its voluntary payment. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804 (Syl., point 6); *Stewart v. Assurance Co.*, 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101; *Wap. on Attach. & Gar.* §§ 926, 959, 963.

For the reasons herein given, the judgment of the circuit court must be reversed and set aside, and, this court proceeding to render such judgment as the circuit court should have rendered, it is considered that the plaintiff, William M. Roberts, recover against the defendant, the Hickory Camp Coal & Coke Company, and the Citizens' Trust & Guaranty Company of West Virginia, the surety in the appeal bond, the sum of \$299.05, the principal and interest of the plaintiff's claim from July 8, 1904, until the date of the judgment, with interest on said sum of \$299.05 from June 13, 1905, until paid, and the costs about his action in that behalf expended, and that this judgment be certified to the clerk of the circuit court for execution to be issued thereon.

(53 W. Va. 233)

TRACEWELL v. WOOD COUNTY COURT.
(Supreme Court of Appeals of West Virginia.
Nov. 7, 1905.)

1. TRIAL.—INSTRUCTIONS.

An instruction must not submit a question of law to the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 818, 467.]

2. WATERS.—SURFACE WATERS.—DAMAGES.

In an action against a county court for damage from collecting surface water in a ditch along a county road, and casting it in a body upon land, the rule, as a measure of damages, that if the land is worth as much in market value after the injury as before no recovery can be had, does not apply. Nor can general benefits in increase of value or otherwise from the construction of the road, common to all in the vicinity, be set off against such damages.

3. EMINENT DOMAIN.—PROPERTY TAKEN FOR PUBLIC USE.—SURFACE WATER.

A county court which, by a ditch made by it along a public road for drainage, collects surface water, and casts it in a body on land, doing damage, is liable for such damage by reason of section 9, art. 3, of the Constitution.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 236.]

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by W. S. Tracewell against the Wood county court. Judgment for defendant, and plaintiff brings error. Reversed.

V. B. Archer and Wm. Beard, for plaintiff in error. John F. Laird, for defendant in error.

BRANNON, P. W. S. Tracewell brought an action of trespass on the case against the county court of Wood county, and it resulted in a verdict and judgment for the county court from which Tracewell has sued out a writ

of error. The action was for damages to the land of the plaintiff on the side of a high hill adjoining the city of Parkersburg, known as Ft. Boreman, on which land the plaintiff had dwelling houses standing upon foundations. The declaration alleges that the county court had recently constructed a public road along the side of the steep hill above the plaintiff's land, and had made drains or ditches along the same, which drains or ditches collected in a body surface water flowing upon the hillside in great quantity, and cast the same in a body upon the plaintiff's land, carrying and depositing mud and sediment upon it, cutting and eroding its surface, creating dampness under the dwelling houses, rendering them unhealthy, injuring their foundations, and causing the surface of the ground to slip and loosen the foundations of the dwellings.

The plaintiff assigns it for error that the court gave an instruction saying that a county court is not responsible to an individual in damages for injury sustained in consequence of the neglect of the county court, its officers or agents, to perform any duty enjoined by law, unless action is expressly or by necessary implication given by the Constitution or statute; and that, therefore, in this case the jury is instructed that, even though they believe from the evidence that the real estate described in the declaration as belonging to the plaintiff when the cause of action claimed to have arisen actually belonged to the plaintiff, and even though the jury should believe that the real estate, by reason of the failure and neglect of the defendant to properly construct and keep in repair the ditches, drains, waterways, channels, and sluices mentioned in the declaration, yet unless the jury believe that the same constituted a portion and part of the public road mentioned in the declaration, they should find for the county court. This instruction is bad. First. It puts a proposition of law to the jury for its decision. It leaves it to the jury to say whether by law the facts stated in the declaration and evidence would give an action, and as, if connected with that question, it says that if the plaintiff was injured by the ditch, yet there could be no recovery if the ditch was not part of the road. If the ditch was not part of the road, how could there be recovery? Or how could there be any connection of this clause with the legal proposition? There was no evidence tending to show that the county court had constructed a ditch independent of the road. There is no connection between that legal proposition put to the jury in the opening of the instruction and the hypothesis of the ditch not being a part of the road. The instruction is confused, inconsistent, misleading. A legal proposition should not be put to the jury for its decision. What had that legal proposition to do with the theory that the ditch was not a part of the road? Second. There was no evidence of any ditch made

by the county court separate and apart from the road, and the instruction put a theory not arising upon the evidence, introduced before the jury a question not fairly arising on the evidence.

Instruction 4 says that, even if the jury should believe from the evidence that by reason of the construction of the road, or by failure to keep in repair the ditches, more water was caused to flow upon the land of the plaintiff than flowed or spread on it before such construction or failure to keep in repair, this would not entitle the plaintiff to recover, unless by reason of such construction or failure to repair surface water was collected and cast in a body or mass upon the property of the plaintiff. I think the instruction bad, because it goes on the theory that more surface water, spreading as surface water, went upon the plaintiff's land after the construction of the road than before, and presented a question of fact not developed by the evidence; for, whatever the evidence tended to show as to increase of water or flowage of water upon the plaintiff's land, it was not as surface water continuing as such, but in a body. It is true that the legal proposition put in that construction is sound. To render the defendant liable, its work must gather surface water and cast it in a body upon the plaintiff's land. *McCray v. Town of Fairmont*, 46 W. Va. 442, 33 S. E. 245; *Clay v. St. Albins*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883. The instruction does not, however, seem fitted to the evidence.

Instruction No. 3 says: "The jury is instructed that, unless they believe from the evidence that the ditches and drains * * * mentioned in the declaration are part of the public road of Wood county, mentioned therein, or that by reason of construction of the road mentioned in the declaration of this cause, they should find a verdict in favor of the county court, as, under the law, a county court is not liable for damages sustained by any person by reason of any defect in a drain or ditch, unless said drain or ditch form a constituent part of a public road." As above stated, no evidence tended to show that the ditch was not a part of the public road. All the evidence tended to show that it was made by the court as a part of the road. Therefore, the instruction puts a theory not arising from the evidence. It is irrelevant to the case. But it is vague and incomplete in one of its material clauses; that clause in the words, "or that by reason of construction of the road mentioned in the declaration in this case." What followed by reason of the construction of the road? If the jury believed that by reason of the construction of the road, what? Instructions must be clear, not obscure. The sentence is incomplete. There is no evidence tending to dislocate the ditch from the road.

Instruction 5 told the jury that surface water is like the water of the sea, which each

may fight, consume, repel, or expel without regard to any injury to another proprietor; an exception being that such water cannot be collected, and then cast in a body upon the property of another, and that, if the county court constructed the ditches on its property for the purpose of draining off from its property the surface water, the court had right to take such action, as it would not be liable for damages from the flow of such water, unless through construction or failure to keep in repair such ditches surface water was collected and thrown in a body or mass upon the land of the plaintiff. This instruction is criticised on the ground that there was no evidence to show that the county court was making simply an effort to keep surface water from its road. This criticism is untenable. For what was the ditch made? The defendant had right to make a ditch to keep the surface water from its road, but could not gather it in a body, and cast it upon the plaintiff's land.

Instruction 6 told the jury that the measure of the damages to the property of the plaintiff would be the difference in its market value immediately before and immediately after the time when it was claimed that the damage was inflicted, and that, if the plaintiff's property was worth as much after as before the injury, the jury must find for the defendant. *McCray v. Fairmont*, 48 W. Va. 442, 33 S. E. 245, and *Blair v. City of Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837, are cases relied on for this proposition. Those cases do not apply to this case. They relate to the permanent damages to property by reason of change of grade of a street—enduring damages—while this case is for transient or intermittent injury, ensuing from a removable cause. If a work of internal improvement, like change of grade, leaves the property fully as valuable as before, the owner is not injured; but can we conceive that any one may gather surface water in a ditch, and cast it in bulk upon a town lot, filling the lot with mud, flowing under a house, depositing debris upon the surface, and greatly injuring the daily use of the property, and defend himself by saying or proving that the property will still bring as much as before? We do not think the rule put for this instruction is applicable in this case.

The same objection applies to instruction 8. The grading of a street by competent authority is a lawful act; the casting of surface water in a body upon a lot is not. There is a difference. The objection to the evidence of Tracewell, going to prove that coal and wood could be hauled to his premises by the new road, was improper. It only tended to show benefit to him from the new road, common alike to him and all others. He could not be charged with them in offset against any damages he might be entitled to. The evidence of Straus, Deem, and Kirk, tending to show that the property of the

plaintiff was worth as much after the alleged injury as before, and to show an appreciation of property along the road, would be inadmissible, under principles just stated.

Instruction 1 for the defendant was objected to. It told the jury that the burden of proving the allegations of the declaration was upon the plaintiff, and, if the jury should believe from a consideration of all the evidence that the plaintiff had failed to prove his case, the jury should find for the defendant, and that the law did not require the defendant to prove that it was not guilty of inflicting the damage charged in the declaration, but that, on the contrary, the law required the plaintiff to "convince" the jury that he had sustained loss, and that the defendant was responsible therefor. We see no objection to this instruction. The word "convince" is not improper in such case. The jury would have to be convinced by the evidence of the facts necessary to convict the defendant of the wrong attributed to it.

Instruction 8 is bad, because it told the jury that if the construction of the road and ditches resulted in a special benefit to the plaintiff's property by reason of increase in market value, or "otherwise," then such special benefit might be offset against "any such damage permanent to the property arising from construction of the road, to the extent that the jury may decide to be right and proper." Now the word "otherwise" as to the benefit is indefinite. What benefit besides increase in market value is here meant? Did the evidence tend to show any special benefit? Increase of value would be common to all, and should not be charged against the plaintiff. *Guyandotte Co. v. Buskirk* (W. Va.) 50 S. E. 524. Can we set off increase of value by reason of the construction of a new road—a result common to all of the neighborhood—against that damage which comes to a particular property owner from the flowage upon his lot of surface water in body, resulting from ditches made in the construction of the road? Can you enter into a process of debit and credit in such case by taking the damage, and setting off the benefits? We do not think you can do this in such a case, and in this instruction the damages spoken of are permanent. Is the word "permanent" here meant as relating to a cause that is permanent? This case is not one for permanent damages, because the source of the injury could be remedied, the damages occasional or intermittent, and, besides, all evidence of damages after suit was excluded; and we do not see that the introduction of the question of permanent damages was proper in this case.

Instruction 9 says that, though the property of the plaintiff was injured, yet if it was due to unusual flood or extraordinary rainfall, out of ordinary experience, and that the injury would not have occurred except for such unusual flood and rainfall, and not from the construction of the road, the jury

should find for the defendant. This legal proposition is sound. *Clay v. St. Albins*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883. But there is no evidence tending to prove that state of facts, unless it be of rains after the suit. That evidence was excluded, or rather the jury was told that no damage was claimed after suit was brought.

An instruction was given that the law did not require the county court to furnish a drain or ditch to carry water away from the premises of the place. There was no such question before the jury. No one claimed that the defendant was bound to make a drain to carry away the water from the plaintiff's land. It was irrelevant to the case before the jury.

An instruction was given to the effect that article 3, § 9, of the Constitution, that private property shall not be taken or damaged for public use without compensation, does not make a county court liable for damages from surface water where a private individual would not be liable. Probably so, but this instruction affords no rule for the guidance of the jury. It leaves it to the jury to say when a private individual would be liable by law. It makes the jury the judge of the law. It left to the jury to say when an individual would be liable by law, and if he would be liable, then the county court would be liable, and if he would not be liable, then the court would not be liable. The instruction is no guide to the jury.

An instruction was given that, if the jury believed that the plaintiff sustained damage, and that damage was all since the institution of the suit, and none before, the jury should find for the defendant. This is utterly irrelevant to the case. No such question arose from the evidence. The plaintiff disclaimed recovery from any damage after the suit.

We do not understand that any contention was made that, if the cause of action stated in the declaration was sustained by proof, the county would not be liable. *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654, is cited for the county court, but for what purpose does not appear. It was used on the trial, referred to in an instruction. It is not in the brief relied upon to disprove the liability of a county court for any public work which injures private property, either by an act which amounts to "taking," or only damages to the property. That case has no application to this case, whatever may be the object of counsel in referring to it. He makes no argument to apply it to this case. That case denies recovery against the county for damage to the person from a tree left standing too close to the road, which fell upon the person. It was claimed that the county should have cut it down. That was

damage to the person, and the principle stated in that case is doubtless sound, namely, that a county is not liable for a wrong inflicting injury done in discharge of the public functions of the county court, where no statute gives action. But that case sustains this action, if its cause be proven, because that case says that a county is liable if there be express law holding it liable for an act, and in this case the action is based on the provision of the Constitution and of section 1, c. 42, of the Code of 1899, ruling that case, saying that: "Private property shall not be taken or damaged for public use without just compensation." It makes a county court, as well as a municipal corporation, liable for its acts and works which take or damage private property without the consent of the owner or without compensation. But for that provision the county would not be liable. If a city is liable to a lot owner for consequential damages from change of grade of a street, why is not a county liable for damage to land from water thrown upon it by a road ditch? Both injuries come from the performance of public functions by the public authority. Indeed, if any difference, the case of the county is plainer for liability, because it causes a physical invasion of the property. It is a taking, and actionable under the Constitution, as it was before the words "or damaged" were put in it. "Discharging water upon it [land] is a taking, within the meaning of the Constitution." "A deposit of stone and rubbish upon land is such a taking as to require compensation." *Mills, Em. Domain*, § 30. "The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statute authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation." *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557. But this is not material, in view of the addition of the words "or damaged" to the clause as it was before the Constitution of 1872. This subject is discussed in *Johnson v. City of Parkersburg*, 16 W. Va. 402, 27 Am. Rep. 779. The same rule of liability applies to the county courts and to municipal corporations. It is useless to re-discuss this matter. See 15 Cyc. 656; *Chester County v. Brower (Pa.)* 12 Atl. 577, 2 Am. St. Rep. 714; *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638; *Lewis on Eminent Domain*, §§ 89, 229; *City of Omaha v. Cramer (Neb.)* 41 N. W. 295, 13 Am. St. Rep. 504; *Wendel v. Spokane (Wash.)* 67 Pac. 576, 91 Am. St. Rep. 825; *Brown v. City (Wash.)* 31 Pac. 313, 314.

For these reasons, we reverse the judgment, set aside the verdict, and grant a new trial.

(72 S. C. 506)

STATE v. MURRAY.

(Supreme Court of South Carolina. Oct. 11, 1905. On Rehearing, Oct. 30, 1905.)

1. FORGERY—WHAT CONSTITUTES.

Cr. Code 1902, § 873, providing that whoever falsely forges or counterfeits, or assists in forging or counterfeiting, any writing or instrument, and utters or publishes the same as true, is guilty of forgery, is within the power of the Legislature.

2. JURY—CHALLENGES OF STATE.

On an indictment for forgery the state under Cr. Code, § 55, is entitled to five peremptory challenges.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 611.]

3. STATUTES—TITLE OF ACT.

The words "Forgery and Offenses against the Currency," inserted in the Criminal Code for convenience and indicating the subject-matter of that chapter, are not part of the title of the act, so as to render Cr. Code 1902, § 873, unconstitutional on the ground that the title and body of the statute do not correspond.

4. FORGERY—WHAT CONSTITUTES.

In order to constitute forgery by uttering or publishing a forged instrument or writing, it must be uttered and published as true, and must be known by the party uttering or publishing it as false, forged, or counterfeited and the act must be done with intent to prejudice, damage, or defraud another.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, § 6.]

5. SAME—EVIDENCE.

Evidence held to sustain a conviction for forging and uttering a lease.

Appeal from General Sessions Circuit Court of Sumter County; Gage, Judge.

George W. Murray was convicted of forging and uttering a lease, and appeals. Affirmed.

The following are the exceptions:

"First. Because, it is respectfully submitted, his honor erred in allowing the state, over the objections of the defendant, to challenge peremptorily more than two jurors; whereas, the law only allowed the state two challenges in the trial of said case.

"Second. Because his honor erred in refusing the motion of the defendant to direct a verdict of not guilty upon the close of the case for the state, which motion was made on the grounds: (1) That the state had not proven that the lease was uttered by the defendant with any knowledge of its falsity; (2) because there was no evidence to show any intent to defraud; (3) because there was no evidence tending to show an effort to cheat or defraud by means of the lease; (4) that there was no evidence tending to show that the defendant forged the lease or had any knowledge of the alleged forgery; (5) because there was no evidence that the paper was actually uttered, but, on the contrary, it appeared that the lease was introduced in evidence by the defendant's attorney simply because it was in existence, and the evidence showed that the lease as introduced was in exact accordance with the terms of the lease relied upon by the plaintiffs, and consequently could not under any view of the testimony

operate to cheat or defraud any person, and it further appeared that the defendant could not be convicted of uttering a forged instrument, under section 373, Criminal Code, because that statute only undertakes to define forgery, and cannot cover the independent crime of uttering a forged instrument, because it would be unconstitutional to that extent, the title of the act being 'Forgery and Offenses against the Currency.'

"Third. Because his honor erred in not granting a new trial in said case, on the motion of the defendant, made upon the minutes of the court, upon the grounds that the undisputed oral and documentary evidence taken in the case at bar, and in the proceedings leading up to the case, and in which the lease was used as evidence, showed conclusively that the same was used only for legitimate purposes, and that the use of the same under the issues raised by the pleadings could not operate to cheat or defraud the Chatmans, nor could the defendant have intended to have cheated or defrauded the Chatmans, because said lease was in exact terms as that introduced in evidence by the Chatmans; because there was no evidence tending to show that the defendant either forged or caused to be forged the lease, nor was there any evidence tending to show that the defendant had any reason to believe the lease to have been forged; because, said lease being in exact accordance with the true contract as set up by the Chatmans, its introduction in evidence strengthened the case of the plaintiffs, and in no way benefited the case of the defendant, for the reason that the sole issues raised by the pleadings and evidence in the case for specific performance were (a) the legal construction of the lease as to whether it was a lease with an incidental right of purchase, or whether it was a contract of purchase with a right vested in the lessee to comply at any time, whether in default or not; (b) whether or not the five acres of land included in the lease had been returned by the Chatmans at an agreed price or not; because the evidence as a whole taken in connection with the good character of the defendant, which was proven in the case, was totally insufficient to support a verdict of guilty; and because the statute under which the defendant was tried, to wit, section 373, is unconstitutional, the same being contrary to the provisions of article 2, § 20, of the Constitution of 1868, and of article 3, § 17, of the Constitution of 1895, in that the title of said act relates to 'Forgery and Offenses against the Currency,' and provides for the punishment of crimes already existing, to wit, the crimes of forgery and of offenses against the currency, but the body of the act provides a punishment for persons 'willingly acting or assisting in the false making, forging or counterfeiting of any writing or instrument of writing, or of uttering, or publishing as true any false, forged or counterfeited writing, or instrument of writing,' and that said

act, so far as it relates to the uttering as true any false, forged, or counterfeited writing, is unconstitutional, null, and void, and the conviction in this case should not be allowed to stand under a void statute."

Lee E. Moise and George Johnstone, for appellant. John S. Wilson, for the State.

GARY, A. J. The indictment, under which the defendant was convicted, charged that he "did willfully and falsely utter and publish as true a certain false, forged, and counterfeited writing and instrument of writing, commonly called a lease of land, of the tenor as follows: * * * He, the said George W. Murray, then and there, well knowing the same to be forged, with intent to defraud Scipio Chatman and James Chatman. * * *" The exceptions will be set out in the report of the case.

1. The first question that will be considered is, whether his honor, the presiding judge, erred in allowing the state to challenge peremptorily more than two jurors. The names of the persons composing the jury were drawn and called in the usual manner, and defendant exercised seven challenges and the state exercised two, whereupon the state challenged the third juror, and the defendant objected upon the ground that this was not a charge of forgery, but of uttering a forged instrument, and that section 55 of the Criminal Code of 1902, was not applicable to this case. The court overruled the objection and allowed the challenge. The state did not exercise more than five challenges. Section 373 of the Criminal Code of 1902 is as follows: "Whoever shall be convicted of falsely making, forging or counterfeiting, or causing or procuring to be falsely made, forged or counterfeited, or of willfully acting or assisting in the false making, forging or counterfeiting, of any writing or instrument of writing, or of uttering or publishing as true any false, forged or counterfeited writing or instrument of writing, or of falsely making, forging, counterfeiting, altering, changing, defacing, or erasing, or causing or procuring to be falsely made, forged, counterfeited, altered, changed, defaced or erased, any record or plat of land, or of willingly acting or assisting in any of the premises, with an intention to defraud any person, shall be guilty of forgery, and shall be sentenced to be imprisoned not less than one year or more than seven years, and also to pay such fine as may be judged expedient, at the discretion of the judge who may try the case." Section 55 of the Criminal Code provides that any person who shall be arraigned for the crime of forgery shall be entitled to peremptory challenges not exceeding ten, and the state in such cases shall be entitled to peremptory challenge not exceeding five; persons indicted for other crimes shall be entitled to peremptory challenge not exceeding five, and the state not exceeding

two. Uttering or publishing as true any false, forged, or counterfeited writing constitutes the crime of forgery, under section 373 of the Criminal Code of 1902. It is a kindred form of forgery. It is usual to enact that various illegal acts shall constitute the crime of forgery, as will be seen by reference to the statutes of the different states. The Legislature is vested with power to enact such statute.

2. The next question for consideration is whether section 373 of the Criminal Code of 1902 is unconstitutional, on the ground that the title and body of the statute do not correspond. We have failed to find in the record where the circuit judge ruled, or was requested to rule, upon this question. The assignment of error cannot, however, be sustained. The words "Forgery and Offenses against the Currency" do not form the title of an act, but are merely inserted in the Criminal Code for convenience in indicating the subject-matter of that chapter.

3. The remaining exceptions raise the question whether there was any testimony tending to sustain the allegations of the indictment that were put in issue and contested by the defendant. In order to constitute forgery by uttering or publishing a forged instrument of writing, three important factors are requisite: (1) It must be uttered or published as true and genuine. (2) It must be known by the party uttering or publishing it as false, forged, or counterfeited. (3) It must be with intent to prejudice, damage, or defraud another person. We will first consider whether there was any testimony to the effect that it was uttered or published by the defendant as true and genuine. It was offered in evidence by the defendant upon the trial of the action for specific performance of contract instituted against him by Scipio Chatman and James Chatman, and he testified that it was genuine.

The next question for consideration is whether there was any testimony tending to prove that the defendant knew that the writing uttered or published was false, forged, or counterfeited. There is abundance of testimony to the effect that said writing was forged. James Chatman testified that he did not sign the lease. Scipio Chatman testified that James Chatman did not sign it on the 4th of November, 1899, while he and James were at the house of defendant when the negotiations for the lease or purchase of the land were consummated. Marion W. Cato, who witnessed the agreement, signed in duplicate by Scipio Chatman and George W. Murray, testified that he did not sign his name as a witness to the instrument of writing set out in the indictment, which purports to have been signed by George W. Murray and James Chatman, and witnessed by him. Witnesses testified that there was only one kind of ink used by Murray and others, when the papers were signed on the 4th of November, 1899, and it was black, yet the

alleged forged instrument was written in blue ink, and on white paper, while the duplicate writing signed by the defendant and Scipio Chatman was on blue paper. E. F. Miller testified that he printed the blank on which the lease in question was written, along with others, for the defendant, during the early part of the year 1900. On those blanks then printed, appear the numbers "190" in two places. It is at least a reasonable inference from these facts that the defendant knew the writing was forged.

The next question that will be considered is whether there was testimony tending to show that the writing was uttered with a fraudulent intent. In 2 Bish. Cr. Proc. § 428, it is said: "That the defendant made false representations at the time of the uttering, that he fabricated a disposition to prove the forged writing genuine, that his statements concerning the source whence he obtained it have been contradictory, and other like equivocations and suspicious doings, may be shown against him." In 9 Enc. of Pl. & Pr. 561, we find the following: "It is not necessary to state how the instrument could have been used for the purpose of fraud. It is enough if it appear from the character of the instrument, together with the provisions of the statute, that it might have been so used in connection with other facts, real or simulated, either then existing, or with which it was to be afterwards connected." This is quoted with approval in *State v. Bullock*, 54 S. C. 300, 32 S. E. 424. The rule is thus stated in *State v. Fuller*, 1 Bay, 245, 246, 1 Am. Dec. 610: "In the present case the indictment states that the note was passed, knowing of the forgery, with intent to defraud." The verdict finds the uttering, knowing of the forgery. The facts which constitute the offense are here found. The intent is only matter of circumstance, which naturally follows and springs out of the facts. No other than a fraudulent intent can be inferred, when a man makes or passes a false deed as and for a true one. The law will presume, as in the foregoing cases (in *odium fraudis*), that it was done with "a fraudulent intention."

The defendant testified that he did not know until the proceedings for specific performance were commenced that the parties claimed that only one of them had signed the contract; and afterwards, when he found out that only one had signed, he mentioned it in his answer. The following appears in the testimony of the defendant: "Q. You have stated that up to the time these proceedings were started you thought both these parties signed the contract? A. Yes, sir. Q. And when this complaint was served, and you saw only Scipio Chatman had signed this contract, you began to look up your papers, and you found that paper signed by James Chatman? A. Yes, sir. Q. And you set up in your answer that Scipio Chatman didn't make any contract with you, but that James Chatman did so, and that he had

abandoned the land and gone away? A. Yes, sir; and so he had." Also the following: "Well, you have stated to the counsel that when you swore out this notice and affidavit to turn these people off, that you swore it out as having been a contract with the two of them? A. Yes, sir. Q. And afterwards, when you found only one had signed, you mentioned it in your answer? A. Yes, sir." Marion W. Cato testified that the defendant approached him about testifying in the case, and said he wanted him to say he witnessed "those papers." The testimony tended to prove that there was a scheme on the part of the defendant to show that only James Chatman signed the lease, and that he had abandoned the land and gone away. This would have been prejudicial to the rights of Scipio Chatman. The question whether there was a fraudulent intent depended upon all the facts and circumstances of the case, and we are unable to say that the verdict is without any testimony to support it.

It is the judgment of this court that the judgment of the circuit court be affirmed.

On Rehearing.

PER CURIAM. After careful consideration of the petition herein, the court is satisfied that no material question of law has been either overlooked or disregarded.

It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(73 S. C. 450)

GREENWOOD GROCERY CO. v. CANADIAN COUNTY MILL & ELEVATOR CO.

(Supreme Court of South Carolina. Oct. 17, 1905.)

SALE—RESERVATION OF TITLE.

Where a seller shipped the goods with a bill of lading providing for delivery to consignee on payment of the draft attached, it is *prima facie* evidence of a reservation of title and right to the goods until payment of the draft, and the buyer obtains no right to possession by tender of less than the amount called for by the draft.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 547.]

Appeal from Common Pleas Circuit Court of Greenwood County; Gary, Judge.

Action by the Greenwood Grocery Company against the Canadian County Mill & Elevator Company. From an order refusing to dissolve an attachment, defendant appeals. Affirmed.

W. K. Blake and Caldwell & Giles, for appellant. Sheppards, Grier & Park, for respondent.

WOODS, J. The complaint in this cause is to recover damages for breach of a contract to deliver a car load of flour to the plaintiff. The defendant being a foreign corporation, an attachment was issued to obtain jurisdiction and under the warrant

the flour was seized in the hands of the railroad company at Greenwood, S. C. The defendant moved to dissolve the attachment, on the ground that it appeared from the complaint and the affidavit the flour was the property of the plaintiff and not of the defendant, and hence the court was without jurisdiction. The motion was refused and defendant appeals.

The essential facts stated in the complaint and the affidavit are as follows: The defendant, Canadian County Mill & Elevator Company, a corporation resident in El Reno, Okl., contracted to sell and deliver to plaintiff, Greenwood Grocery Company, at Greenwood, in this state, 250 barrels of flour at \$4.50 per barrel. The defendant consigned to the plaintiff the flour, and sent draft on plaintiff, with bill of lading attached, to the Bank of Greenwood, but the draft required payment for the flour at \$5.50 per barrel, instead of \$4.50, the contract price. Plaintiff tendered to the bank the contract price and demanded the bill of lading, but the bank refused to accept less than the full amount of defendant's draft, and, upon plaintiff's refusal to pay more than the contract price, withheld the bill of lading. Thereupon the plaintiff brought this action for damages, attaching the flour in the hands of the railroad. The defendant's position is that when the flour was delivered to the carrier consigned to the plaintiff, it ceased to be the property of the defendant, and became the property of the plaintiff, subject only to the right of stoppage in transitu, and that therefore the attachment must fail.

1. The general rule is that an attachment will not be dissolved, on the ground that the defendant has no title to the property, or that it is the property of the plaintiff. The defendant's lack of interest in the property would affect the title of the purchaser under the attachment, but not the validity of the process. *Drake on Attachments*, § 417. As said in *Metts v. Insurance Company*, 17 S. C. 120, 123: "The attachment is based on facts disconnected with the property, and it must stand or fall upon these facts." But it is manifest this reasoning does not apply where the court obtains jurisdiction of a nonresident by virtue of the attachment of his or its property in the state. In such case, the jurisdiction and the validity of the attachment depend upon the defendant having property in the state, and if this fact does not appear, it is fatal. 4 Cyc. 775. In this case the flour is the property in this state alleged to belong to defendant, and if the title to that has passed from the defendant to the plaintiff, the attachment should be dissolved.

2. The sole question, therefore, is whether by drawing on the plaintiff with the bill of lading attached to the draft and refusing to deliver the bill of lading without payment of the draft, the defendant retained title and right of possession of the property. The effect of a bill of lading issued by the carrier

who is a third party, on the title to the property as between the consignor and consignee is a question of fact depending not only on the terms of the paper itself, but on the intention of the parties as expressed by their dealings with each other. 1 *Benjamin on Sales*, §§ 568, 579, 580; *Emery v. Irving National Bank (Ohio)* 18 Am. Rep. 299; 24 A. & E. Enc. Law, 1066; *Hobart v. Littlefield*, 13 R. I. 341; *Merchants' National Bank v. Bangs*, 102 Mass. 291; *Kentucky Refining Co. v. Globe Refining Co. (Ky.)* 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468; *Chandler v. Sprague*, 38 Am. Dec. 418, note; 23 Eng. Rul. Cases, 383, note. The fact that the bill of lading is taken, making the goods deliverable to the order of the vendor, who is himself the consignor, is very strong prima facie evidence that the vendor in delivering the goods to the carrier intended to reserve the title until payment of the purchase money; and when a draft for the price is drawn on the purchaser with such bill of lading attached, the title does not ordinarily pass to him until the draft is paid. *Bank v. Rowan*, 23 S. C. 339, 55 Am. Rep. 26; 1 *Benjamin on Sales*, § 567; *Porter on Bills of Lading*, § 482; *Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. Ed. 214; *Kentucky Refining Co. v. Globe Refining Co. (Ky.)* 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468; *Hopkins v. Cowen (Md.)* 44 Atl. 1062, 47 L. R. A. 124; *Emery v. Irving National Bank*, 18 Am. Rep. 299; *National Bank v. Crocker*, 111 Mass. 167; *Bank v. Cummings (Tenn.)* 18 S. W. 115, 24 Am. St. Rep. 618; *Farmers' & Merchants' National Bank v. Logan*, 74 N. Y. 568; *Lanfeur v. Blossman*, 45 Am. Dec. 76; *Stollenwerck v. Thacher*, 115 Mass. 224; *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513. But this presumption may be rebutted by other circumstances and previous dealing of the parties evidencing a different intention. *Porter on Bills of Lading*, § 483.

In this case, however, it seems by the terms of the bill of lading the goods were deliverable to the consignee. The presumption therefore was that the consignor intended the title to pass. *Emery v. Irving National Bank*, 18 Am. Rep. 299; 1 *Benjamin on Sales*, § 596. If, therefore, the railroad company had delivered the goods to the consignee without the surrender of the bill of lading and without notice of any reservation of title and possession, it would not be liable to the consignor, though he actually intended to reserve the title and possession until payment of his draft for the price. *Bank v. Railway Co.*, 25 S. C. 224. As between the vendor and purchaser, the authorities leave no room to doubt, however, that even if the bill of lading provides for delivery to the consignee, yet if the consignor draws for the price attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve the title and right of possession until the draft is paid, and the consignee is not entitled to the goods until payment. *Emery*

v. Irving National Bank, 18 Am. Rep. 290; Chandler v. Sprague, 38 Am. Dec. 419, note; Bank of Rochester v. Jones, 55 Am. Dec. 290; Cayuga County National Bank v. Daniels, 47 N. Y. 631; Marine Bank v. Wright, 48 N. Y. 1; Halsey v. Warden, 25 Kan. 128; First National Bank of Green Bay v. Dearborn, 15 Am. Rep. 92. That the intention of the shipper as evidenced by his action in respect to the bill of lading is controlling, is supported by the elaborate opinions in *Shepherd v. Harrison*, 23 E. Rul. Cases, 349, especially the opinions of Kelly, C. B., and Lord Chelmsford. Here, according to the statement of the complaint and the affidavit, not only did the defendant, the consignor, express its intention to reserve the *jus disponendi* by presenting through a bank the draft with the bill of lading attached, but the plaintiff expressed this to be also its understanding of the contract by offering to pay the price, as it claimed it to be, as a condition precedent to acquiring possession of the bill of lading, and through it of the flour.

It is argued, however, that according to the complaint, which must be taken as true, the plaintiff tendered the real price agreed upon, and that by such tender he became entitled to the flour without respect to the amount of the draft. This argument is not without force, but it is not convincing nor is it sustained by authority. Even the important case of *Mirabita v. Imperial Ottoman Bank*, 3 Ex. Div. 164, cannot fairly be said to go to the extent of holding the buyer entitled to recover possession upon tender of any amount less than the draft. The question whether the right to possession would pass to the vendee upon tender of less than the amount called for by the draft if the less amount tendered be the true amount of the purchase money, did not arise and was not decided. There the draft for the purchase money with the bill of lading attached had been sent to the defendant bank, with instructions to deliver the bill of lading upon payment of the draft. The plaintiff tendered the full amount of the draft, and demanded the bill of lading. The bank refused to deliver it, claiming it had incurred freight charges which must also be paid, whereas it had done nothing to make itself liable for freight. The case was, therefore, one in which it appeared the defendant bank, on its own responsibility, had refused to accept the full amount claimed by the vendor as expressed in the draft, upon payment of which the bill of lading was to be delivered to the vendee. Under these facts, the bank was held liable to the vendee. Lord Justice Cotton uses the following language: "So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not

absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner v. Trustees of Liverpool Docks*, 6 Ex. 543; 20 L. J. (Ex.) 393; *Shepherd v. Harrison*, Law Rep. 4 Q. B. 196; *Ogg v. Shuter*, 1 C. P. D. 47. But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs, there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and, in my opinion, under such circumstances, the property does on payment or tender of the price, pass to the purchaser." From the context and the facts of the case, as hereinbefore stated, it is, we think, manifest that the court is referring to payment or tender of the price as expressed in the draft accompanying the bill of lading, and not some price which the vendee contends to be the true one, different from that expressed in the draft, upon payment of which the bill of lading was to be delivered. The defendant's argument on this point leaves out of view the principle that as between plaintiff and defendant in the circumstances here appearing, the flour was shipped on condition the the draft—not the amount claimed by the plaintiff as the true price—should be paid by the plaintiff before it should have the flour. Until the draft is paid or there is tender of the amount it calls for, the contract is executory, and while in some exceptional cases an executory contract for the sale of chattels may be enforced by an action for specific performance, the rule is that a buyer's action of claim and delivery to recover possession can be founded only on an executed contract of sale. 2 Benjamin on Sales, § 1306.

Even if the draft and bill of lading had been sent to the plaintiff itself under such conditions as exist here, it could not have retained the bill of lading, which was the symbol of the goods, without payment, or at least acceptance, of the draft. 1 Benjamin on Sales, § 570; 1 Daniel on Neg. Instruments, §§ 1734, 1734a-1734c; Tiedemann on Commercial Paper, § 494; *Bank of Rochester v. Jones* (N. Y.) 55 Am. Dec. 290; *Cayuga County National Bank v. Daniels*, 47 N. Y. 631; *Marine Bank v. Wright*, 48 N. Y. 1. It requires no argument to show that it is of the utmost importance to commerce that a bill of lading should have full effect as an instrument by which a vendor or shipper may retain his right of possession—*jus disponendi*—using it as a symbol of the property to express his intention as to the conditions upon which the property should be delivered. The

courts of this country and of England have with practical unanimity given the bill of lading this force. But even if the defendant's view were correct, that the tender of the true price as stated by the plaintiff, without respect to the amount required by the draft accompanying the bill of lading, passed to the plaintiff the title and right to possession, the plaintiff would still have his election to sue for the property itself, or for damages for breach of the contract in refusing to deliver the goods. 24 A. & E. Ency. Law, 1149, 1150. On the facts as presented in the complaint and the affidavit, the defendant is *prima facie* the owner of the flour.

The judgment of this court is that the judgment of the circuit court be affirmed.

(72 S. C. 437)

GARNER et al. v. GARNER et al.

(Supreme Court of South Carolina. Oct. 10, 1905.)

EQUITY—DISMISSAL OF BILL—INSUFFICIENCY OF EVIDENCE.

A motion to dismiss a bill on the ground that there was no testimony tending to sustain the allegations thereof was, in effect, a motion for nonsuit, which cannot properly be made in an equitable action.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 827.]

Appeal from Common Pleas Circuit Court of Florence County; Dantzler, Judge.

Action by John S. Garner and others against Joseph F. Garner and others. From an order overruling an order of the master dismissing the complaint, certain defendants appeal. Affirmed.

W. F. Dargan and George Galletley, for appellants. Green & Hines and J. P. McNeill, for respondents.

GARY, A. J. This is an action to set aside certain transactions for fraud, to subject the lands described in the complaint to the payment of the claims therein mentioned, and for an accounting as to rents and profits. By order of the court a referee was appointed to take the testimony and report his conclusions of law and fact. At the close of the plaintiffs' testimony a motion was made to dismiss the complaint as to the defendants Arthur R. Garner and Maggie Garner, on grounds which are set out in the report of the referee.

The report of the referee was as follows: "This case was referred to me by order of the court, bearing date the _____ day of _____, to take testimony and report on all issues. Pursuant to this order, I have taken the testimony, which is herewith submitted. At the conclusion of the testimony on behalf of the plaintiffs, the attorneys for defendants moved to dismiss the case as to the defendants Arthur R. Garner and Maggie Garner, on the following grounds, to wit: First, upon the ground of an utter failure to prove and sustain the action against them, under

rule 30 of the circuit court, and because the proof adduced before the referee was insufficient to support the cause of action against the said defendants. Second, because it appears from the pleadings and proof of the plaintiffs that the land in question was sold for \$3,428, and that the plaintiffs have received the same, and have not returned or tendered the same to the defendants, or either of them. After hearing argument, the motion is granted, on the ground first stated, to wit, because I find that there is not sufficient testimony to make out a case against the defendants Arthur R. Garner and Maggie Garner."

Both the plaintiffs and the defendants Arthur R. Garner and Maggie Garner filed exceptions to the report. His honor, the presiding judge, made the following order: "This cause came on to be heard on exceptions to the report of the referee, to whom was referred all issues of law and fact. A motion by the defendants Arthur R. Garner and Maggie Garner was made, on the close of plaintiff's testimony, to dismiss the complaint as to them upon grounds fully set forth in their motion. The referee granted defendants' motion on the first ground set forth, dismissing the complaint as to Arthur R. Garner and Maggie Garner. It appearing from the testimony that there was some evidence going to prove that at the sale of the real estate, mentioned in the complaint as having been made at Darlington in 1884, there was an attempt to chill the bid at such sale, which resulted in sale of same at less than its real value, to the detriment and injury of the rights of the plaintiffs, then wards of the defendant Joseph F. Garner, and it appearing that said Arthur R. Garner and Maggie Garner were advantaged by the chilling of the said bid, the court is of the opinion that the referee erred in dismissing the complaint as to those defendants. It is so ordered. Ordered, further, that the cause be remanded to the referee to take further testimony therein, responsive to the allegations in the pleadings."

The said defendants appealed upon exceptions assigning error in reversing the referee upon the first ground of the motion to dismiss the complaint, and in refusing to reverse his ruling upon the second of said motion. The motion to dismiss the complaint on the ground that there was no testimony tending to sustain the allegations thereof was, in effect, a motion for a nonsuit, which cannot properly be made in an equitable action. *Woolfolk v. Mfg. Co.*, 22 S. C. 332; *McClenaghan v. McEachern*, 47 S. C. 446, 25 S. E. 296; *Barnes v. Rodgers*, 54 S. C. 115, 31 S. E. 885; *Gilreath v. Furman*, 57 S. C. 289, 35 S. E. 516; *Railway v. Beaudrot*, 63 S. C. 266, 41 S. E. 299. The general principle is thus stated in 6 Enc. of Pl. & Fr. 830: "Nonsuits are applicable only to cases arising before common-law tribunals, and cannot be resorted to in

actions of an equitable nature, unless by virtue of statutory authority." In cases brought to trial before a jury, the presiding judge rules upon the questions of law and the jury determines the issues of fact. The object of the nonsuit is to withdraw the case from the jury upon a question of law to be decided by the presiding judge. It is the dual nature of the trial that gives rise to the practice of making a motion for nonsuit. There is no necessity for resorting to this practice in chancery cases, as the questions of law and issues of fact are to be determined by the same person except in certain cases not necessary to mention. The case under consideration is a good illustration that it is far better for the referee to decide the issues after all the testimony has been submitted, instead of granting a nonsuit or dismissal at the close of the plaintiffs' testimony, for the reason that the court, when called upon to decide whether there was any testimony to sustain the allegations of the complaint, is compelled to canvass the evidence without the aid of the referee's findings of fact, as required by rule 30 of the circuit court.

Another reason why the practice of granting nonsuits should not be sanctioned in equity cases is that it may not have the effect of a final judgment as to the rights of the parties, and the same question may afterwards arise when the plaintiff is able to supply the testimony which was lacking, and thus prolong litigation. But, waiving this objection, we are satisfied that the order of the referee was properly set aside by his honor, the circuit judge. As the case will be remanded for further proceedings, the court deems it advisable to refrain from a discussion of the testimony in detail until the findings of fact have been made in the manner provided by rule 30, hereinbefore mentioned.

It is the judgment of this court that the order of the circuit court be affirmed.

JONES, J., concurs in the result.

WOODS, J. (concurring in the result). I express no opinion as to whether the evidence is strong enough to justify a final decree in favor of the plaintiffs, annulling the sale of the land as against the defendants Arthur R. Garner and Maggie Garner, who set up the defense of purchasers for valuable consideration without notice; nor as to whether the circuit judge was right in holding the mere fact of these defendants being advantaged by the chilling of the bidding at the sale when Joseph F. Garner, their grantor, bought, would be sufficient to set aside the sale as to them. But I think the relationship of the Garners and the evidence of lack of means of Arthur R. Garner and Maggie Garner to make the purchase were sufficient to make it safer to refuse a

motion to dismiss the complaint without hearing all the evidence that either side had to offer.

I do not assent, however, to the view taken in the opinion of Associate Justice GARY, that the circuit judge should never dismiss an equity cause upon hearing the evidence of the plaintiff, however conclusively it may show he is not entitled to recover. The authorities cited in the majority opinion fully establish that where an issue of fact is referred to a jury a nonsuit cannot be granted. The philosophical reason for this is that an order of nonsuit is not conclusive of the issue, and therefore there should be a verdict, which is conclusive, as contemplated by the statute. But on the trial of an issue from an equity cause submitted to a jury the practice of directing a verdict for defendant when it is plain the plaintiff has not established his case is sustained in *Brock v. Nelson*, 29 S. C. 49, 6 S. E. 899, and *Gilreath v. Furman*, 57 S. C. 289, 35 S. E. 516. It follows inevitably that where the circuit judge is trying the cause on evidence taken in open court, or by a master or referee under the order of the court, and it appears clearly from the plaintiff's own showing that in no view of the facts could there be a decree in his favor, the circuit judge may dismiss the complaint without consuming the time and labor necessary to take the evidence on the part of the defendant. To curtail the power of the circuit court in this regard would, in my opinion, be fruitful of delay and unnecessary labor. No doubt the case should be quite clear to warrant such action, because in such cases, as in cases where nonsuits are granted or verdicts directed, there is always the possibility of delay from the necessity of a new trial, if on appeal this court should regard the evidence worthy of rebuttal.

(72 S. C. 453)

GREGG v. BANK OF COLUMBIA.

(Supreme Court of South Carolina. Oct. 17, 1905.)

1. TROVER AND CONVERSION—DRAFT FOR COLLECTION — SALE BY BANK OF GOODS SHIPPED.

Where a draft with a bill of lading attached is sent to a bank, with instructions to notify the shipper if the draft is unpaid, it cannot sell the goods to a third party without notice to the owner; and, if it does, it is guilty of conversion.

2. PLEDGE—CONVERSION BY PLEDGEE—DEMAND—TENDER.

Where a pledgor had no notice of a conversion of the pledged chattel and an application of the proceeds by the person converting the same to his debt until after the conversion, he may bring an action for damages without tender of the amount due and demand for the return of the property.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 92.]

3. TROVER AND CONVERSION—DAMAGES.

In conversion of personal property, the jury may give the highest market value up to the time of the trial.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 263, 264.]

Appeal from Common Pleas Circuit Court of Richland County; Purdy, Judge.

Action by Joseph Gregg against the Bank of Columbia. Judgment for plaintiff. Defendant appeals. Affirmed.

D. W. Robinson, for appellant. Barron & Ray, for respondent.

WOODS, J. The Bank of Columbia, defendant in this action, appeals from a judgment recovered against it for damages for the conversion of three car loads of corn. The exceptions charge error in refusing to grant a nonsuit, in the admission of evidence, in the charge to the jury, and in refusing a new trial.

A brief statement of the evidence will so show the true relation of the parties and the rights and duties which grew out of that relation that the case will be relieved of much apparent complication. The business of the plaintiff, Joseph Gregg, in the city of Chicago, was to ship grain, usually on orders, but occasionally to brokers, for sale on his own account. The three carloads of corn with which we are now concerned had been bought on order, but the orders were canceled before shipment, and thereupon the plaintiff sent them to J. D. Miot, a grain broker, of Columbia, S. C., and made separate drafts on him with bills of lading attached for each car of corn, amounting in the aggregate to \$1,238.05. These drafts were in favor of Wanzer & Co., a large brokerage house of Chicago, who advanced to Gregg the amount of the drafts, and who in turn placed the drafts, with the bills of lading attached, to their own credit in American Trust & Savings Bank of Chicago. This bank sent the drafts and bills of lading to the Bank of Columbia, with instructions to collect and remit proceeds for its credit to National Bank of the Republic in New York. Across the left end of each of the drafts was the following instruction: "Do not surrender documents until draft is paid. If not paid promptly notify ———, Chicago, giving reasons and hold for instructions." The Bank of Columbia received the papers on June 7, 1901, and after several refusals by Miot to accept or pay the drafts, returned them to the Chicago bank. A second time they were sent for collection, and returned after a like unsuccessful effort to collect. Upon receiving them a third time, after again presenting them to Miot, the Bank of Columbia sold the corn to a third party on July 25, 1901, for the face of the drafts, storage charges, and freight, and remitted the amount of the drafts, less exchange, to National Bank of the Republic for credit of American Trust & Savings Bank. The plaintiff had no notice

of the sale until receipt of a letter from Miot, dated August 7, 1901, advising of his inability to deliver a carload of corn he had contracted to sell, because all the corn had been already sold by the Bank of Columbia. In the meantime corn had advanced in price. The plaintiff's claim was for \$720, alleged to be the difference between the price realized for the corn and the highest market price from the date of the alleged conversion to the time of the trial. The defendant endeavored to prove as a material fact that the intention of Gregg, the drawer, was not, as he alleged it was, to make Miot, the drawee, merely his broker to sell the corn, pay the drafts, and account for the sale, but that Miot should buy the corn and become himself absolute owner on payment of the drafts. Assuming that the evidence left this issue of fact in doubt, it was quite immaterial, in view of the undisputed documentary evidence, what the original position and rights of Miot were, because, if the jury had taken defendant's view, when Miot refused payment of the drafts, which was the condition of his acquiring ownership and possession of the corn, the ownership stood as if the drafts had never left the bank in Chicago. Although the drafts were returned to the Chicago bank and resent for collection several times, the original instruction to hold and notify in case of nonpayment was not only altered, but was each time resent with the papers. If Gregg sold the corn to Miot on condition that he should pay the amount of the drafts as the purchase price, as the defendant contends he did, then he was bound to take the price agreed upon from Miot, notwithstanding a rise in the price of corn, but the Bank of Columbia had no right to bind him to sell to another at the same price or at any price. While the bank of Columbia no doubt acted in good faith, the documents in its hands afforded no justification for the sale of the corn.

1. The Chicago owner of the corn had through the drafts and bills of lading invested the Bank of Columbia with legal authority to offer the corn to Miot—whether as purchaser or as agent of the plaintiff, is not material; but when he refused to take it, the authority of the bank was at an end, and it had no more right to sell the corn to another than if it had never had the drafts. Such a sale by the bank was therefore as much an unwarranted conversion of the property of the owner as a sale made by a stranger would have been. This was not a case where an emergency had arisen. There was no danger of the loss of the corn. It is plain that even the Chicago bank or Wanzer & Co. had no right to order a sale of the corn, if Gregg was the owner, without notice to him and demand on him for payment of his debt, and surely the defendant, a mere collecting agent, had no right to sell without notice to any of the parties concerned. Therefore, the circuit judge might well have

charged the jury that the papers held by the Bank of Columbia gave it no authority to sell, and the defendant certainly could not complain when it was left to the jury to say whether, under all the testimony, including the papers, the defendant bank had such authority, and, if they found it had no authority, then it would be guilty of conversion.

Another issue of fact was whether the plaintiff, in drawing the drafts on Wanzer & Co., with the bills of lading attached, and receiving the amount expressed on their face from Wanzer & Co., actually sold the corn or only pledged it as security for money loaned. This issue was plainly stated to the jury, with the manifestly correct instruction, if the plaintiff had unconditionally parted with the ownership and right of possession, he could not recover for the conversion.

2. But the most serious question is whether the plaintiff could maintain an action for conversion, even if it is conceded he had not parted entirely with the ownership of the corn, but merely pledged it for money borrowed from Wanzer & Co. by indorsing the bills of lading. The defendant made this question by a motion for nonsuit and by appropriate requests to charge. The ordinary relation of pledgor and pledgee imports general ownership of the pledge by the pledgor, and a special property or lien of the pledgee accompanying the possession. Since an interest in property is not sufficient to sustain an action for conversion, unless there is also the right to possession, and since that right is in the pledgee and not the pledgor, the latter cannot, as a general rule, maintain such an action until his right of possession has been regained by payment or tender of the debt secured by the pledge and demand for the return of the property. There was no proof in this case that plaintiff made a tender to Wanzer & Co., or the Chicago bank, or the defendant, or that he demanded a return of the property from any of them. There was evidence, however, to the effect that the defendant paid Wanzer & Co.'s debt to the Chicago bank, which credited the amount to Wanzer & Co. and thus paid the debt of the plaintiff to that firm. The payment was made by remitting the proceeds of the alleged unauthorized sale, and manifestly, if the plaintiff had with knowledge of the conversion acquiesced in this application of the proceeds for his benefit, he would be held to ratify the sale. But, as we have seen, there was evidence that the plaintiff did not know until after the 7th of August of the sale, which had been made on the 25th of July. When the defendant gave notice it had sold the corn, this was notice it was out of its power, or that of the Chicago bank, or Wanzer & Co., to surrender it to plaintiff. This notice imported that tender and demand would be futile, and that the only remedy of plaintiff would be to recover damages for the conversion, in estimating which the bene-

fits received by the plaintiff must be taken into the account. *Gage v. Allison*, 1 Brev. 495, 2 Am. Dec. 682; *Jones on Pledges*, § 748; 22 A. & E. Ency. Law, 879. The plaintiff having the remedy of a suit at law for conversion, an equitable action for accounting, which defendant insists was the proper action, could not have been maintained. *Lacombe v. Forrestall*, 123 U. S. 562, 8 Sup. Ct. 247, 31 L. Ed. 255. The equitable doctrine of accounting had no application, therefore, and was stated by the circuit judge to indicate that, if the jury reached the conclusion the Chicago bank or Wanzer & Co., as pledgees, in order to collect their money authorized the sale made by the Bank of Columbia, the remedy then would have been on the equity side of the court to obtain an accounting, and this action could not be maintained. This instruction was not unfavorable to defendant, and clearly was a correct statement of the law.

3. The defendant next submits, if it was liable at all, the jury should have been confined in estimating damages to the value of the property at the time of conversion, and it was error to charge: "In a case of conversion of personal property the jury may give the highest market value up to the time of the trial." It will be observed the instruction was not that the plaintiff in all cases of conversion is entitled to recover the highest market value up to the time of trial, but that the jury may adopt that as the measure of damages. This was a correct statement of the law as laid down in this state. *Carter v. Du Pre*, 18 S. C. 179. The just measure in some circumstances may be the value at time of conversion, as was considered by the court in *Reynolds v. Witte*, 13 S. C. 9, 36 Am. Rep. 678; in other circumstances the just measure might clearly be the highest market value; and the jury may adopt the one or the other, according to their view of the justice of the case. No doubt, if either measure were capriciously adopted, the circuit judge would have the power to relieve against the injustice by ordering a new trial. For instance, if the conversion were made a bona fide claim of right without grievous wrong or oppression, and it appeared reasonably certain the plaintiff would have sold about the time of the conversion, manifest injustice would be done to make an enormous sporadic rise in the market price, due to abnormal conditions occurring long after the conversion, the measure of damages. On the other hand, to give only the value at the time of conversion would, in some circumstances, be equivalent to requiring the owner of the property to sell his property at a time and for a price fixed by a wrongdoer. In this case, the jury took as a basis the approximate, if not the exact, value at the time of the conversion, and the defendant has no reason to complain.

The judgment of this court is that the judgment of the circuit court be affirmed.

(140 N. C. 154)

BROWN v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 5, 1905.)

TRIAL—ARGUMENT OF COUNSEL—RIGHT TO OPEN AND CLOSE.

The tender of witnesses by defendant's counsel to counsel for plaintiff, in order that their fees may be taxed as costs in the event plaintiff is cast in the suit, does not amount to the introduction of evidence by defendant, within the meaning of superior court rule 3, providing that, when no evidence is introduced by defendant, the right of reply and conclusion shall belong to his counsel, and does not take from defendant the right to open and close the argument.

Appeal from Superior Court, McDowell County; Justice, Judge.

Action by J. R. Brown against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

S. J. Ervin, for appellant. Justice & Pless, for appellee.

BROWN, J. The plaintiff offered evidence tending to prove that his mule was killed on the defendant's track at a crossing by coming in contact with a box car which partly obstructed the crossing, and which had been negligently left there for some time in such position by the defendant's agents. There was a motion for judgment of nonsuit, and, this being denied, the defendant excepted. The defendant offered no evidence.

After the argument was begun, the defendant asked to tender the witnesses summoned by it to the counsel for the plaintiff. This was done in order that they might be taxed in the event the plaintiff was cast, under the ruling in *Loftis v. Raxter*, 68 N. C. 340, and *Henderson v. Williams*, 120 N. C. 341, 27 S. E. 30. The plaintiff's counsel proceeded to examine one of these witnesses before the jury, and after examining this witness claimed the right to open and conclude the argument. The court ruled that the tender of the witnesses by the defendant's counsel amounted to introducing evidence, and that according to the practice of the court the plaintiff should open and conclude the argument, and the defendant excepted to this ruling. In the rules of practice adopted by the justices of this court for the government of the superior courts, it is provided: "In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel." Rule 3, 128 N. C. 655. In all other cases, the right to open and conclude the argument is left to the discretion of the judge, and his decision is not reviewable. Rule 6, *Id.* 656. We do not think the tendering of the witnesses for the evident purpose of having their fees taxed as costs amounted to the introduction of evidence within the letter or spirit of rule 3 above quoted. The introduction of evidence includes something more than the tendering of a witness. One of the ablest law writers, Thomas Starkie,

defines "evidence" as follows: "That which is legally submitted to a jury to enable them to decide upon the questions in dispute or issue as pointed out by the pleadings, and as distinguished from all comment and argument, is termed evidence." Starkie on Evidence, p. 8, § 3. Mr. Elliott says that Starkie's definition is among the clearest and best that has ever been framed. Elliott, § 6. The word "evidence" is used in rule 3 in the sense and with the significance given to it by the text and judicial writers. Witnesses are vehicles or means of proof. Evidence is the proof itself, offered to establish or disprove an alleged fact, the truth of which is in dispute. Unless the party tendering a witness examines such witness with the view thereby to elicit proof in support of his side of the controversy, he cannot be said to introduce evidence.

If we should adopt the construction placed upon the rule by the court below, then defendants will in all cases have to surrender the right to have their counsel open and conclude the argument, under the terms of the rule, or else forfeit the right to have their witness fees taxed as costs, although the plaintiff should be cast in the suit. We are quite sure such a construction or intention was not in the minds of our predecessors when the rule was formulated. We have examined the cases of *Cureton v. Garrison*, 111 N. C. 271, 16 S. E. 338, and *Sitton v. Lumber Co.*, 135 N. C. 542, 47 S. E. 609, and neither of them decides the point presented upon this appeal. They relate to the taxation of costs only. The object of tendering the witnesses is to give the adversary party an opportunity to test their materiality, and to prevent oppression by summoning a multitude of immaterial witnesses for the purpose of increasing costs. This disposition of the case renders it unnecessary to consider the remaining exceptions of the appellant.

New trial.

(140 N. C. 135)

OYSTER v. IOLA MIN. CO. et al.

(Supreme Court of North Carolina. Nov. 28, 1905.)

1. PARTIES—DEFENDANTS—JOINDER.

Where an individual with the consent of a corporation converted the corporation and its assets to his own use, and manipulated the corporation for his own benefit in a reckless manner, and secreted and disposed of its property to defeat the collection of a debt due plaintiff, and the corporation and individual were so intimately connected in the transactions that it would be almost impossible to investigate their acts unless both were brought into court, plaintiff could join both as parties defendant to an action to recover the property converted by them, and for a receiver and injunction to protect plaintiff's interest in such property, and secure the payment of his judgment.

Appeal from Superior Court, Montgomery County; Cooke, Judge.

Action by Charles C. Oyster against the Iola Mining Company and another. From a

judgment overruling a demurrer to the complaint, defendants appeal. Affirmed.

C. W. Tillett, Osborn, Maxwell & Keerana, and E. E. Raper, for appellants. H. C. Niles, Adams, Jerome & Armfield, and W. J. Adams, for appellee.

CLARK, C. J. This is an appeal from a judgment overruling a demurrer to the complaint. Briefly stated, the grounds of demurrer are: (1) Misjoinder of parties. (2) Misjoinder of causes of action. (3) Failure to state a cause of action against Iola Mining Co. (4) Failure to state a cause of action against M. L. Jones. These are the only defendants. Without fully analyzing the complaint, it charges that the defendant Jones, with the consent of the defendant mining company and its manager, has wrongfully converted the entire corporation and all its assets to his own use, and has manipulated and used the corporation and its property for his own benefit exclusively; that as manager, and with the consent of the corporation, he has taken exclusive possession of the entire property of the corporation; that his management has been reckless and improvident; that he has disposed of the products of the mine for the deliberate purpose of defrauding the stockholders of the mining company, including the plaintiff, and preventing an enforcement of their rights.

One general object of the complaint is to recover property belonging to the plaintiff, which it is alleged that the two defendants confederated to destroy or place beyond the reach of the plaintiff. The 32,000 shares of stock mentioned in the first cause of action are alleged to have been wrongfully disposed of by the two defendants, and the proceeds divided between them. The 75,000 shares named in the second cause of action, it is alleged, were fraudulently declared forfeited, and were sold by both defendants, and the proceeds applied in part to a debt of the corporation already paid. The fourth cause of action alleges that Jones concurred in this disposition of the property to defeat the second cause of action; while the third clause, claiming \$5,800 against the corporation is connected with the second by reason of the fact that \$3,000 of the \$5,800 went to the said corporation by reason of the fraudulent conversion of the stock mentioned in the second cause of action, and the allegation that Jones, with the consent of said company, has secreted and disposed of the property of the corporation to defeat the collection of the debt due the plaintiff. The complaint also asks for a receiver and injunction to protect the plaintiff's interest in the property, and to secure the payment of such judgment as he may recover. The two defendants are so intimately connected in these series of transactions that it would be almost impossible to investigate any of the grounds of complaint and unravel the tangled skein, unless both defendants are made parties, and

have opportunity to be heard, and the whole series of transactions is gone into.

Under the former system of procedure at common law, where everything was calculated for the production of a single issue, it was essential to exclude all parties and causes of action save one, if possible. The present procedure more nearly resembles the former equity practice. "Where a general right is claimed, arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter in one suit." *Young v. Young*, 81 N. C. 91. This has been recently followed in *Fisher v. Trust Co.*, 138 N. C. 224, 50 S. E. 659, in which *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122, and many other cases of similar purport are collected. Upon the allegations in the complaint, both defendants being called on to answer and having opportunity to defend, the whole matter can be inquired into, and the rights of all the parties properly adjusted better and more readily than if the action were chopped up into many distinct and several actions.

No error.

WALKER, J. (concurring in result). The complaint is so drawn that it is difficult to determine with certainty whether or not there has really been a misjoinder, and while this question is to be decided in the first instance, at least, by the complaint itself, it may sometimes turn out that there has, in fact, been a misjoinder, when it does not appear on the face of the pleading. In order to sustain the joinder of the causes of action in this case, it is necessary to give the allegations a very liberal construction under section 260 of the Code. If the object is to recover a debt due by the corporation for money borrowed from Mosser & Co., and to recover damages from Jones and the company for a wrongful conversion of the stock of Mosser & Co., and finally to charge them with mismanagement of the affairs of the company, and a tortious manipulation of its assets, for the purpose of defeating the recovery of the debt and of the damages for the conversion of the stock, the causes of action can be joined. *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122. The objection to the pleading is that the plaintiff does not clearly and distinctly allege a joint liability of the company with Jones, though it was doubtless the intention of the pleader so to do. The confederacy between the two to defeat the plaintiff's rights is not set forth with that certainty and definiteness which the Code requires; but this defect should perhaps have been taken advantage of by motion, and not by demurrer. Code, § 261.

Again it appears, by implication at least, that the members of the firm of Mosser & Co. consented to the alleged wrongful acts of Jones, because it is alleged that the company

consented, and they were stockholders, directors, and the principal officers of the company, and there is no allegation that they protested against what was contemplated to be done, and what was afterwards actually done by Jones. Whether Mosser & Co., plaintiff's assignors, gave their consent to the alleged wrongful acts in such a way as to deprive them of any right now to complain of them, is a question I prefer to decide when the facts are all before us, and not now upon the present meager statements of the complaint. There is ambiguity in the allegations of the complaint, but, under the circumstances, I do not feel justified in withholding my assent to the conclusion of the court, believing it better that the matter should be investigated when the facts will be shown with more clearness, and not seeing, at present, that any substantial right of the defendants is likely to be prejudiced thereby. The defendants, as has been said, could have had the allegations of the complaint made more definite and certain, in order "that the precise nature of the charge would be made apparent." Code, § 261. This was not done, for some good reason, I have no doubt, and, in the absence of a more definite statement, construing the complaint liberally, as required by section 260, I concur in the decision for the reasons already assigned, though my assent is not unreservedly given to all that is said in the opinion of the court. Care should be taken that we do not give too loose an interpretation to section 260 of the Code with respect to misjoinders, and too free a hand to pleaders in such cases. That section was enacted to prevent multifariousness and confusion in the trial of causes, which should always be avoided in pleading; and parties, who may otherwise be prejudiced, are entitled to its strict enforcement. "The bill," says Judge Story, "should not be multifarious, for if it is so it is demurrable, and may be dismissed by the court of its own accord, even if not objected to by the defendant. By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. In the latter case, the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants with which he has no connection. In the former case, the defendant would be compellable to unite, in his answer and defense, different matters wholly unconnected with each other, and thus the proofs applicable to each would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others

might be fully ripe for hearing. Indeed courts of equity, in cases of this sort, are anxious to preserve some analogy to the comparative simplicity of proceedings at the common law, and thus to prevent confusion in their own pleadings, as well as in their own decrees." Story, Eq. Pl. § 271.

CONNOR, J., concurs in the concurring opinion.

(129 N. C. 534)

MILLS v. BISCOE LUMBER CO.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. DISCOVERY — STATUTES — PRODUCTION OF WRITINGS—DEPOSIT IN COURT.

Code, § 578, provides that the clerk or judge may order either party to give the other an inspection and copy, or permission to take a copy, of any papers, books, or documents under his control containing evidence relating to the merits of the action or defense. *Held*, that the statute confers no authority to order a party to deposit papers, books, or documents in the clerk's office.

2. SAME—ORDER—CONCLUSIVENESS.

Where, on appeal to the judge from an order of the clerk for deposit of books for inspection, made under Code, § 578, it was reversed, it being a discretionary matter and the order an administrative one not affecting the merits, it was not *res judicata*, and the motion could be renewed and a new order obtained.

Appeal from Superior Court, Montgomery County; Peebles, Judge.

Action by W. A. Mills against the Biscoe Lumber Company. From an order reversing an order of the clerk requiring plaintiff to give an inspection of certain papers, defendant appeals. Affirmed.

Hinsdale & Hinsdale, for appellant. Adams, Jerome & Armfield, for appellee.

CLARK, C. J. Code, § 578, provides that the court—i. e., clerk (Code, § 182)—or judge "may in their discretion and upon due notice order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy of any books, papers and documents in his possession or under his control containing evidence relating to the merits of the action or the defense therein." This was a motion in the cause by the defendant before the clerk for an inspection of papers, etc., of that nature in possession of the plaintiff. The clerk made an order requiring the plaintiff to "produce and deposit in the office of the clerk" certain papers described in the order, and that, "in order that the defendant, its agents or attorneys, may in the presence of the clerk examine and take copies thereof, it is further ordered that said notes, letters, papers, documents, and books of account shall be deposited in said clerk's office on or before August 12, 1905, and shall remain in said office two weeks." The plaintiff excepted "to so much of the order as requires the defendant to deposit the papers with the clerk and al-

low them to remain two weeks." On appeal the judge briefly entered, "The above judgment is reversed."

The judgment of the clerk was erroneous in the particular excepted to. There is nothing in the statute which authorizes an order that the respondent be required to deposit the papers. In practice, this might prove oppressive and detrimental. The papers and books might be necessary in the conduct of the plaintiff's business, and there is no guaranty of their safety when so deposited. All that the statute authorizes is an order that the papers be produced with sufficient opportunity to the other side to inspect the same and take a copy. *Sheek v. Sain*, 127 N. C. 272, 37 S. E. 334. The judge probably did not intend to do more than reverse the part of the order objected to. But, if he did, it was a discretionary matter, and, the order being an administrative order in the cause and not affecting the merits, it is not res judicata, and the motion can be renewed and a new order obtained, in the discretion of the court or judge, of the tenor authorized by the statute. Indeed, the plaintiff is not resisting an order of that purport.

No error.

(139 N. C. 503)

CAMPBELL et al. v. EVERHART et al.
(Supreme Court of North Carolina. Nov. 15, 1905.)

1. DEEDS—PARTIES.

Code, § 1329, which provides that "any limitation by deed" to the heirs of a living person shall be construed to be to his children, abolishes the common-law rule that a deed to the heirs of a living person is void for uncertainty, and makes a deed to the heirs of a living person a valid deed to his children; the word "limitation" in the statute meaning the creation of an estate.

2. SAME—CHILD UNBORN AS GRANTEE.

A conveyance to the heirs of a living person is a conveyance to his children as tenants in common, including a child en ventre sa mere; Code, § 1328, providing that a child unborn, but in esse, shall be deemed a person capable of taking by deed.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 21.]

3. EJECTMENT—PROOF OF TITLE BY PLAINTIFF—NECESSITY.

Plaintiff, in ejectment, in order to recover, must show a title good against the world or good against defendant by estoppel.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 16-19.]

4. SAME—PRIMA FACIE PROOF OF TITLE.

Plaintiff, in ejectment, establishes a prima facie case on showing a grant from the state and mesne conveyances connecting him with the grant, or proving a title out of the state by grant duly issued, or by an adverse possession for 30 years, without regard to the number or connection of tenants, and 20 years' adverse possession in himself or those under whom he claims, or such a possession for 7 years under color, or showing 30 years' adverse possession by himself or some one person, and mesne conveyance connecting him with the title acquired by that person against the state, or showing adverse possession by himself or

those under whom he claims for 21 years under color, or showing an estoppel arising from defendant obtaining possession as tenant of plaintiff, or connecting defendant with a common source of title showing in himself a better title.

5. ESTOPPEL—POSSESSION OF LAND UNDER ANOTHER.

One taking possession of land under another is estopped from disputing the latter's title until the possession is restored to him, after which time the one affected by the estoppel may set up any right he may have to the property.

6. EJECTMENT—ISSUES—PROOF.

Where, in ejectment, plaintiff alleges that his grantor acquired title by reason of the possession of a third person, through whom defendant claimed, by the permission of the grantor, he must, in order to prevail, prove that the third person entered on the land or continued in the possession thereof as the grantor's tenant, thereby estopping the third person from denying the grantor's title; and defendant will defeat a recovery on showing that the third person surrendered his possession and then relied on his title or acquired title to the premises.

7. TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.

The evidence showing that the third person's possession was by the permission of the grantor consisted of testimony of his declarations to that effect. *Held*, that an instruction that the deed was sufficient to vest title in plaintiffs was in effect a peremptory instruction to find for plaintiffs, and an invasion of the province of the jury in violation of the express provisions of Code, § 418.

8. SAME—QUESTION OF LAW OR FACT.

The question of the legal sufficiency of the evidence is for the court, while the question of the weight of legally sufficient proof is for the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 332, 339.]

9. SAME—SUBMISSION OF ISSUE TO JURY.

Where reasonable minds, acting within the limitations prescribed by law, might reach different conclusions from an examination of the evidence on an issue, the evidence must be submitted to the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 332.]

10. EJECTMENT—DEFENSE—ADVERSE POSSESSION.

Where, in ejectment, plaintiff showed a prima facie title and right to possession, defendant was not confined to his own adverse possession, but could tack it to the possession of those under whom he claimed.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 214, 215.]

11. APPEAL—HARMLESS ERROR.

Where, in ejectment, plaintiffs must fall if the third person under whom defendant claimed had not been in possession under plaintiff's grantor, the error in an instruction that, unless defendant had adverse and exclusive possession for 20 years, he could not recover, was immaterial.

12. EVIDENCE—HEARSAY.

A recital in a deed conveying land to the heirs of a living person that the latter had paid the grantor a certain consideration is not competent, in ejectment by his children, as against defendant claiming under such person.

13. SAME—RECORDS—CENSUS LIST.

A census list found in the clerk's office is inadmissible to prove that a person was not in being at a specified date, in the absence of proof showing how the list was made or the source of the information it purported to contain.

14. WITNESSES—COMPETENCY.

The testimony of a witness interested in the event of an action of ejectment as to transactions with a decedent from whom defendant derived title is incompetent against him, without reference to the extent of the interest.

Appeal from Superior Court, Davidson County; Bryan, Judge.

Action by R. G. Campbell and others against Chas. Everhart and another. From a judgment for plaintiffs, defendants appeal. Reversed.

This is an action for the recovery of real property, a parcel of land in Lexington township. Plaintiffs, in support of their claim to title, put in evidence a deed dated November 22, 1870, from Susan Humphreys "to the lawful heirs of B. F. Hilliard and their heirs." Hilliard was the son of Susan Humphreys, and the plaintiffs are the grandchildren of said Hilliard, and claim under the deed for the reason that their mothers (who are now dead) were the children of Hilliard, and therefore answer to the description in the deed of the persons who were intended to take thereunder. There was no proof of title in Susan Humphreys, but there was testimony which plaintiff insists tended to show that Hilliard either entered upon the land originally, or continued in possession after the date of the deed to his heirs (November 22, 1870), by her permission, and is therefore estopped to deny her title. It is unnecessary to set out this testimony in order to an understanding of the point upon which the case is decided. There was testimony to the effect that Hilliard had occupied the land for 12 years prior to the date of the deed of Mrs. Humphreys in 1870, and that he continued in possession until his death in 1898 with brief interruptions, his children living there with him most of the time during their minority and after they became of age, and that he had conveyed a part of the land to his wife and other portions to Darr and Leonard.

The court charged the jury, among other things not necessary to be stated, as follows: "(1) The burden of the issue is upon the plaintiffs. They must recover upon the strength of their own title, and not the weakness of the defendants. They must show title in themselves, and that they were entitled to the possession at the commencement of the action. (2) The court instructs the jury that the deed introduced by the plaintiffs in this action is sufficient to vest in them the legal title to the land described in the complaint, and to authorize them to take possession of the same; nothing else appearing." Defendants excepted. And in response to prayers from the plaintiffs the jury were instructed as follows: "(1) There is no evidence of exclusive, continuous, and adverse possession under color of title on the part of the defendants for seven years, and, unless you find from the evidence that the defendants have

had adverse and exclusive possession for the period of 20 years under known and visible metes and bounds, you will answer the first issue 'Yes.'" Defendants excepted. "(2) The court charges you that there is no evidence that the defendants have had adverse and exclusive possession under known and visible metes and bounds for the period of 20 years, and you should answer the first issue 'Yes.'" Defendants excepted. "(3) The court charges you that the deed of 1870 from Susan Humphreys to the lawful heirs of B. F. Hilliard was the same in law as if it had been made to the children of B. F. Hilliard, and conveyed a valid title from Susan Humphreys to the children of B. F. Hilliard then living, and if you find, from the evidence, that Margaret Leonora Wood was born in April thereafter, she would in law be included as one of the children then living, and would be within the description of the grantees in the deed." Given. Defendants excepted.

The court refused the following prayers of the defendants: "(1) The court charges you that the deed from Susan Humphreys to the lawful heirs of B. F. Hilliard is invalid and null and void for want of grantees, and the jury should answer the first issue 'No.' (2) That there is no evidence to go to the jury that Susan Humphreys, at the time of the execution of the deed, owned said land or was in possession thereof, or had any right to convey the same, and the jury should answer the first issue 'No.' (3) That if the jury shall find, from the evidence, that prior to the execution of the deed from Susan Humphreys to the lawful heirs of B. F. Hilliard said B. F. Hilliard was in the open, notorious, adverse, and exclusive possession of the land in controversy, and continued to so hold the same up to his death, and that after his death his widow, V. A. Hilliard, held the same under him by deed from B. F. Hilliard introduced in evidence, and her grantees so continued to hold adverse possession thereof up to the commencement of this action, then the plaintiffs would not be entitled to recover, and the jury should answer the first issue 'No.' (4) That in passing upon the question of adverse possession the jury should consider the fact, if they find such to be the fact, that B. F. Hilliard, from a time prior to the year 1870 and up to his death, was in receipt of the rents and profits of said land, paid taxes thereon, lived on the same for a large part of the time, conveyed a large portion of the tract by deed to his wife, and other portions thereof by deed to Darr and Leonard, witnesses for defendants, and that Jane Campbell and Lenora Wood, plaintiffs' ancestors, never made any claim to said land, if the jury find they made no claim thereto, and if upon the whole evidence the jury shall find that defendants and those under whom they claim have held continuous, adverse, and exclusive possession thereof for the years succeeding the year 1870, then the

jury shall answer the first issue 'No.' (5) The fact that Jane Campbell and Lenora Wood, ancestors of the plaintiffs, lived with their father a part of the time on the land in controversy as members of the family, as children live with their parents, would not put them in possession of the land under their own right, nor interrupt their father's adverse possession. If the jury shall find his possession was adverse until they made some claim to own the same, and if the jury shall find from the evidence that the children so lived with their father as members of his household, and not under any claim or right of their own, and if the jury shall further find that defendants and those under whom they claim have been in the continuous, exclusive, adverse possession thereof from the year 1870 and prior thereto, then the plaintiffs are not entitled to recover, and the jury shall answer the first issue 'No.' (6) That Fred Hilliard, a son of B. F. Hilliard, born in lawful wedlock, though begotten after the execution of the deed from Susan Humphreys to the lawful heirs of B. F. Hilliard, would share in said land, and under the same there are four children to take the same, viz., Sallie Hilliard, Jane Campbell, Lenora Wood, and Fred Hilliard, or the heirs of such of them who are dead, and in no event can plaintiffs claim more than one-half of the land, and the jury should answer the issue accordingly."

There was a verdict and judgment for the plaintiffs, and defendants, having duly excepted to the rulings of the court, appealed.

McCrary & Ruark and E. E. Raper, for appellants. Watson, Buxton & Watson, Walser & Walser, and King & Kimball, for appellees.

WALKER, J. (after stating the case). The first question raised in this case calls for a construction of the deed from Mrs. Humphreys to her son, B. F. Hilliard, and also involves its validity. We have no doubt as to either proposition thus presented. At common law a conveyance could not be made directly to the heirs of a living person, simply because a living person could have no heirs in present. The rule of the law then was, "Nemo est hæres viventis." This maxim was originally and generally applied to both wills and deeds, and its proper translation was that "no one can be heir during the life of his ancestor." And though a party may be heir apparent or heir presumptive, yet he is not heir, living the ancestor, and therefore, when an estate was limited to one as a purchaser under the denomination of "heir," "heir of the body," "heir male," or the like, the party could not take as purchaser, unless by the death of the ancestor he has, at the time when the estate is to vest, become the very heir. But this rule was relaxed by the courts, and an exception engrafted on it,

and, if there was sufficient on the face of a will to show that by the word "heir" the testator meant heir apparent, it should be so construed, and in such case the popular sense was allowed to prevail against the technical. In other words, it appears to have been established by the authorities that prima facie the word "heir" should be taken in its strict legal sense, but, if there was a plain demonstration in the will that the testator used it in a different sense, the court would assign that meaning to it; what was sufficient to show that the testator did not intend that it should have its technical construction depending largely upon the language employed in connection with it and the circumstances under which the word was used. Broom's Legal Maxims (8th Ed.) p. 521 (marg. p. 523). It was likewise held in the case of a will that the rule had no place, if the testator knew of the existence of the parent and intended his devise to take effect during his life. Broom, p. 524. One reason for the relaxation of the rule in the case of wills was that the testator might have been *inops consilii*, and the instrument therefore was construed so as to effectuate his intention. But the maxim was also extended to deeds, and a limitation (the word is here used in the sense of conveyance) "to the heirs of a person" who is living was held to be void for uncertainty, as no one can in any proper sense be the heir of a living person, and it could not, therefore, be known who were to have the benefit of the conveyance; but it was likewise the rule in regard to a deed that, if anything appeared on its face to indicate that the grantor used the word "heirs" as *designatio personarum*, or if a preceding estate was created, so as to make the limitation to the heirs of the living person a contingent remainder, depending for its vesting upon the event of the death of the ancestor before the life estate terminated, the word "heirs" was construed to mean children. It has always been true, both in the case of deeds and of wills, that if the instrument shows who the grantee is, or if it designates and so describes him that there is no uncertainty respecting the party who is intended to take under the will or deed, it is not of vital consequence that the matter which establishes his identity is not in the common or best form, or expressed with technical nicety or accuracy, or in the usual or most appropriate position in the instrument. 1. Devlin on Deeds, §§ 184, 185; 2 Devlin on Deeds, § 864, and note 11, where cases from this and other states are collected; 8 Washburn on Real Property, 282. But at common law, where the limitation in the deed was simply to the heirs of a living person, and nothing else appeared to indicate the special intention of the grantor as to who should take, the deed was void, because no grantor was sufficiently designated. Our statute completely reverses this principle, and now, by virtue of its wise provision, such a

limitation is conclusively presumed to be intended for the children of the person named therein. The language of the statute is too plain for any possible doubt as to its true meaning. It is as follows: "Any limitation by deed, will or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless the contrary intention appear by the deed or will." Code, § 1329.

But the defendants' counsel contends that the use of the word "limitation" in the statute takes our case out of its operation, as the deed in this case is in effect a direct conveyance to the heirs of B. F. Hilliard, without the creation of any preceding estate to be "limited" or determined by the happening of a future event or the performance of any condition. The fallacy of this contention is to be found in the misapprehension of the true legal definition of the word "limitation." It has a twofold meaning, says Mr. Fearn. We quote his own language: "Great confusion has frequently arisen from not observing that the word 'limitation' is used in two different senses; the one of which may, for the sake of convenience of distinction, be termed the original sense, namely, that of a member of a sentence, expressing the limits or bounds to the quantity of an estate, and the other, the derivative sense, namely, that of an entire sentence, creating and actually or constructively marking out the quantity of an estate." 2 Fearn on Remainders (4th Am. Ed.) marg. p. 10, § 24. In our statute the word is manifestly used in its derivative or secondary sense, which is made very clear to us by the learned, able, and elaborate opinion of Chief Justice Shepherd in the leading case of *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598, remarkable for its lucidity of statement and the strength and cogency of reasoning from ancient and well-settled principles of the law, by which it distinguished between vested and contingent remainders, and further sustained the conclusion of the court that this statute did not abolish the rule in *Shelley's Case*, but was intended merely to give effect to the intention of the maker of the instrument, namely, that the persons for whose use and benefit it was made should take, either directly or indirectly, as purchasers, and to cure what was supposed to be the defect in, and to remove the injustice of, the rule of the common law. *Starnes v. Hill*, supra. Under this construction of our statute Margaret Hilliard (afterwards Margaret Wood), if en ventre sa mere at the time the deed was executed, took as tenant in common with the living child or children, who at the time answered to the description of "lawful heirs" of their father. She would not have taken anything at common law, as she was not actually in esse at the date of the deed, and no one was appointed to preserve the use to her. In *Dupree v. Dupree*, 45 N. C. 167, 59 Am. Dec. 590 et seq., Pearson, J., speaking of a conveyance immediately to an

unborn child says: "Property must at all times have an owner. One person cannot part with the ownership, unless there be another person to take it from him. There must be a 'grantor and a grantee and a thing granted.' We have no sort of doubt that Mrs. Goff intended all the children of Robert and Rachel (Peggy Ann excepted), without reference to the time of their birth, to be participants of her bounty; and the only regret is that she did not call upon a lawyer, who would have drawn a conveyance passing the property to a trustee, by which the uses could have been kept open until the death of Mrs. Dupree, so as to let in all of her children. But she chose to make a common-law conveyance directly to the children; and, of course, no other could take under her deed of gift except those in esse, or, as my Lord Coke expresses it, 'in rerum natura,' when the right of property passed out of her. To wit, at the date of the deed of gift. The owners were then called for, and it was then necessary for them to take the property. The plaintiff could not answer the call, and there is no rule of the law, by which we can give him another day." See, also, *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155. This rule of the common law has been changed by the statute to the extent that it affected a child en ventre sa mere. It is now provided by statute that "an infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing, any estate whatever, in the same manner as if he were born"; that is, in rerum natura. Code, § 1328; *Heath v. Heath*, supra. It comes to this, therefore, that the deed was sufficient in form and substance to pass whatever title Mrs. Humphreys had in the land to the children of B. F. Hilliard, her son.

But we are brought now to the consideration of the question, did she have any title to pass? A plaintiff, in order to recover in an action of ejectment, must show a title good against the world, or good against the defendant by estoppel. He makes out a title prima facie under the first branch of the requirement when he shows a grant from the state (the origin and source of all title to land) and mesne conveyances connecting him with the grant, or by proving title out of the state by grant duly issued or by an adverse possession for 30 years, without regard to the number or connection of the tenants, and 20 years' adverse possession in himself or those under whom he claims, or such a possession of 7 years under color, or by showing 30 years' adverse possession by himself or by some one person, and mesne conveyances connecting him with the title thus acquired by that person as against the state (the law presuming, not only title out of the state by virtue of the possession for 30 years, but also a grant to the person who has thus held the possession for 20 years of the time [*Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766]), or by showing adverse possession by himself

or those under whom he claims for 21 years under color, or by showing an estoppel arising out of the fact that the defendant obtained the possession of the land as tenant of the plaintiff or by his permission, or, lastly, by connecting the defendant with a common source of title, showing in himself an older and better title from that source; the law, by a rule of evidence established for convenience, not requiring in such a case proof of title beyond the common source. This rule is sometimes called an estoppel. Whether erroneously or not we need not decide. *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; *Newlin v. Osborne*, 47 N. C. 164; *Frey v. Ramsour*, 66 N. C. 466; *Caldwell v. Neely*, 81 N. C. 114; *Christenburg v. King*, 85 N. C. 229. The method of proving title to land is well stated by *Avery, J.*, in *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142. In what we have said no reference is made to the particular nature of the possession necessary to bar the entry of the state, or to the manner in which the connection between the successive tenants, when required, must be shown. This matter is fully discussed by *Justice Connor* in *Jennings v. White* (at this term) 51 S. E. 799. If we apply the above-stated principles to the facts of this case, we find that no evidence has been adduced to show any title in *Mrs. Humphreys* when she made her deed to the plaintiffs' ancestors, unless the testimony introduced tended to show that her son, *B. F. Hilliard*, either entered into possession or continued his possession by her permission, and thereby estopped himself, so long as he retained that possession, to deny her title. It is undoubtedly true that, where a party takes possession of land under another, he is not allowed to dispute the latter's title until he has given up the possession so acquired. The whole doctrine upon which the estoppel rests in such cases is most clearly and forcibly stated by *Dillard, J.*, in *Farmer v. Pickens*, 83 N. C. 549. "It is settled," says he, "that a person accepting a lease from another is estopped, during the continuance of the lease, and afterwards, until he surrenders the possession to his landlord, to dispute his title; it being a rule founded on a principle of honesty which does not allow possession to be retained in violation of that faith on which it was obtained or continued. *Hartzog v. Hubbard*, 19 N. C. 241; *Lunsford v. Alexander*, 20 N. C. 166; *Smart v. Smith*, 18 N. C. 258; *Burnett v. Roberts*, 15 N. C. 81. The rule between lessor and lessee extends equally to one who takes or holds possession under a contract of purchase, and he is not permitted to controvert the title of him under whom he entered or by whose consent he has continued a possession. *Love v. Edmonson*, 23 N. C. 152." And the rule applies with equal force to a person who continues a possession antecedently held by him with the consent of the party whose title is in question. "The rule best supported by authority, English and American," it is said,

in the same case, "is stated by *Bigelow*, in his work on Estoppel, at pages 397 and 398, to be that an anterior possession does not vary the application of the rule, on the ground that, although the party asserting the estoppel may not have lost the advantage of parting with the possession, yet by attornment to him, or the new relation of vendor and vendee, he may have been led into some omission or conduct prejudicial to his title, which otherwise would not have been. In this state the rule is held to be that a possession previous to a lease or contract of purchase does not let in the party to dispute the title which he had recognized." *Springs v. Schenck*, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552. The rule affects as well the assignee or undertenant of the person, who has thus acquired the possession of the land, as it does the assignor. *Lunsford v. Alexander*, 20 N. C. 166; *Pate v. Turner*, 94 N. C. 47; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 822. But the estoppel lasts no longer than does the possession so acquired and on which it is founded. When possession is wholly restored to the party who gave it, the estoppel no longer applies, and the party formerly affected by it can then stand upon his original right, to which he is fully remitted; for, reason being the soul of the law, when the reason of any particular law ceases, so does the law itself. Having given up that which he gained by reason of the favor or consent of another, and which might prejudice the latter if he retained and asserted title in himself, he is at perfect liberty to set up any right or title he may have to the property surrendered, for he is not then bound in good conscience or in fairness to do otherwise. The plaintiffs, therefore, may show, if they can, that *Hilliard* entered upon the land or continued in the possession of it as the tenant of *Mrs. Humphreys* or in subordination to her and the defendants may show, if they can, that he or those claiming under him have surrendered the possession, so that now they may rely on any title that *Hilliard* had or that they have acquired in the premises. It follows as a matter of course that there was error in the charge, in so far as the jury were told that the deed of *Mrs. Humphreys* to *Hilliard's* heirs at law (now construed to mean his children) was sufficient of itself to vest the title to the land in them. This was equivalent to a peremptory instruction, binding upon the jury, to find for the plaintiff, whereas the deed of itself could not pass a title the grantor did not have; and, if the testimony was legally sufficient to show such a possession in *Hilliard* under *Mrs. Humphreys* as raised an estoppel against him, it consisted in the alleged declarations of *Hilliard* to *Tussey* and others, and the credibility of these witnesses was surely a matter for the jury to pass upon. The court, in deciding this question for them, invaded their province contrary to the provision of Code, § 413, which provides that in charging the petit jury in a case the court

shall not give an opinion whether a fact is fully or sufficiently proven, such matter falling within the true province of the jury, but shall only state the evidence, and declare and explain the law arising thereon.

We have not passed upon the sufficiency of the testimony to show an estoppel, as the question may not be presented to us again, and, if it is, the evidence may not be just as we find it in this record. It may be stronger or weaker than it now is. We may say generally that evidence should raise more than a mere conjecture as to the existence of the fact to be proved. The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies within the province of the court; the last, within that of the jury. Applying the maxim "*De minimis non curat lex*," when we say that there is no evidence to go to the jury, we do not mean that there is literally and absolutely none, for as to this there could be no room for any controversy; but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established, though there is no practical or logical difference between no evidence and evidence without legal weight or probative force. The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury. *Lewis v. Steamship Co.*, 132 N. C. 904, 44 S. E. 686; *Byrd v. Express Co.* (at this term) 51 S. E. 851. To which may be added *Wheeler v. Schroeder*, 4 R. I. 383; *Offutt v. Col. Exposition*, 175 Ill. 472, 51 N. E. 651; *Day v. Railroad*, 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335; *Cattlett v. Railway*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; *Railroad v. Stebbing*, 62 Md. 504.

Whether any proof has been adduced in this case as to the estoppel, which conforms to the legal standard, we leave as an open question, to be decided when it becomes necessary to do so. Nor need we decide whether the fact that B. F. Hilliard's children lived on the land with him as members of his family prevented his possession from being adverse to them and those claiming under them after the deed was executed by Mrs. Humphreys. It is a general rule that as between those occupying parental and filial, or quasi-parental and filial, relations, the possession

of one is presumed to be permissive, and not adverse to the other. 1 Am. & Eng. Enc. (2d Ed.) 821. The character of the possession will depend somewhat upon the state of the proof, as no hard and fast rule applicable to all cases can well be laid down. As illustrative of the general principle, we refer to the following cases: *Burrus v. Meadors*, 90 Ala. 140, 7 South. 469; *White v. White*, 52 Ark. 188, 12 S. W. 201; *Douglas v. Irvine*, 126 Pa. 643, 17 Atl. 802. If Hilliard held his possession under Mrs. Humphreys from November 20, 1870, the date of her deed, to the time of his death in 1898, he having never given up the land, such possession could not have been adverse to his children, who claimed under her deed, and it can make no difference in this connection, nor, indeed, when considering the question of estoppel, whether she really had any title or not. If that time is excluded from the count altogether, his previous possession was not continued long enough to presume a title in him; he having no color. If he was not holding under his mother, then as no title is shown in her, and consequently none in his children by virtue of her deed, it becomes immaterial whether his possession was adverse to his children or not, for plaintiffs, in that event, having shown no title in themselves at all, must necessarily fail in the suit, however weak the title of Hilliard or the defendants may be; the burden of the issue being on them, and not on the alienees of Hilliard, the defendants. It follows, therefore, that (1) the first instruction of the court in its general charge was correct, and the second was erroneous. (2) The first instruction in response to plaintiffs' prayers was not correct in the abstract, as if plaintiffs showed *prima facie* a title and right to recover, and defendants were put to their proof, the latter were not confined to their own adverse possession, but could tack to it the possession of those under whom they claimed. But the error in this instruction was immaterial, for the reason we have already given—that plaintiffs must fail, if Hilliard was not in possession under Mrs. Humphreys, unless hereafter they can show title in her derived in some other way. (3) The second instruction in response to plaintiffs' prayers is likewise immaterial, for the reason just given in considering the next preceding instruction. If plaintiffs show a title in Mrs. Humphreys otherwise than by estoppel, we do not think the possession of Hilliard could be considered adverse to his children, if they lived with him on the land, during the time of such joint occupancy. (4) The instruction in response to plaintiffs' third prayer was correct, except as to the legal effect of the deed in passing title, which was at least misleading. The refusal of the first instruction in response to defendants' prayers was correct. Defendants' second prayer was correct in part. Whether there is any evidence of Mrs. Humphreys

possession will depend, of course, upon the nature of Hilliard's possession, as the jury may find it to have been. If he held under her, his possession was in law her possession. The sixth prayer was properly refused. The other prayers of both parties are sufficiently covered by what we have already said in this opinion.

There remains to be considered the questions as to the competency of evidence: (1) The recital in the deed of Mrs. Humphreys that Hilliard paid her the consideration, \$1,000, is not competent against defendants, nothing else appearing. It is merely her unsworn declaration. If he actually paid her the money, it would at least be some evidence as to the character of his possession; that is, as to whether he claimed in his own right or under her. (2) The census list, found in the clerk's office, offered by defendants to show that Lenora Wood was not in esse at the date of the deed from Mrs. Humphreys, was incompetent. Census reports are competent to prove facts of a public nature. As evidence they are confined to such facts, and the details as to individual persons and other private matters, as the age of a particular person or the product of a factory, are noted only as a necessary basis for the general summaries or the ultimate statement of facts affecting the public. 3 Wigmore on Ev. § 1671. The case of *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257, is directly in point. There, as here, a census list (not a census report) was found in the clerk's office, and offered to show nonage of one of the parties, whose vote had been challenged. It was held incompetent on two grounds, (a) as not being a census report, and (b) as not evidence of any matter of a private nature. The method of proving age by documentary evidence is stated in *Elliott on Ev.* §§ 410, 413, 1286. It appears that such evidence as that offered in this case was admitted in *Flora v. Anderson* (C. C.) 75 Fed. 231, upon the authority of *Greenleaf*, Ev. 483, and *Stephens Dig. of Ev.* art. 34; but on referring to these books we find that the authors state that public registers and reports are evidence only of facts of a public nature, and agree in this respect with Wigmore. The mistake in that case, we think, was in supposing that the fact proposed to be established was within that category. There was no proof as to how this list was made, or from what source the information it purported to contain was derived, and it would hardly accord with the general rule in regard to evidence, if it was permitted to be considered as against entries in the family Bible which were introduced. (3) Testimony of a witness interested in the event of the action as to transactions or communications between him and a deceased person from whom defendants derive title are not, of course, competent against them. The extent of the interest is not material.

It is unnecessary to specially consider the other numerous exceptions, as they may not again be presented. We order a new trial for the error committed in the charge to the jury, as above indicated.

New trial.

(139 N. C. 520)

EUBANKS v. ALSPAUGH et al.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. MASTER AND SERVANT—DISCHARGE—JUSTIFICATION—BURDEN OF PROOF.

In an action for breach of a contract of employment, the contract and the servant's discharge by defendants having been established, the burden was on the latter to prove a justification.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 47.]

2. APPEAL—HARMLESS ERROR.

Where, in an action for breach of a contract employing plaintiff as superintendent of defendant's mill, there was evidence that defendants only inquired as to plaintiff's capacity as a weaver, and that it was not necessary that a superintendent should be an expert in all departments of a mill, but there was no evidence of any notice to defendants as to plaintiff's qualifications as a carder and spinner, error in an instruction that the fact that plaintiff was not an expert carder and spinner would not justify his discharge, if defendants had notice thereof before employing him, was not material.

3. MASTER AND SERVANT—WRONGFUL DISCHARGE—INCOMPETENCY—INSTRUCTIONS.

In an action for wrongful discharge of a servant, an instruction that if it was necessary for a person employed in plaintiff's capacity to understand carding, spinning, and weaving, and plaintiff did not sufficiently understand such vocations to enable him to direct those in charge of such departments, and he did not intelligently direct them on account of his lack of skill and knowledge, defendants had a right to discharge him from their employment, sufficiently covered the defense that plaintiff was properly discharged for incapacity.

Appeal from Superior Court, Iredell County; Bryan, Judge.

Action by S. D. Eubanks against U. L. Alspaugh and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The plaintiff alleged that the defendants, having employed him as superintendent of their mill for a term of six months, wrongfully discharged the plaintiff, to his damage, etc. The defendants denied that plaintiff was wrongfully discharged, and alleged, by way of further defense, that the plaintiff was entirely incompetent to perform the duties he had undertaken, and claimed the right to discharge him on that account, and they further set up this breach of contract on the part of the plaintiff as a counterclaim to his demand. Issues were submitted responsive to the pleadings. Verdict and judgment in favor of plaintiff. Defendants excepted and appealed.

Armfield & Turner and R. Z. Linney, for appellants. Furches, Coble & Nicholson and Zeb V. Long, for appellee.

PER CURIAM. The judge below charged the jury very fully on the issues, and properly put on the plaintiff the burden of proving the contract of employment, the discharge by the defendants, and the existence and amount of substantial damage. The only exception made by the defendants, or urged upon our attention, was in giving the prayer for instructions by the plaintiff No. 7, which is as follows: "The burden is upon the defendants to show that the plaintiff was not capable and efficient in the performance of his duties under the contract, and if the jury should find by a greater weight of the evidence that the plaintiff was not an expert in the departments of carding and spinning, yet if the jury further find by a greater weight of the evidence that the defendants had notice of this fact, at or before the time they employed the plaintiff, that the plaintiff was not an expert carder and spinner, if such was the fact, would not excuse the defendants for discharging the plaintiff, and if the jury find that the plaintiff was discharged, and for this cause, this would be a breach of the contract on the part of the defendants, and you will answer the third issue 'Yes.'" This was given. The defendants excepted to the above instruction, first, because the burden was wrongfully put on the defendants; second, because there was no evidence that the defendants knew of the plaintiff's incompetency before the contract of employment.

There is no merit in the first exception. The contract of employment and the discharge by the defendants being established, the law places the burden of justification on the defendants, and the charge of the court on this point is correct. *Deitrich v. Railroad*, 127 N. C. 25, 37 S. E. 64; *McKelthan v. Tel. Co.*, 136 N. C. 213, 48 S. E. 646. While the second exception is not entirely responsive to the language of the charge, it sufficiently appears that the defendants intended to address the same to that part of prayer No. 7 on the question whether the defendants knew the plaintiff was not an expert carder and spinner before the contract of employment. The court here told the jury that even if the plaintiff was not an expert carder and spinner, yet if the jury further found that the defendants had notice of this before employing the plaintiff, such fact would not justify his discharge. The defendants contend that there is no evidence that they had any notice in the matter, and there is none set out in the record, as far as the court

can discover. There is testimony to the effect that the defendants only inquired of the plaintiff's capacity as a weaver, but no evidence of any notice as to his qualifications as a carder and spinner.

We are of opinion, however, that this does not constitute reversible error, for the reason that the mistake is not on any essential or controlling feature of the defense. There was no contract that the plaintiff should be an expert in carding and spinning, and there was no allegation or evidence of such requirement. There were allegation and evidence that the plaintiff was employed by the defendants to superintend this and the other departments of the mill. There was also evidence of the plaintiff to the effect that it was not necessary that a superintendent should be an expert in all departments of a mill, and a witness for the defense testified that, while it was better for a superintendent to be an expert in all the departments, there were many mills run successfully where the superintendent was not such. The mistake of the court, therefore, to which the exception is addressed is not on an essential or material matter, and does not, we think, justify or call for a new trial. Speaking directly to this question in another part of the charge, in response to a prayer for instruction by defendant, the court told the jury: "If the jury shall find from the greater weight of the evidence that it was necessary for a superintendent of the defendant's mill, to successfully operate the same, to understand carding, spinning, and weaving in order to intelligently direct those under him in those departments, and should further find from the evidence that the plaintiff did not sufficiently understand carding and spinning to enable him to direct those in charge of those departments, and that he did not intelligently direct and instruct those placed in charge of the carding and spinning on account of a lack of skill and knowledge on his part, then I charge you that this was a violation of the contract on the part of the plaintiff, and the defendants had the right to discharge him from their employment, and the plaintiff is entitled to recover nothing in this action." This, we think, gave the defendants the full benefit of this feature of the defense; and, taking the charge as a whole, we are of opinion that the cause has been fairly and correctly submitted to the jury.

Judgment affirmed.

(104 Va. 551)

MOON'S ADM'X v. HIGHLAND DEVELOPMENT CO.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. TRUSTS—TRUST DEEDS—CONSTRUCTION—DEED BY BENEFICIARY.

Certain property was conveyed by a husband to trustees for a valuable consideration for the benefit of his wife; the deed providing that, in the event of the husband's death before the wife, the trustees should convey the property to her for life, remainder in fee to such persons as she might appoint, and in default thereof to her heirs, and that, in case she died before the husband, then the trustees should convey the property to such persons as the wife appointed by will, and in default of such appointment to her children. The husband survived the wife, who died, leaving a last will and testament, by which she devised the estate to her son and daughter. *Held*, that such devisees took a fee-simple estate.

2. LIMITATION OF ACTIONS—ACKNOWLEDGMENT OF DEBT.

In a partition suit one of the parties consented to a decree recognizing that his share in one of the tracts was bound by the lien of a mortgage. The decree was entered two days before May 1, 1903, at which date, by terms of Code 1887, § 2935 [Va. Code 1904, p. 1555], the limitation of the right to enforce such mortgage expired. Thereafter trustees under such mortgage revived such partition suit by a cross-bill sought to foreclose the mortgage. *Held*, that by such consent decree the bar of limitations as against the enforcement of the mortgage was removed.

3. PARTITION—CREDITORS' BILL—PARTIES.

Where, in a partition suit as originally instituted, partition was not the sole relief demanded, and subsequent decrees and proceedings had made the case in effect a creditor's bill for the satisfaction of liens due by the coparceners and binding on the estate to be partitioned, it was error to dismiss a party claiming title adverse to any party to the cause, on the ground that such issue could not be determined in the partition suit.

Appeal from Circuit Court, Bath County.

Action by R. J. Glendy's administrator and trustees against R. J. Glendy's heirs and others for partition, etc. A statement of liens was filed, to which Julia A. Moon, as administratrix of J. S. Moon, deceased, filed certain exceptions. From an order overruling the same, and dismissing the Highland Development Company as a party to the suit, Julia A. Moon, as administratrix, etc., appeals. Reversed in part.

Patrick & Gordon, for appellant. Daniel Harmon and W. M. McAllister, for appellee.

KEITH, P. A controversy between certain parties to this suit was disposed of at a former term of this court, and is reported under the style of *McAllister v. Harman*, 101 Va. 17, 42 S. E. 920.

The cause having been remanded to the circuit court, a decree was entered on the 29th of April, 1903, reviving it against the executors of Warner Wood, one of the defendants, and referring it to a commissioner to state an account showing the balance due upon the bond and lien proved in favor of Warner Wood; an account of the collections

and disbursements made by McAllister, as general receiver of the court, by reason of the decree authorizing him as such receiver to collect from Lewis Harman and Carter Berkeley the purchase money for the lands involved, showing the balance in his hands as such receiver and how the fund so collected by him had been applied (see *McAllister v. Harman*, supra); an account of all collections and disbursements made by McAllister, general receiver of the court, of funds involved in the cause, and the amounts still due and uncollected on the rent account; an account showing the balance in the hands of McAllister, as trustee of Robert J. Glendy and as administrator of R. J. Glendy, deceased; an account of all the claims proved in the cause and to what extent and how any of said claims are payable and binding upon all the lands involved in the cause, and which of said claims are payable exclusively by R. J. Glendy's estate or are binding upon that part of the real estate assigned to the estate of R. J. Glendy; and to what extent, if any, Lewis Harman and Carter Berkeley or their assignees may be entitled to reimbursement or subrogation by reason of payments made by them or either of them to William M. McAllister, general receiver.

Upon the coming in of this report it appeared that the first lien was for taxes; that in the second class were attachments issued by Barley and Thomas; in the third class, a sum due McAllister as receiver; fourth, the debt due Warner Wood; fifth, that of D. B. Taylor & Co.; and, sixth, that of Julia A. Moon, administratrix of J. Summerfield Moon, with interest from December 1, 1904.

To this statement of liens' exceptions were filed by Warner Wood's executors and Julia A. Moon, administratrix, in which they unite in an attack upon the first three classes, and Julia A. Moon in addition attacking the debt of Warner Wood as not constituting a lien upon the land which had been assigned to C. D. Glendy.

The court overruled these exceptions and directed a sale of the moiety of land which had been assigned to R. J. Glendy; and with reference to that portion allotted to C. D. Glendy, and which appears to have been purchased by Jacob Yost, the decree provides that the said Yost may have 60 days from the adjournment of the court to notify the commissioners appointed to sell whether or not he proposes that his purchase shall be adopted as a judicial sale by the court, in which event the purchase money is to be paid to the commissioners, and if he fails to comply with the terms of his purchase, and C. D. Glendy, or some one for him, shall fail to pay the debt chargeable on that share of land within 60 days, then the commissioners were directed to sell that moiety of land also. From this decree an appeal was obtained to this court.

The land in controversy belonged originally to Robert J. Glendy, who on the 20th of No-

vember, 1876, conveyed it to Hugh W. Sheffy, trustee, reciting in the deed that, the grantor desiring to provide the means of paying his debts by the conveyance to trustees for that purpose of various tracts of land, in all of which Mary J. Glendy had a right of dower, and it being desirable that said Mary J. Glendy should unite in the deed of trust, so as to secure a perfect title to the purchasers, and she having agreed to unite in said deed upon condition that Robert J. Glendy should convey to a trustee the property therein described and upon the trusts therein declared, therefore the said Robert J. Glendy granted to Hugh W. Sheffy and his heirs certain land, which he describes, known as "The Wilderness"; "but it is expressly understood that a lien is retained upon said Wilderness estate for the sum of \$3,000, payable in three equal annual payments, with interest from this date, and in favor of Hugh W. Sheffy and James Bumgardner, Jr., trustees for said Robert J. Glendy, under the trust deed aforesaid of even date with this deed." This conveyance of November 20, 1876, was declared to be upon the following trusts: "That said Hugh W. Sheffy shall hold the property for the sole and separate use of said Mary Jane Glendy, free from the debts of and contracts of her husband, and in the event of the death of said Robert J. Glendy before the said Mary J. Glendy that said trustee will convey said real estate to the said Mary J. Glendy, to hold it during her natural life, with remainder in fee to such persons as she may by deed or will appoint, and in default thereof to her right heirs; and in case the said Mary Jane Glendy shall die before her said husband, then the said trustee will convey said real property to such persons as the said Mary Jane Glendy may in writing, attested by three witnesses, or by her last will and testament, designate and appoint, and in default of such appointment to her children and the descendants of such as may be dead per stirpes."

On the 8th of February, 1882, Robert J. Glendy and Mary J. Glendy, his wife, parties of the first part, H. W. Sheffy and James Bumgardner, Jr., trustees, created by the deed of Robert J. Glendy dated November 20, 1876, parties of the second part, and C. D. Fishburne and James Bumgardner, trustees, of the third part, and Warren Wood of Albemarle county, Va., of the fourth part, recites that, whereas, Robert J. Glendy and Mary J. Glendy, his wife, two of the parties of the first part, are indebted to the said Warren Wood in the sum of \$4,000, evidenced by their bond of even date, payable on demand, with interest from date, which they desire more fully to secure to said Wood; and whereas, there was in the deed first above referred to a lien reserved on the land thereby conveyed (which is the same land conveyed in the deed of February 8, 1882), to secure the payment of a debt of \$3,000, with interest from 20th November,

1876, to Messrs. H. W. Sheffy and James Bumgardner, Jr., the trustees named in R. J. Glendy's general deed of trust (to wit, the second deed hereinabove described), which last-named debt has been paid in full out of said sum of \$4,000, as evidenced by the signatures hereto of said parties of the second part, who hereby release the land hereinafter conveyed from the lien reserved as aforesaid: Now, therefore, in consideration of the premises, Robert J. Glendy and his wife, Hugh W. Sheffy, as trustee of Mary J. Glendy, and with her consent, convey to C. D. Fishburne and James Bumgardner, Jr., the "Wilderness," the "Fowler," and two "Nelson" tracts, which are described in the deed, except 785 acres sold to various parties named in the deed, the whole quantity conveyed being 3,906 acres, in trust to secure to Warren Wood and his heirs the payment of the debt of \$4,000, with interest thereon till paid.

Mary J. Glendy died before her husband, leaving a last will and testament, by which she devised the whole of her estate, both real and personal, to her husband during his natural life, the personal property at his death to be disposed of as he might see fit and proper, and "the real estate to be divided equally between my son Charles D. and daughter, Edmonia Glendy, to be enjoyed by them, forever." This will bears date the 3d day of March, 1884, and was signed and sealed by the testatrix in the presence of three attesting witnesses, and was admitted to probate at the January term, 1885, of the county court of Bath county.

Edmonia Glendy married a Mr. Fowler and died, leaving a daughter, who died under 21 years of age, from whom Robert J. Glendy inherited one-half of the estate. By deed of the 17th of May, 1889, Robert J. Glendy conveyed the "Wilderness" estate to McAllister, trustee, to secure certain creditors therein named.

At April rules, 1890, William M. McAllister, as administrator and trustee of Robert J. Glendy, deceased, certain persons secured by the deed of May 17, 1889, and others, heirs at law of Robert J. Glendy, filed their bill, in which they set forth a debt to the Valley Bank of Staunton due by Robert J. Glendy and upon which some of the plaintiffs were indorsers, deduce the title of Robert J. Glendy to the "Wilderness" tract through the various deeds which we have recited, set forth the debt due by bond to Warner Wood and the payments upon it, and charge "that the residue of said bond and interest is still due and unpaid and constitutes a lien upon said Wilderness estate, one-half of which should be paid by the said C. D. Glendy and the remaining half whereof should be paid by the estate of the said Robert J. Glendy, deceased." They further charge that partition should be made of the said Wilderness estate between the said

Charles D. Glendy and the estate of the said Robert J. Glendy, deceased, and that one-half of the trust debt due to Warner Wood should be provided for out of a sale of the half of said Wilderness estate which shall be allotted and assigned to the said Robert J. Glendy, and the other half made a charge upon the half assigned to C. D. Glendy. Charles D. Glendy, Warner Wood, and C. D. Fishburne and James Bumgardner, Jr., trustees in the deed to secure the debt of Warner Wood, are made parties and required to answer.

In August Warner Wood and his trustees answered, and state that by deed dated February 8, 1882, Robert J. Glendy and his wife, Mary J. Glendy, conveyed the land therein mentioned and described to the defendants, James Bumgardner, Jr., and C. D. Fishburne, trustees, to secure the payment of their bond to Warner Wood for \$4,000, as described in said deed of trust; that the deed of trust was executed also by Hugh W. Sheffy, as trustee of said Mary J. Glendy, under deed of said Robert J. Glendy and wife, dated 20th November, 1876, and by said Sheffy and James Bumgardner, Jr., trustees in a general deed of trust by said Robert J. Glendy dated November 20, 1876, thus giving to said defendants as trustees the first lien on said land to secure said debt to Warner Wood; that the interest on said debt had been paid up to the 8th day of August, 1888, so that all the principal and interest on the same at 6 per cent. per annum is now due from the 8th of August, 1888.

Accounts were taken under this decree, and subsequently a contract of sale was made to Harman and Berkeley, and the suit growing out of that contract was before this court in the case of McAllister, Trustee, v. Harman, supra.

By a decree entered on the 29th of April, 1903, which has already been referred to, after numerous accounts had been ordered, it is provided as follows: "And by consent of parties the right and privilege is given to C. D. Glendy to take possession and control that part of the real estate involved in this cause which was assigned to him, subject, however, to all liens existing thereon, and especially subject to the deed of trust lien in favor of Warner Wood covering all the real estate involved in this cause; it being distinctly understood that such privilege and right to take possession and control said real estate shall not impair or affect any existing lien on said real estate, or the right of any holder or owner of any lien thereon to enforce the same."

At August rules, 1903, Micajah Woods and J. W. Fishburne, executors of Warner Wood, deceased, against whom this suit had been revived by consent, filed a cross-bill, in which they set out the proceedings theretofore had so far as they were pertinent to the interests of their testator. They call attention to the fact that the "Wilderness" tract of land

had been originally conveyed to Hugh W. Sheffy, trustee, subject to a lien of \$3,000 in favor of Hugh W. Sheffy and James Bumgardner, Jr.; that Hugh W. Sheffy and James Bumgardner, Jr., trustees, holding the lien of \$3,000 on the "Wilderness" tract of land, united in the deed under which Mary J. Glendy held, and those claiming under her hold, for the purpose of showing that the aforesaid lien had been paid in full out of the sum of \$4,000 which Warner Wood loaned to Robert J. Glendy and Mary J. Glendy and which the said deed was executed to secure. The cross-bill charges that the whole of the \$4,000 loan was used for the payment of the aforesaid lien and interest, and that by reason of the premises Warner Wood became and has continued to be subrogated to all the rights and remedies of the said Hugh W. Sheffy and James Bumgardner, Jr., trustees, under said lien, in addition to the rights which he acquired under the deed of trust aforesaid.

The contract of September, 1890, by which C. D. Glendy and William M. McAllister, trustee, gave an option to Lewis Harman and Carter Berkeley to purchase the "Wilderness" tract, is set out, and a part of the decree of the 18th of February, 1891, is recited, as follows: "And, the said Charles D. Glendy consenting thereto, the said Lewis Harman and Carter Berkeley shall also pay to the said general receiver that portion of the land payment contracted to be paid by them to the said Charles D. Glendy; it being manifest to the court that the greater part thereof will be necessary to pay off and discharge Charles D. Glendy's one-half of the trust lien, reported in this cause in the name and favor of Warner Wood."

It is assigned as error that the debt of Warner Wood was allowed as a lien against the lands of C. D. Glendy (1) because Mrs. Glendy had only a life estate in the property; (2) because the statute of limitations barred the right to enforce the lien; and (3) because the demurrer to the cross-bill should have been sustained.

It will be observed that Mrs. Glendy was not a volunteer, but a purchaser for valuable consideration, as appears from the deed of November 20, 1876, by which the "Wilderness" estate was conveyed to Hugh W. Sheffy, in trust for the sole and separate use of Mary J. Glendy, "and in the event of the death of Robert J. Glendy before the said Mary J. Glendy that said trustee will convey said real estate to the said Mary J. Glendy, to hold it during her natural life, with remainder in fee to such persons as she may by deed or will appoint, and in default thereof to her right heirs, and, in case the said Mary J. Glendy shall die before her said husband, then the said trustee will convey said real property to such persons as the said Mary Jane Glendy may in writing, attested by three witnesses, or by her last will and testament, designate and

appoint, and in default of such appointment to her children." The husband survived the wife, who died leaving a last will and testament, by which she devises this estate to her son, C. D. Glendy, and her daughter, Edmonia, from whom Robert J. Glendy derives title.

We are of opinion that her devisees took a fee-simple estate.

We are also of opinion that the statute of limitations does not bar the right to enforce the lien.

The statute upon which appellant relies is section 2935 of the Code of 1887 [Va. Code 1904, p. 1555], which provides that "no deed of trust or mortgage hereafter given to secure the payment of money, and no lien hereafter reserved to secure the payment of unpaid purchase money shall be enforced after twenty years from the time when the right to enforce the same shall have first accrued, and no deed of trust or mortgage given prior to May first, eighteen hundred and eighty-eight, to secure the payment of money, and no lien reserved prior to May first, eighteen hundred and eighty-eight, to secure unpaid purchase money, shall be enforced after twenty years from the time the right to enforce the same shall have first accrued: Provided, the limitation of the right to enforce such deed of trust, mortgage, or lien reserved, shall not expire prior to May first, nineteen hundred and three."

The debt is set forth in extenso in the bill filed by McAllister, trustee, and others, and all the parties bound for its payment were before the court; and if the moiety of land belonging to C. D. Glendy could not originally in that proceeding have been sold for the satisfaction of this debt, the difficulty consisted in a defect in the prayer for relief. The whole transaction out of which this debt grew, all the parties to it, and the property upon which it was secured, were under the jurisdiction of the court in that case.

In this attitude of affairs consent decrees were entered which fully recognized that the share of Charles Glendy in the "Wilderness" tract is bound by the lien to secure the Warner Wood debt; and by the decree of April 29, 1903, he in express terms consents that it shall be "subject to the deed of trust lien in favor of Warner Wood covering all the real estate involved in this cause." It will be observed that his decree was entered two days before May 1, 1903, before which date by the terms of section 2935 it is declared that the limitation of the right to enforce such deed of trust, mortgage, or lien reserved shall not expire.

We think, also, that the cross-bill was properly filed, and that its effect was to cure any omission existing in the pleadings up to that time.

"A cross-bill is a bill filed by a defendant in a suit against a plaintiff, or some other defendant, or both, in the same suit touching the matter in question in the original bill;

and it may be either to obtain a discovery in aid of the defense to the original bill, or to obtain relief for all parties touching the matter of that bill. * * * This bill lies, among other instances, in the following cases:

* * * Where a question arises between two defendants upon a case made out by evidence arising from pleadings and proofs between the plaintiffs and defendants, * * * and where at the hearing it appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it to decide upon the rights of all the parties." Barton's Chancery Prac. vol. 1, § 101.

In this case the original bill and all the proceedings show that the executors of Warner Wood, deceased, have a perfect case as against their codefendant, C. D. Glendy. Not only do the facts recited and proof establish this right beyond peradventure, but C. D. Glendy has conceded it in decrees entered by his consent. It would be a travesty upon justice, under the circumstances disclosed in this record and which we have set out in detail, to turn these executors out of court and declare that their just claim is barred by the statute of limitations.

We are of opinion that the assignment of error, with respect to the debt of Warner Wood as a lien against the land of C. D. Glendy, is not well taken in any of its aspects.

We are further of opinion that there was no error in the decree with respect to the liens established for taxes, amounting to \$307.66; for one-half of the Barley and Thomas attachments, amounting, respectively, to \$233.33 and \$87.09; or to the amount allowed William M. McAllister, receiver, \$465.31.

We are of opinion, however, that there is error in so much of the decree as dismisses the Highland Development Company as a party to the suit. Upon this subject, the decree is based upon the proposition that the Highland Development Company claims by title adverse to any party to this cause, and not through any of said parties, following the law as stated by this court in *Pillow v. Southwestern Improvement Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804, in which the court holds that a partition suit cannot be made a substitute for an action of ejectment, and that to give the court jurisdiction to settle questions of title in such a suit the defendant must be a person who claims under one who was a joint owner with the plaintiff.

Without undertaking to discuss the effect of the amendment to the statute which has been made since the decision in *Pillow v. Southwest, etc., Co.* was rendered, it is sufficient to observe that a partition of the land between C. D. Glendy and R. J. Glendy was not the sole object of this suit, as originally instituted, and subsequent decrees and proceedings in the case have made it in effect a creditors' bill for the satisfaction of liens due by the coparceners and binding

upon the estate to be partitioned; so that it is brought within the influence of that very numerous class of cases which require that, before real estate can be sold for the payment of debts, all clouds upon the title must be removed and all liens, their amounts, and order of priority fixed and determined. *Rossett v. Fisher*, 11 Grat. 492; *Horton v. Bond*, 28 Grat. 817, and *Hudson v. Barham*, 101 Va. 67, 43 S. E. 189, 99 Am. St. Rep. 849, are some of the many authorities upon that point.

For this error we are of opinion that the decree of the circuit court should be reversed, and it is affirmed in all other respects.

(104 Va. 565)

AILSTOCK v. MOORE LIME CO.

(Supreme Court of Appeals of Virginia.
Nov. 23, 1905.)

MALICIOUS PROSECUTION — ATTACHMENT — WRONGFUL SUING OUT — LIABILITY.

Where an attachment is sued out from a court without jurisdiction, maliciously and without any reasonable or probable cause, plaintiff is liable to defendant for damages resulting from the levy.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 13.]

Error to Circuit Court, Botetourt County.

Action by J. T. Ailstock against the Moore Lime Company. Judgment in favor of defendant, and plaintiff brings error. Reversed.

Harvey & Nelson and De Witt V. Lemon, for plaintiff in error. Benj. Haden, for defendant in error.

CARDWELL, J. This is an action on the case, brought by plaintiff in error, J. T. Ailstock, to recover of the defendant in error, the Moore Lime Company, damages for malicious prosecution of a civil suit.

The declaration alleges that the Moore Lime Company "went and appeared before one W. R. Carper, then and there being one of the justices of the peace in and for said county of Botetourt, and then and there before said justice falsely and maliciously and without any probable or reasonable cause whatever caused and procured the said justice to issue and grant it a writ of attachment against the said plaintiff and in favor of the said Moore Lime Company, as plaintiff therein, in the words and figures following, to wit:

"Virginia, Botetourt County—to wit:

"To R. L. Rudersill, Deputy Sheriff of Said County: Whereas, the Moore Lime Company have this day made before me, W. R. Carper, a justice of said county, a complaint on oath that they verily believe that they have a just claim against J. T. Ailstock for the sum of one hundred and thirty-six dollars and ninety-eight cents (\$136.98) for debt due them for open store account (account herewith attached), and that the said Moore Lime Company has present cause of action therefor, and further—

more to the best of affiant's belief that the said J. T. Ailstock has or will have in the hands of W. C. Matthews' estate sufficient to satisfy the claim of the said Moore Lime Company.

"These are therefore in the name of the commonwealth to command you to attach the estate of the said J. T. Ailstock now in the hands of the said W. D. Matthews for the amount of the said claim and make return thereof at Eagle Rock, Virginia, in the said county, on September 9, 1903, at 10 o'clock a. m., before me or such other justice of said county as may be there to try this attachment, showing the day and manner of executing the same.

"Given under my hand this 31st day of August, 1903. W. R. Carper, J. P."

"And the said defendant afterwards, to wit, on the same day of the date of the said writ of attachment, delivered the same to R. L. Rudersill, a deputy sheriff of said county, and then and there maliciously and without any reasonable or probable cause whatsoever caused and procured the said deputy sheriff to execute the said attachment on W. C. Matthews, in whose hands was a large sum of money, to wit, \$250, owing to the said plaintiff; that by reason of the execution of this writ of attachment the said W. C. Matthews refused to pay to the said plaintiff the whole or any part of the amount owing to him; that afterwards, to wit, on the 12th day of September, 1903, the attachment proceedings were dismissed and abandoned by the said defendant."

Then follows the allegation that by the wrongful and unlawful suing out and execution of said writ of attachment the plaintiff was damaged, etc.

To this declaration the Moore Lime Company demurred, which demurrer was sustained, and to that judgment this writ of error was awarded.

The sole question involved in the demurrer, necessary to be considered here, is, "If an attachment be sued out from a court without jurisdiction, maliciously and without any reasonable or probable cause whatsoever, and damage results from the levy of the said attachment, can the malicious suing out and levy of the said attachment be made the basis for an action for damages?"

This precise question has never been before this court, so far as we have been able to find from the reported cases, and the authorities elsewhere seem hopelessly divided, though it seems to us that the best-reasoned cases maintain the proposition that the action will lie.

It is clear from the declaration that the justice who issued the attachment complained of was wholly without jurisdiction. In the first place, the amount sued for (\$136.98) was in excess of his jurisdiction, and his warrant sets out no ground upon which to issue an attachment.

By section 2961 of the Code of 1887 [Va.

Code 1904, p. 1571] it is provided that a justice may issue an attachment against a debtor removing his effects out of the state, and by section 2962, Code 1887 [Va. Code 1904, p. 1572], that he may issue an attachment against a tenant removing his effects from the leased premises. But neither of these grounds for the attachment appears in the justice's warrant in this case. It merely shows that the debt sued for was due and owing and was an open store account for \$136.98, which is in excess of a justice's jurisdiction; the limitation of the jurisdiction of a justice in such cases being \$100. Section 2939, Va. Code 1904.

"It has been considered," says Chitty, in his work on Pleading (volume 1, p. 204), "that when civil proceedings in an inferior court having no jurisdiction over the debt are adopted by a party with an express malicious intent, though there be a demand recoverable elsewhere, an action on the case may be supported." And on page 149 of the same volume, citing a number of authorities, the same author says: "If the proceeding be malicious and unfounded, though it were instituted in a court having no jurisdiction, case may be supported, for trespass."

In a note by Hare & Wallace, in 1 Am. Lead. Cas. 260, it is said: "An action lies also for maliciously holding to bail, or maliciously attaching property, under the process of a court which has no jurisdiction. And it lies for maliciously suing out an attachment, and attaching the plaintiff's property, where nothing is due, or for more than is due. It lies also for maliciously suing out a domestic attachment, where either there is nothing due, or the party has not rendered himself legally liable to such process." Among the many authorities in support of the text is the case of Goslin v. Wilcock, 2 Wils. 302, which has been cited with approval in the cases which we will hereafter refer to, and in many others.

In Boon v. Maul, 3 N. J. Law, 862, where it was held that suit lies for maliciously attaching property by writ from a court without jurisdiction, the opinion says: "The counsel for the defendant below, the plaintiff in this court, now insist that the declaration is defective, inasmuch as it does not contain an averment that the defendant knew that the common pleas of Philadelphia had not jurisdiction of the cause. In the case of Goslin v. Wilcock, 2 Wils. 302, which case very much resembles the present in point of principle, this averment was not considered essential. It appears to me that if a man maliciously makes use of the process of law, with an intention to vex and distress another, that he does it at his peril. He must see to the legality of the proceedings."

The Supreme Court of Ohio has uniformly held to the same doctrine. See Fortman v. Rottier, 8 Ohio St. 548, 70 Am. Dec. 606, and Coal Co. v. Upson, 40 Ohio St. 17. In the last-named case, the opinion says: "It may now

be considered the approved doctrine that an action for the malicious prosecution of a civil suit may be maintained whenever, by virtue of any order or writ issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty, or of the possession, use, or enjoyment of property of value."

In Hays v. Younglove, 7 B. Mon. 545, it was held that where a proceeding was malicious and unfounded, though instituted before a court having no jurisdiction, either trespass or case may be maintained.

To the same effect is Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362, where it was held, citing a number of authorities, that the action would lie, even where there had been no arrest or seizure of property.

In Morris v. Scott, 21 Wend. 281, 34 Am. Dec. 236, the Supreme Court of New York held that "an action on the case for a malicious prosecution lies against a party who falsely and maliciously prosecutes another, although the court in which such prosecution was had was utterly destitute of jurisdiction in the matter," and that all that was necessary to maintain such an action was the malice and falsehood of the prosecution.

In Kerr v. Mount, 28 N. Y. 659, a case very similar to the one under consideration, the opinion by Denio, C. J., says: "The process being void, the party who set it in motion, and all persons aiding and assisting him, were prima facie trespassers. If, though void as respects the party, it were yet regular and apparently valid on its face, it might protect the officer against an action, on the principle of Savacool v. Boughton, 5 Wend. 170, 21 Am. Dec. 181; but this protection, being extended to the officer upon motives of policy, would not at all aid the party. Acts which the officer might justify would be trespasses against the party. There is no principle with which I am acquainted which can shield the defendant from the damages which the plaintiff has sustained by his wrongful act in causing this property to be seized under a void warrant of attachment."

In Antcliff v. June, 81 Mich. 477, 45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533, also similar in many respects to the case we have under consideration, after showing that "latterly the American authorities are tending strongly and increasing rapidly in favor of the maintenance of a suit for malicious prosecution where no property is seized and the person is not molested," and that the exact point had not been passed on by that court before, the opinion says: "I am satisfied, however, that if the wrong and injury is done by a malicious suit, it is immaterial, upon principle, whether the court had jurisdiction or not to entertain such suit. For every malicious wrong there is certainly in this day and age a remedy; and under our liberal system of pleading in this state a plain and clear statement of the facts constituting the wrong is suffi-

cient, and it is but little matter, in actions of trespass on the case, what the action is named or called." In Michigan there is a similar statute to section 2901 of our Code of 1887 [Va. Code 1904, p. 1526], which provides that an action of trespass on the case may be maintained where an action for trespass would lie.

The line of authorities from which we have made the foregoing citations maintain that it is as much a wrong to disturb one's property or peace, or to injure his reputation and credit, by the prosecution, maliciously, of a civil suit, as it is to prosecute one maliciously and without probable cause, by which the person is wronged, going upon the common-law principle that for every injury there is a remedy, and to deny remedy in such case would violate this wholesome principle. They maintain that, when the plaintiff sets the law in motion, he is the cause, if it be done groundlessly and maliciously, of the defendant's damage, and that while a void process of law, upon which one's property is seized or he is deprived of his liberty, might upon motives of public policy be sufficient to protect the officer executing the process, it would not at all aid the party who begun and carried on the action with malice and without probable cause.

There is unquestionably a strong array of authority for the opposite view; but, as we have remarked, the question has never been determined in this state, and we are therefore at liberty to adopt the view that we think is founded on the better reason, and that view is in accordance with that taken in the authorities we have cited, and as expressed pointedly by Pennington, J., in *Boon v. Maul*, supra, viz., that if one maliciously makes use of the process of law, with an intention to vex and distress another, he does it at his peril. He must see to the legality of the proceedings. This is the gravamen of the charge made in the declaration in this case, and we are of opinion that the demurrer thereto should have been overruled.

The judgment of the circuit court will therefore be reversed and annulled, the demurrer overruled, and the cause remanded for a trial upon its merits.

(53 W. Va. 327)

PICKENS et al. v. DANIELS et al.

(Supreme Court of Appeals of West Virginia. Nov. 21, 1905.)

1. APPEAL—REVIEW—PRESUMPTIONS.

A decree confirming the finding of a commissioner's report and decreeing in accordance therewith carries with it the presumption of correctness, and will not be reversed unless plainly wrong.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4015-4018.]

2. EQUITY — CODEFENDANTS — LITIGATION BETWEEN.

Codefendants in a chancery suit cannot therein lawfully litigate matters between them-

selves wholly foreign to the matters raised by the pleadings and proofs between the plaintiffs and defendants.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 1000.]

3. APPEAL—FINAL DECREE.

A decree merely ascertaining a personal indebtedness from a defendant to the plaintiffs, but not decreeing payment thereof, and not fixing a lien therefor or otherwise providing for the payment thereof, is not final or appealable.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by John D. Pickens and others against W. W. Daniels and others. Decree for plaintiffs, and J. N. B. Crim appeals. Reversed in part.

Melville Peck, for appellant. Dayton & Dayton and Samuel V. Woods, for appellees.

COX, J. At January rules, 1890, the executors of James Pickens filed their bill in chancery in the circuit court of Barbour county against W. W. Daniels to subject his real estate to the satisfaction of the liens of two judgments, alleged therein to have been recovered by plaintiffs' decedent in his lifetime against Daniels and others. It is alleged in the bill that on the 14th day of May, 1886, Daniels assigned to the plaintiffs' decedent one-half of a certain debt (the one-half amounting to \$581.05) due the firm of Crim & Daniels, composed of J. N. B. Crim and W. W. Daniels, as collateral security for the payment of said judgments, and that the collateral has proved unavailing, because J. N. B. Crim, the partner of Daniels, has assumed to control the whole debt, and denied the right of Daniels to assign such one-half to Pickens. The debt referred to was a deed of trust debt due from Mary J. Love to Crim & Daniels, and will hereafter be called the "Love debt." J. N. B. Crim and two judgment lienors against the real estate of Daniels were also made parties defendant to the bill. By answers Daniels denied substantially that the assignment to Pickens of one-half of the Love debt was as collateral, but claimed that the assignment was in part payment of the judgments, and that afterwards on the 16th of February, 1888, he (Daniels) settled with Dever Pickens, one of the executors of James Pickens, for the residue of said judgments, and exhibited a receipt showing such settlement, and claimed also that J. N. B. Crim assented and acquiesced in the said assignment, and that Crim had wrongfully appropriated the one-half of the Love debt assigned to Pickens, by applying the whole of the Love debt upon the purchase money of the Love land, which had been sold in another chancery suit in that court to satisfy the liens against it, and purchased by Crim. Daniels also denied any indebtedness of the firm of Crim & Daniels to Crim or any other person. By answers Crim denied substantially that said

assignment to Pickens was legal, but claimed that at the time it was made there was a large indebtedness due to Crim as a member of the firm of Crim & Daniels, and also claimed that, by agreement with Daniels, the whole of the Love debt became the property of Crim as payment on the indebtedness due him from the firm, and that upon the request of Daniels he became the purchaser of the Love land and applied to the purchase money thereof the part of the whole amount of the Love debt payable out of said purchase money. In May, 1890, while this suit was pending, Daniels died. Previous to his death, he conveyed the land sought to be subjected by the plaintiffs to O. F. Hodges for \$1,800, for which, in part, Hodges executed his notes to Daniels. Some of these notes were assigned by Daniels to A. W. Martin. Martin brought suit in equity against Hodges and Daniels, and in that cause Hodges paid into court to the general receiver purchase money amounting to \$1,900, and that cause was heard with this cause at the time of the entry of the last decree of reference, and at the time of the entry of the decree here complained of, although the record of that cause is not brought here. After the death of Daniels, an answer was filed by his administrator setting up practically the same defenses made by his decedent. There were two references to a commissioner, the last one on the 15th of November, 1897, both in the lifetime of Daniels. J. N. B. Crim filed four exceptions to the last report of the commissioner. A decree was entered overruling three of the exceptions, without designating them, and confirming the report as modified by the decree. The decree in most particulars followed the findings of the commissioner. From this decree Crim alone appeals.

He complains of the overruling of his exceptions to the commissioner's report and of the decree in accordance with its findings. By his exception No. 4 he objects to the report because the whole of the Love debt was not reported as belonging to him. This raises the question of the correctness of the report of the commissioner and of the decree finding that the assignment of one-half of the Love debt by Daniels to Pickens was valid and absolute, and that Daniels was not indebted to plaintiffs, and that plaintiffs' judgments were extinguished and no longer liens. Considerable evidence was taken up on the question as to the assignment to Pickens of one-half of the Love debt, and upon the question of whether or not Crim assented and acquiesced therein. This evidence is conflicting, but the commissioner found that the assignment was valid and absolute and that plaintiffs' judgments were therefore extinguished. The circuit court decreed to the same effect. While the finding of a commissioner upon a question of fact is not as conclusive as the verdict of a jury, it is entitled to great weight. *Holt v. Taylor*, 43 W. Va.

153, 27 S. E. 320; *Handy v. Scott*, 26 W. Va. 710; *McGuire v. Wright*, 18 W. Va. 507. This decree, confirming the finding of the commissioner and decreeing in accordance therewith, carries with it the presumption of correctness and will not be overthrown unless plainly wrong. *First National Bank v. Bowman*, 36 W. Va. 649, 14 S. E. 989; *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921; *Mann v. Bryant*, 12 W. Va. 516. We have considered all the evidence, facts, and circumstances appearing, which we deem it unnecessary to detail in this opinion; and giving to them, and to the finding of the commissioner, and to the decree of the lower court the weight to which they are entitled under the law, we cannot say that the court erred in so decreeing. Consequently, appellant's exception No. 4 should have been overruled.

Appellant by his exception No. 1 complains because the commissioner found a balance against him on settlement of the partnership accounts of the firm of Crim & Daniels, and by his exception No. 2 complains because the commissioner did not find Daniels indebted to him upon such settlement, claiming that there was a large balance due him from Daniels. The consideration of the ruling of the lower court upon these exceptions raises the questions whether or not the settlement of the partnership accounts between Crim & Daniels, codefendants, was a proper matter to be litigated in this suit, and whether or not the decree, based upon the commissioner's report, that Crim pay to Daniels' administrator \$81.59 found due upon settlement of said partnership accounts, is correct. The object of plaintiffs' bill was to enforce judgment liens. It is true that the title to one-half of the Love debt was in issue between plaintiffs and defendants J. N. B. Crim and W. W. Daniels, but this issue did not require a settlement of the partnership accounts. The state of the partnership accounts at the date of the assignment might be a material fact tending to sustain either Daniels or Crim in their contention as to the right of Daniels to make the assignment; but the present state and settlement of the partnership was foreign to the matters raised by the pleadings and the proofs between plaintiffs and defendants. The settlement of the partnership between the members thereof constituted a wholly independent subject of controversy between them, in which the plaintiffs were in no wise interested. Under the well-settled rules of equity procedure, the matter of the settlement of the partnership accounts could not legally be litigated between these codefendants in this suit. *Worthington v. Staunton*, 16 W. Va. 208; *Tavener v. Barrett*, 21 W. Va. 656; *Templeman v. Fauntleroy*, 3 Rand. 434; *Hoffman v. Ryan*, 21 W. Va. 415; *Jones v. Grant*, 10 Paige, 348; *Vance v. Evans*, 11 W. Va. 342; *Radcliff v. Corrothers*, 33 W. Va. 682, 11 S. E. 228; *Fowler v. Lewis' Adm'r*, 36 W. Va. 112, 14 S. E. 447. It may be

claimed that after the death of Daniels, the settlement of the partnership accounts was proper in the settlement of the personal estate of Daniels; but the answer to that claim is disclosed by this record. There was no settlement of the personal estate of Daniels in this suit. There was no personal estate before the court to be distributed, except the aforesaid fund in the hands of the general receiver. There was no notice to creditors, no settlement of the accounts of the administrator of Daniels, no ascertainment of the personal estate, and no steps were taken to ascertain it. In this condition of the record the settlement of the partnership accounts was not proper as an incident to the settlement of the personal estate of Daniels. Appellant's exception No. 1 should have been sustained, and No. 2 overruled.

Appellant complains of the ascertainment in the decree of an indebtedness against him of \$531.05, with interest from the 14th of May, 1886, in favor of plaintiffs for one-half of the Love debt, and by his exception No. 3 he objects to the report of the commissioner because it finds him chargeable with the whole amount of the one-half of the Love debt, notwithstanding the debt was not paid in full, or entitled to be paid in full, out of the proceeds of the sale of the Love land. While the decree ascertained this indebtedness, it did not decree payment of it and did not fix a lien for it, or otherwise provide for its payment, but expressly withheld any decree for payment, and continued the cause between plaintiffs and defendant Crim, with leave to plaintiffs to amend their bill. Is this part of the decree final or interlocutory? A decree rectifying the expressed opinion of the judge, but not followed by the sentence of the law, is not appealable. *Hill v. Cronin*, 56 W. Va. 174, 49 S. E. 132. A decree or judgment, to be final, must be complete and certain in itself, and not a recital or memorandum. It must show intrinsically and distinctly, and not inferentially, that the matter has been adjudicated. It must contain the sentence of the law. *Hill v. Cronin*, supra; *Core v. Strickler*, 24 W. Va. 689; 2 Cyc. 594, 613, 614; *Harris v. Refining Co.*, 41 Cal. 393; *Elliott v. Pell*, 1 Paige, 268; *Tripp v. Vincent*, 3 Barb. Ch. 613. We cannot treat this ascertainment of indebtedness as more than tentative, and subject to change or revision by the court below. It is not final, so that it may be appealed from. Appellant's exception No. 3 to the report of the commissioner finding against him the whole amount of the one-half of the Love debt assigned to Pickens should have been sustained, as the appellant, if he could be charged at all, could not be charged on account of that half of the Love debt more than was payable thereon out of the proceeds of the sale of the Love land.

Appellant complains of the allowance to Samuel V. Woods of \$144.79, with interest from the 1st of January, 1897, for services as counsel for W. W. Daniels in this

suit. This allowance was fixed as a lien on the \$81.59 decreed to be paid by appellant to Daniels' administrator upon settlement of the partnership accounts; but, as the decree for the payment of the \$81.59 must be reversed and set aside, there remains nothing before the court to which the lien may attach. There was no further decree for payment or provision for payment of this allowance, or of certain general debts, other than lien debts, which were ascertained by the decree against Daniels' estate. Such debts, other than lien debts, were only ascertained, without decree for payment. The record discloses nothing for this ascertainment to operate on without further adjudication. So far as the general debts, other than lien debts, were ascertained by the decree, we must treat their ascertainment as merely interlocutory and without finality under the principles before stated.

Appellant complains that the liens were fixed and directed to be paid in an ambiguous manner out of the fund in the hands of the general receiver, derived from the sale of the real estate of Daniels. How can appellant complain? By no pleading did he claim a lien against that fund. The liens reported and decreed against it were more than the fund. Appellant made no exception to that part of the commissioner's report ascertaining the liens against that fund, and no objection to the decree thereon when it was entered. Under these circumstances, we think appellant cannot complain against that part of the decree. *Ward v. Ward*, 21 W. Va. 262; *Keck v. Allender*, 87 W. Va. 201, 16 S. E. 520.

Appellant complains that costs, including a docket fee, were adjudged against him in favor of the administrator of Daniels. While this alone would not be ground for appeal, yet this court, finding other error for which the decree must in part be reversed, may review the judgment awarding costs against appellant. *Jones v. Cunningham*, 7 W. Va. 707; *Farmers' Bank v. Woodford*, 34 W. Va. 480, 12 S. E. 544; *Bogges' Heirs v. Robinson's Heirs*, 5 W. Va. 402; *King v. Burdett*, 12 W. Va. 688. We take it that this decree against Crim for costs included the costs incurred in the settlement of the partnership accounts, as other costs were decreed in favor of Daniels' administrator against the plaintiffs. The litigation as to the settlement of the partnership accounts being improper, and it being necessary to reverse the decree in that regard, we think the decree for costs against appellant was also improper.

For the reason stated, so much of the decree entered by the circuit court of Barbour county on the 31st day of May, 1904, in this cause, as ascertained the validity of the assignment of the one-half of the Love debt by Daniels to Pickens, and as decreed that Daniels was not indebted to plaintiffs at the date of the filing of their bill, and that plaintiffs' judgments were extinguished and no

longer liens against the real estate of Daniels, and that plaintiffs pay to Daniels' administrator the costs incurred, etc., and as decreed the liens upon, and directed their payment out of, the fund in the hands of the general receiver of said circuit court derived from the sale of the real estate of Daniels, is affirmed, and so much of said decree as adjudicated the settlement of the partnership accounts of the firm of Crim & Daniels, and as decreed that Crim pay to Daniels' administrator the sum of \$81.59 and costs, including docket fee, and as decreed that the allowance to Samuel V. Woods be fixed as an attorney's lien on said sum so decreed to be paid by Crim to Daniels' administrator, is reversed, set aside, and annulled, and the appellant's exceptions numbered 1 and 3 to the report of the commissioner are sustained, and appellant's exceptions numbered 2 and 4 to said report are overruled, and to the extent exceptions are hereby sustained the report is set aside, and as to the residue of said decree not above affirmed or reversed the appeal and supersedeas is dismissed; and this cause is remanded to the circuit court of Barbour county for such further proceedings as may be proper therein, according to the principles herein announced and the rules governing courts of equity.

(58 W. Va. 291)

STATE v. BRIGGS.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1905.)

1. CRIMINAL LAW — DEFENSE — APPOINTMENT OF ATTORNEYS.

When the court appoints three practicing attorneys to aid a prisoner in making his defense, it is not error for one of them to withdraw from the trial, where the prisoner makes no objection to such withdrawal.

2. SAME—APPEAL—SETTING ASIDE VERDICT.

A motion to set aside the verdict of a jury on the ground that the lower court gave certain instructions for the state will not be entertained in this court, unless it affirmatively appears from the record that the accused objected to such instructions at the time they were offered, and excepted to the ruling of the court in giving them.

3. HOMICIDE—INTENT.

In determining the criminality of the act of killing, it is immaterial whether the intent was to kill the person killed, or whether the death of such person was the accidental or otherwise unintentional result of the intent to kill some one else. The criminality of the act is deemed the same.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 23.]

(Syllabus by the Court.)

Error to Circuit Court, Fayette County. Jesse Briggs was convicted of murder, and he brings error. Affirmed.

McVey & Daniels and Littlepage & Vickers, for plaintiff in error. C. W. May, Atty. Gen., and Frank Lively, for defendant in error.

SANDERS, J. The defendant, Jesse Briggs, was convicted of the murder of Wood-

son Lyons by the criminal court of Fayette county, and sentenced to be hanged, and a writ of error to this judgment was allowed by one of the judges of this court. The defendant was tried at the January term, 1904, of said court, and on a motion for a new trial he filed his affidavit, showing that at the same term, and within a few days after he was indicted, he appeared before the court, and stated that he had no money, and was therefore unable to employ counsel to represent him upon his trial. The court thereupon appointed Elmo McVey, an attorney at law, to make his defense. Shortly thereafter, and on the 26th of the same month, the prisoner was arraigned for trial, at which time the court appointed J. W. Daniel and E. G. Pearson, attorneys, to assist McVey in his defense. After the jury was impeached, Pearson, without the prisoner's consent, voluntarily withdrew from the case. The affidavit also shows that Pearson was an attorney of ability and experience, while McVey and Daniel were both young and inexperienced attorneys. The affidavit does not expressly state that Pearson accepted the appointment and entered upon the trial as one of the attorneys, but presumably he did, inasmuch as it appears therefrom that after the jury were sworn he withdrew. It does not appear that there was an objection to Pearson's withdrawal, nor that demand was made for additional counsel, and this matter was not called to the court's attention, nor complained of, until after verdict. The important right of one accused of crime to have the assistance of counsel in making his defense was denied by the common law. When the government charged a person with treason or felony, he was denied this privilege, and only such questions as he could suggest was counsel allowed to argue. But the framers of our Constitution, regarding the protection of life and liberty as the protection of the most sacred and greatest right of man, promulgated such constitutional provisions as to throw around every subject of the sovereignty a veil of protection from oppression and wrong, by extending to every citizen, when the state prefers a charge against him for the infraction of its laws, the privilege of being assisted by counsel in establishing his innocence, and seeing that justice is done him when called upon to answer such charge. The law is never vindicated by the oppression and punishment of the innocent, nor by even the punishment of the guilty, until there is a fair trial in conformity to the rules of law; and, in order to avoid unjust punishment, and to see that all who are charged have their cases fully and fairly presented to the court and jury before whom they are arraigned, our Constitution has provided that the accused shall have the assistance of counsel upon his defense. But while we have such constitutional provision, and even if it should be so construed as

to make it the duty of the court to provide counsel for the accused when he is peculiarly unable to do so, rather than permissive, and extending to him the privilege of such counsel, which was denied him at common law, it is not such as makes it the duty of the court to make the appointment, unless a demand therefor has been properly made. The right is such as can be waived, and the silence of the accused, and his failure to request the assistance of counsel, is a waiver of such constitutional guaranty. In *State v. Kellison*, 56 W. Va. 690, 47 S. E. 166, it is said by Judge Poffenbarger: "The Constitution does not make assistance of counsel a prerequisite to conviction, as it does a trial by jury. The clause contains no prohibitory language. It only says he shall have the assistance of counsel. * * * Even if said clause makes it the duty of the state to furnish counsel when demanded, it does not follow that such action is to be taken unless demand therefor has been made." In this case the court appointed three attorneys to represent the accused upon his trial, and, while the affidavit alleges that the two who remained and conducted the trial were young and inexperienced, yet no objection was made to Pearson retiring from the case, the court was not asked to require him to continue in the trial, nor was additional counsel asked for. The defendant complained of his retirement for the first time after the verdict was pronounced against him. The affidavit, while it contains the facts as hereinbefore stated, was not made until after verdict. We think the court committed no error in refusing to set aside the verdict on this ground.

It is claimed by the prisoner that the court erred in giving certain instructions to the jury for the state. We find from the bill of exceptions that the defendant moved to have the verdict of the jury set aside on the ground that instructions numbered 1 to 7, inclusive, were given for the state; but the record fails to show that the court gave more than five such instructions, which are numbered 1, 2, 3, 4, and 7, and as to these which were given there is nothing in the record to show that the defendant made any objection to them when offered, or excepted to them when given. In fact, there is nothing to show that the prisoner complained of them until he made his motion to set aside the verdict of the jury, and assigned the giving of them as one of the grounds therefor. But, even if objection had been made to these instructions, counsel in their brief do not point out any objection to them, nor is that urged as a ground for reversal of the case; and, moreover, upon an examination, it is found that they correctly expound the law applicable to this case. The prisoner in his assignment of error says that it was error for the court to refuse to give the special charge to the jury which was asked by him. We do not

find contained in the record any instructions or charge offered by the defendant which were not given, but, under the head of "Defendant's Instructions," we find numbers 5 and 6, but it does not appear whether these instructions were given or refused, but they propound correct propositions of law applicable to the case, and, nothing appearing in the record to the contrary, we must presume that these instructions were given; and, inasmuch as they are numbered 5 and 6, it would indicate that there had been other instructions offered by the prisoner, but, if so, they are not made a part of the record, and this court cannot determine whether or not it was error for the court to refuse them, even if it did so.

This brings us to the question as to whether or not the verdict of the jury is supported by the evidence, and, in dealing with this question, it will not be our purpose to detail the testimony, because it will avail nothing to do so, and in fact it is not necessary for an appellate court to give a review, and most especially an extensive one, of the testimony offered upon the trial; but all that is proper, and certainly all that is demanded, is to give conclusions reached by the court from such evidence. The evidence here shows that the prisoner fired the shot which resulted in the death of Woodson Lyons; in fact the prisoner does not deny this. And not only does it show that the shot was fired, but that at the time it was done the deceased and Mary Young were seated in a room, and that the prisoner stepped to the door, and addressed himself to the woman, and immediately pulled his pistol, and fired four shots in rapid succession, some finding lodgment in the woman, and one in the deceased. The prisoner, to excuse himself, says that at the time the shot was fired both the woman and the deceased were advancing toward him, the woman having in her hand a razor. This evidence of the prisoner is without corroboration, while the evidence clearly preponderates to the contrary, and shows that the shots were fired without excuse or provocation.

Counsel argue that this killing was done in the heat of passion, and that for that reason the jury should not have found the prisoner guilty of murder in the first degree. We see no just ground upon which to base such a contention. The evidence fails to disclose anything from which such a conclusion could be drawn. Murder in the first degree is the willful, deliberate, and premeditated killing of a human being, but this deliberation and premeditation need not exist for any appreciable length of time before the commission of the act. If at the time the fatal shot was fired the prisoner had formed the specific intent of taking the life of either Mary Young or the deceased, he would be guilty of murder in the first degree, and upon this evidence the jury

has so found. While we realize full well the extreme penalty which the prisoner has been called upon to pay, and while the infliction of such punishment always appeals to the sympathy of men personally, yet it must be remembered that the law declares that he who takes life willfully, premeditatedly, and deliberately must pay the debt with his own life in return. This being the demand of the law, the evidence proving the prisoner guilty, the jury having so found, and the trial court having so adjudged, this court is powerless, under the forms and rules of law, to render assistance to the prisoner now, and the judgment of the criminal court is therefore affirmed.

(58 W. Va. 308)

CAMPBELL v. CITY OF ELKINS.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1905.)

1. MUNICIPAL CORPORATIONS—STREETS—PUBLIC CHARACTER—RECOGNITION.

To establish prima facie the public character of a road, street, or alley, it is only necessary to prove its use as such by the public and recognition of it as such by the county court, or the city or town, as the case may be; and such act or recognition may be shown either by the records of the county court or municipal corporation, or by proof of work done upon the same by one who is shown to be the officer whose duty it is to take care of, work, and repair the road in the precinct in which it is or the street or alley of the town or city.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1422, 1428.]

2. SAME—EVIDENCE.

In establishing such recognition by proof of work done upon the road or street by such officer, the amount and character of the work is immaterial, if it be such as to show clearly that it was work upon the road or street for the public benefit.

3. SAME—LATENT DEFECTS—LIABILITIES.

Liability of a municipal corporation for injury occasioned by a latent defect in a street or road, such a defect as the injured party could not have observed or discovered by the exercise of reasonable care and prudence, is absolute, and does not depend upon lack of diligence or care on the part of the corporation.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1612, 1616.]

4. SAME—DEFECTIVE SIDEWALK.

A board in a wooden sidewalk, laid on stringers resting upon smooth ground, not dangerous in character, so unsound as to give way under the weight of a pedestrian and injure him, is an actionable defect under the law of this state.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1624.]

5. INTEREST—JUDGMENT EX DELICTO.

A judgment rendered upon a verdict in an action ex delicto should bear interest from the date of the verdict, if there be one, and not from the date of the judgment.

(Syllabus by the Court.)

Error from Circuit Court, Randolph County.

Action by L. H. Campbell against the city

of Elkins. Judgment for plaintiff, and defendant brings error. Affirmed.

W. B. Maxwell and E. D. Talbott, for plaintiff in error. Wamsley & Coberley, for defendant in error.

POFFENBARGER, J. The city of Elkins complains on a writ of error of a judgment of the circuit court of Randolph county against it in favor of L. H. Campbell for damages resulting to him from a defective sidewalk, whereby his ankle was dislocated and his leg broken. The errors assigned are predicated on the action of the court in overruling the demurrer to the plaintiff's evidence, refusing to set aside the verdict of the jury on the ground of excessiveness, and rendering judgment for the amount of the damages assessed by the jury, with interest thereon from the date of the verdict.

Very slight evidence of recognition by the city of the street on which the injury occurred is found in the record. No ordinance or order of the council recognizing it as a public street appears, but J. G. L. Shaffer, superintendent of streets at the time, testified that he thought that particular street was under the control of the city in October and November, 1900, and in that connection said: "We repaired the walks." He also testified that this work was done under the direction of the city authorities. James A. Bent testified that the street in question had been there "since the town was built," but he proves no acts of recognition by the city authorities. That the people used the street is disclosed by considerable evidence in the case, but the only testimony to an act of recognition is that of Shaffer, and he does not say by whom or in what manner he was directed to make repairs upon the walks. In response to the question whether it was done under the direction of the city authorities, he replies, "Yes, sir," but this is very indefinite. Whether he was so directed by the mayor, a member of the council, the street commissioner, or some other officer, or whether the direction was given in pursuance of an order of the council, is in no way indicated. It is well settled by the decisions of this court, however, that proof of the mere working of a road by a road surveyor and its use by the public are sufficient to establish the character of the road as a public road in any proceeding. *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020; *Ball v. Cox*, 29 W. Va. 407, 1 S. E. 673; *Yates v. Grafton*, 33 W. Va. 507, 11 S. E. 8; *Kelly's Case*, 8 Grat. 632; *Parrish v. Huntington* (W. Va.) 50 S. E. 416. The same rule is declared in *Yates v. Grafton* to be applicable to the streets and alleys of cities and towns, and this view finds support in the fact that the statute upon which the doctrine rests is applicable to both classes of highways. It says: "And every road, street or alley used

and occupied as a public road, street or alley, shall in all courts and places, be taken and deemed to be a public road, street or alley (as the case may be,) whenever the establishment thereof as such may come in question." Code 1899, c. 43, § 31. If used by the public and recognized in any manner by the public authorities in charge of the county roads or streets and alleys, as the case may be, the road, street, or alley in question is a public highway. Proof of these facts make it such prima facie. If the work done is of such character and is done by such person and under such circumstances as to show an express and unequivocal act of recognition, the amount of importance of the work is immaterial. It may be much or little; but it must be done in such manner and by such person as to show intent to treat it as a public highway. The sidewalk is part of the street, and work on it is work on the street necessarily. As he was the officer of the city charged with such work, corresponding to the road surveyor in the case of county roads, it is not enough, under our decisions, that it appear that work was done upon the street by him? It would seem that it is not necessary to prove that he had particular direction from the council to do the work. *Yates v. Grafton* says: "Acceptance of the county or city or incorporated town need not be proved by matter of record, but may be presumed from acts of recognition, acceptance and claim." Point 4, syllabus, *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48, says: "The user must be accompanied either by an order of the county court recognizing it in some way as a road, or the road must be worked by a surveyor as such." And in the opinion in that case the evidence is reviewed and analyzed thoroughly to ascertain whether the fact of work by a surveyor is established by it. The inquiry does not go to the extent of the directions under which he worked or his authority as an overseer. These inquiries seem to have been regarded as unnecessary in view of the presumption in favor of the regularity of the acts of public officers. Though very slight, the evidence must be held, under the decisions above referred to, sufficient to warrant a finding by the jury that the street in question was a public one, and, therefore, good on demurrer.

The plaintiff testified that, as he was walking at a rapid gait, near the middle of the board walk, about 9 o'clock in the evening, his foot slipped on a certain plank and broke it down, so that his right heel went into a hole, made by the breaking of the board, and threw him forward with his weight on that foot, and thus dislocated his ankle and broke a bone in the leg. He produced, on the trial, a part of the board which he says so broke with him, and showed that it was decayed to some extent. As to the character of the defect, his testimony is rather indefinite. It did not let his foot go clear through, but

he says his foot went into it and his heel caught in the next plank and kept him from falling, which statement seems to import that the defect was such as to permit his heel to become fastened in it, so that his weight, thrown upon the foot, either forward or to one side, dislocated the ankle and broke a bone. He says he saw the hole that night, November 25, 1900, and went back in April or May following, and found the hole still there, and that a board had broken in the middle, and the end of the part toward the street was down in the middle of the walk, while the other half rested on the stringer nearest the property line and the middle stringer. The piece produced at the trial was the one the end of which had gone down under his weight. Another witness swears he went the next morning and examined the sidewalk, to ascertain, if possible, the place and manner of the injury, and found a hole in the sidewalk, and, from the tracks left in the frost by the plaintiff in crawling away seeking assistance, he was able to locate that as the place at which the injury occurred. But he does not describe the hole in the sidewalk. For aught that he says, it may have been a mere depression caused by a broken board which had settled slightly. The physician who was called to attend him was mayor of the city at the time, and on cross-examination he gave contradictory statements of the plaintiff as to the place at which and the manner in which the injury was sustained, saying the injured man had told him he had fallen at an offset in the walk. The street commissioner, called as a witness for the defendant, says that, having heard of the accident, he went the next day and examined the sidewalk, and found that, owing to the rotting away of the middle stringer, a board had broken in the middle and swaged, so as to make a depression in the walk four or five inches deep; but he did not think it was of sufficient size and depth to allow a person's foot to go down into it. Mrs. Poe, another witness for the defendant, said the plaintiff had come to her door that night seeking help, and while there had told her he had slipped and dislocated his ankle.

Absolute liability of municipal corporations for injuries occasioned by defects in highways, imposed by the decisions of this court, starting with *Sheff v. Huntington*, 16 W. Va. 307, and coming down to *Arthur v. City of Charleston*, 51 W. Va. 132, 41 S. E. 171, renders it impossible for the court to say, in cases of this class, whether there is any evidence of negligence or want of care on the part of the corporation and withhold them from the jury for lack thereof. Diligence and the exercise of even the highest degree of care does not excuse. Under this rule, a sudden disaster to a highway, such as the falling of a tree across it, or a landslide into it, or its demolition by storm, in the night, in front of a traveler, resulting in

injury to him or his property, under such circumstances as would prevent both him and the officer charged with oversight of the road from having any previous knowledge of the occurrence, would probably make the corporation liable; but "so the law is writ," and has been for 25 years. In *Chapman v. Milton*, 31 W. Va. 384, 7 S. E. 22, the weight of the burden which this construction of the statute imposes was pointed out, and as a sort of countervailing principle the law of contributory negligence adverted to in the following language: "But in cases like that now under consideration, where the statute in express terms imposes an absolute liability upon the town, it is unnecessary to allege or to prove notice of the defect to the town. This statute seems to be somewhat harsh and impolitic; but it is one the Legislature had the power to make, and therefore nothing is left to the courts but to enforce it. However, the construction we have given it is not likely to expose municipal corporations to any extraordinary burden, because, if the defect in the highway be open and visible, and the traveler, through his own negligence or rashness, should, by attempting to pass over it thereby suffer injury, such injury would be attributable to himself, and could not be said to arise from the want of repair to the highway." In recent years the principles of the law relating to contributory negligence seem to have been applied in determining what constitutes a defect in a highway, as well as in estopping the plaintiff from claiming damages, when the defect is clearly proven, but he has contributed to his own injury by his negligence in attempting to use the defective part of the road or street. As the law imposes upon the traveler the duty of exercising care in the use of the streets, such highways as may be safely used, by the exercise of care and prudence, are held not to be defective or out of repair, and injury thereon gives no right of action. *Van Pelt v. Clarksburg*, 42 W. Va. 218, 24 S. E. 878, declares that: "A municipal corporation is not an insurer against accidents upon its streets and roads. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets and roads are in a reasonably safe condition for travel in ordinary modes with ordinary care; and whether so or not is a practical question, to be determined in each case by its particular circumstances." In *Waggener v. Town of Point Pleasant*, 42 W. Va. 798, 26 S. E. 352, on demurrer to the declaration, the court held that: "The averment that a person, while passing over a public brick sidewalk in bad repair, rough, uneven, sideling, and slippery, caught his foot against a projecting brick, fell down, injuring himself, does not state a sufficient cause of action, as such incidents are liable to occur with the old and feeble, careless and indifferent, at almost any place or time. Municipalities are simply required to keep streets and sidewalks in a

reasonably safe condition for persons traveling in the usual modes, by day and night, and exercising ordinary care." To the same effect see *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752. In all these cases the alleged defects were patent, such as could be seen and overcome by exercising care in passing them.

Moore v. Huntington, 31 W. Va. 842, 8 S. E. 512, denies the application of these principles in determining as to a latent defect, one which cannot be observed or known before injury results from it, and seems to close every avenue of escape from liability for injury by them. After stating the rule applicable to patent defects, the court there says: "But, if the injury does not result from these, but from another and latent defect, which no reasonable degree of prudence or care could detect, he [a person using the street] will not be considered as taking the risk of injury from the latent defect." In the opinion, at page 849 of 31 W. Va., and page 515 of 8 S. E., Judge Snyder says a person so injured will be entitled to recover if the defect is one "for which the municipality is responsible"; but nothing in the opinion indicates any state of circumstances under which, in such case, the defect could be considered one for which the municipality would not be responsible. In that case, as in this, the plaintiff was injured by the breaking of a board in a wooden sidewalk, and of the defect the court said: "This was a latent defect, for which the defendant was responsible by reason of its neglect in not repairing the sidewalk." As under the decisions hereinbefore noted, the liability of the town is absolute, not dependent upon its negligence or want of care, the word "neglect" could not have been used in its ordinary legal sense, and must be deemed to have been used to signify mere failure to repair, although it did not appear that the corporation had had any knowledge of the defect. In several of the states having statutes similar to ours, liability for such defects does not attach unless negligence on the part of the town is established by showing either knowledge of it or want of ordinary diligence which would have revealed it, such as failure to inspect. *Thomp. Com. Neg.*, § 6156; *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324; *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 935. But our decisions have adopted the principle enunciated in their prototype, *Merrill v. Hampden*, 26 Me. 234, holding that: "If there be a defect in the road, however small, which occasions an injury, the party injured using common and ordinary care, the town is liable." See *Sheff v. Huntington*, cited. Hence, in determining whether an imperfection in a highway which occasions an injury, when the traveler is not in any way at fault and has had no means of knowledge of it, is an actionable defect, the court cannot base a negative answer on want of evidence of negligence. The town's duty is absolute, and, to

prevent liability, it must appear that it has provided a reasonably safe sidewalk, street, or road, as the case may be.

Here the walk was composed of oak boards, about six or seven feet in length, laid cross-wise on three stringers, about equidistant from each other, and, for aught that appears to the contrary, resting on the ground. As the broken board sank only four or five inches below the others, on account of the decay of the stringer, the boards were probably not more than six inches above the ground. The walk was from five to seven years old, but the boards, save the one which broke, appeared to be sound. The street on which it was did not bear the burden of heavy travel, and was not lighted for use at night. Those who used it most were school children. It was not over dangerous ground, such as a ditch, ravine, or sideling place, in view of which the breaking of a decayed board might reasonably be expected to result in injury, but on a comparatively smooth surface, in consequence of which 99 boards might break without injury to the traveler, and the one hundredth with such injury. Under such circumstances, the law announced by the Tennessee court in *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324, might be urged, without doing any violence to reason. There this principle was declared: "In suit against a city for personal injuries sustained by the plaintiff while passing over a common plank sidewalk laid upon the ground, by reason of an alleged defect therein, there being proof tending to show the defect was latent, it is error for the court to charge that the city was liable, though the defect was latent, if it could have been discovered by 'inspection, observation, or otherwise.' This strong doctrine is not applied to latent defects in common sidewalks, but only to defects in structures over dangerous places." But it would be inconsistent with the law as evidenced by our decisions; for, in Tennessee, the basis of municipal liability, as revealed by the above quotation itself, is negligence, not violation of a statutory guaranty of safety, when the pedestrian is not himself in any way at fault. Under *Moore v. Huntington*, cited, and principles uniformly declared by our decisions, the imperfection under consideration must be deemed a defect and actionable.

It is hardly necessary to remark that there is sufficient evidence to warrant a finding by a jury that the injury resulted from the defect, since there is direct and positive evidence to this effect, as has been already indicated. The demurree is entitled to the benefit of all inferences fairly arising from the evidence. *Barrett v. Coal Co.*, 55 W. Va. 395, 47 S. E. 154; *Gunn v. Railroad Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575. If the evidence, were it permitted to go to the jury, would sustain a verdict in favor of the demurree, the demurrer should be overruled.

Kelley v. Railroad Co. (decided at this term) 52 S. E. 520.

As the verdict was rendered May 8, 1903, the subsequent rendition of judgment for the amount thereof with interest from the date of the verdict was in strict obedience to the mandate of the statute. Code 1899, c. 131, § 16. Prior to Acts 1882, p. 341, c. 120, amending certain sections of the Code, including sections 14 and 16, this would have been error. *Fowler v. Railroad Co.*, 18 W. Va. 579. But the act of 1882 amended the chapter so as to make it say, in section 14, judgment shall be entered "with interest from the date of the verdict," instead of "from the date of the judgment," as in the Code of 1868, and, in section 16, for the aggregate of principal and interest due at the date of the verdict, if there be one; otherwise, at the date of the judgment or decree, with interest thereon from such date, in all cases as to which it is not otherwise provided. "Such date" means the date of the verdict when there is one, and the date of the judgment or decree when there is no verdict. This is the plain, logical, as well as grammatical, connection and meaning of the words. *Fowler v. Railroad Co.*, cited, and *Hawker v. Railroad Co.*, 15 W. Va. 628, 36 S. E. 825, assert that actions for damages are ruled by the two sections above referred to, and, as they have been amended so as to give interest from the date of the verdict instead of the date of the judgment, those two cases sustain the interpretation of the statute herein expressed.

As no error is perceived in the judgment, it will be affirmed, with costs and damages according to law.

(72 S. C. 479)

BEST v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. Oct. 20, 1905.)

1. JUSTICES OF THE PEACE—JURISDICTION.

Const. art. 5, § 21, provides that magistrates shall have jurisdiction in such civil cases as the General Assembly shall prescribe, and Code Civ. Proc. 1902, § 71, provides that magistrates shall have jurisdiction of an action for a penalty where the amount claimed does not exceed \$100. *Held*, to give magistrates jurisdiction in such cases against all defendants subject to the process of the court or who may voluntarily appear therein.

2. SAME—ACTION AGAINST FOREIGN CORPORATIONS.

Code Civ. Proc. 1902, § 155, provides for service of summons on foreign corporations when they have property within the state, or the cause of action arose therein, or service may be had on certain officers or agents of the corporation. *Held*, in connection with Const. art. 5, § 21, and Code Civ. Proc. 1902, § 71, to give a magistrate jurisdiction of an action against a foreign corporation having property in the state to recover a penalty by due service of summons.

3. CARRIERS—LOST FREIGHT—RECOVERY OF PENALTY.

Under Act Feb. 23, 1903 (24 St. at Large, p. 81), providing that failure to adjust claims against a carrier within the times prescribed

shall subject a carrier to a penalty, provided that, unless the consignee recover the full amount claimed, no penalty shall be recovered, a consignee of freight cannot recover the penalty for failure to pay for the lost freight, where he accepts, after the time provided in the act, the amount claimed for loss of freight before bringing the action for penalty.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Barnwell County; Geo. E. Prince, Judge.

Action by C. A. Best against the Seaboard Air Line Railway. From an order of the circuit court reversing a judgment of the magistrate, plaintiff appeals. Affirmed.

Davis & Best, for appellant. Robert Alldrich, for respondent.

JONES, J. The plaintiff brought this action in a court of magistrate, in Barnwell county, S. C., to recover of defendant a penalty of \$50, claimed under the act of 1903, for failure to adjust and pay, within the time required by that act, a claim of \$4.40 for loss of a barrel of flour during transportation. The complaint further alleged that the defendant was a corporation under the laws of North Carolina and Virginia, with its line of railroad track through Barnwell county, and that the claim for loss had been paid by the defendant after the time required by the act, but before the commencement of the action for the penalty. Defendant appeared in the magistrate court and demurred: (1) On the ground that the magistrate had no jurisdiction of an action against a foreign corporation; (2) that it appeared on the face of the complaint that the claim for loss or damage had been paid by defendant and received by the plaintiff, and that therefore no action for the penalty could be maintained. The magistrate overruled the demurrer and gave judgment in favor of the plaintiff for the penalty, \$50. On appeal to the circuit court raising the same questions, the circuit court set aside the judgment of the magistrate and dismissed the complaint, sustaining both grounds of the demurrer. The present appeal by plaintiff questions both these rulings.

1. By section 21, art. 5, of the Constitution, it is provided that "magistrates shall have jurisdiction in such civil cases as the General Assembly may prescribe: Provided, such jurisdiction shall not extend to cases where the value of property in controversy, or the amount claimed, exceeds one hundred dollars, or to cases where the title to real estate is in question, or to cases in chancery." The General Assembly, by section 71 of the Code of Civil Procedure of 1902, prescribed that magistrates shall have civil jurisdiction in: "(3) An action for a penalty, fine or forfeiture, where the amount claimed or property does not exceed one hundred dollars." This would seem to give magistrates jurisdiction in an action for a penalty not exceeding \$100 against all defendants who may be subject to the process of that court,

or who may voluntarily appear therein. With respect to the service of the summons on a foreign corporation, it is provided in section 155 of the Code of Civil Procedure of 1902 that "such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made in this state personally upon the president, cashier, treasurer, attorney or secretary, or any agent thereof." It appears by the complaint that the defendant has property in this state, a line of railroad track extending through Barnwell county, in this state, and is engaged in the business of transporting freight to Ulmer, in Barnwell county, S. C., and has an agent there. Under our statutes, now appearing as section 1779 et seq., vol. 1, Civ. Code 1902, foreign corporations doing business in this state are made subject to the courts of this state in all actions or suits arising out of the business or dealings of such corporation with any citizen or corporation within this state. This legislation is broad enough to subject foreign corporations to the jurisdiction of a magistrate, where the magistrate otherwise has jurisdiction of the cause of action, and the foreign corporation appears or is otherwise served with process according to law. By the act of 1898 (22 St. at Large, p. 698), section 156, Code Civ. Proc. 1902, providing for service by publication (among other things) "where the defendant is a foreign corporation, has property within the state, or the cause of action arose therein," was so amended as to empower magistrates within their jurisdiction to order service by publication on absent defendants, in the same manner and to the same extent as authorized by section 156 to be done by the circuit court, or a judge thereof, or the clerk of the court of common pleas, the master, or the probate judge. In this case, however, no question is involved as to the manner of service or process, as it appears on the record that the action was commenced by service of summons and complaint on the 24th day of November, 1903, and that defendant appeared and demurred, not only to the jurisdiction of the magistrate, but to the complaint on its merits. In so far, therefore, as the question of jurisdiction over the person depends upon the service of process or appearance of defendant, it is complete. *Garrett v. Herring Co.*, 69 S. C. 278, 48 S. E. 254, citing cases.

It is contended that section 423, Code Civ. Proc. 1902, limits jurisdiction over foreign corporations to the circuit court in the cases therein specified. That section provides: "An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court—(1) By any resident of this state for any cause of action. (2) By a plaintiff not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated, within this state."

This section must be construed consistently with subsequent legislation of this state, subjecting foreign corporations doing business in this state to the jurisdiction of the courts of this state. It will be observed that there are no words in the above section which show the intent that all actions against foreign corporations must be brought in the circuit court. It is not inconsistent with the legislation of the state, which in terms or by necessary implication gives jurisdiction to magistrates to entertain actions against such corporations doing business in this state, at the suit of citizens or corporations of this state arising out of such business, when the action is otherwise within the jurisdiction of the magistrate; for example, a magistrate has no jurisdiction when the amount exceeds \$100, when the title to real estate is involved, in equitable actions, and when the cause of action arose out of the state. But under this section the circuit court has jurisdiction of a suit by a resident against a foreign corporation in any cause of action, even when it arose out of the state. *Chafee v. Postal Telegraph Co.*, 35 S. C. 372, 14 S. E. 764. But under subdivision 2 of this section the circuit court has jurisdiction to entertain a suit by a nonresident against a foreign corporation, when the cause of action arose in this state, or the subject of the action shall be situated within the state. It may be that a magistrate has no jurisdiction to entertain such a suit by a nonresident, against a foreign corporation; but we are not called upon to consider that question, as it is not suggested that plaintiff is not a resident of this state, or that the complaint is defective for not alleging that plaintiff is a resident of this state. The case of *Chafee v. Postal Telegraph Co.*, 35 S. C. 372, 14 S. E. 764, has no real bearing upon the particular point involved in this case, as that case was decided in 1891, before the legislation of 1897 referred to, and the court was not considering whether a magistrate had jurisdiction in a case like the present one; but the question there was whether in a suit against a foreign corporation in the circuit court a complaint was demurrable for failure to state that the plaintiff is a resident of this state. We therefore think the circuit court was in error in holding that the magistrate was without jurisdiction in this case.

2. We concur, however, in the view of the circuit court that under the act of February 23, 1903 (24 St. at Large, p. 81), an action cannot be maintained for a penalty alone, after a settlement for loss or damage before suit. The statute being penal should receive such strict construction as would not defeat the obvious intent of the Legislature. The act expressly provides: "Failure to adjust and pay such claim within the periods respectively herein prescribed, shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved, in any

court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of loss or damage, with interest as aforesaid. * * *". It seems that the plain meaning of the statute is to make recovery of the amount claimed in a court of competent jurisdiction a condition precedent to a recovery of the penalty, as the statute expressly says that no penalty shall be recovered unless the consignee recover the full amount claimed in such action. The term "recover," when considered by itself, is not the usual or apt word to indicate a voluntary payment or receipt of money for damages suffered, but ordinarily means the obtaining in a suit of the right to something by a verdict and judgment of a court, and that this is the meaning in the present statute is manifest by the context—"recover in such action." The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims; the penalty, in case of a recovery in a court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary. It is true that the statute authorizes a suit for the penalty in the same action for the loss or damage, but that is very far from saying that the penalty is not dependent upon the recovery of the claim by action in court. Doubtless the act provided for such a joinder mainly because the recovery of the penalty is dependent upon recovery at law of the claim.

The judgment of the circuit court is affirmed.

GARY, A. J. (dissenting). This appeal raises two questions: First, was there error on the part of his honor, the circuit judge, in ruling that the magistrate did not have jurisdiction, on the ground that the defendant was a foreign corporation; and, second, was there error in his construction of the act of 1903? The action was commenced in a magistrate's court.

The complaint alleges: First. "That the defendant, the Seaboard Air Line Railway Company, is a corporation duly created and existing under and by virtue of the laws of the states of North Carolina and Virginia, with its line of railroad track extending through the state of South Carolina, Barnwell county." Second. "That on the 10th day of June, 1903, the plaintiff herein filed a claim with the agent of the defendant at Ulmer, S. C., for one barrel of flour, the same being four dollars and forty cents (\$4.40), lost in transit from Nashville, Tenn., to Ulmer, S. C., the said barrel of flour having been consigned along with other flour to the plaintiff herein, from the Liberty Mills, of Nashville, Tenn.,

and that on the 16th day of November, 1903, the defendant paid the said claim for the loss, to wit, \$4.40, but the same was not paid or refused until long after ninety days had expired from the date the said claim for shortage was filed with the said agent."

The defendant filed the following demurrer: "The defendant company, by Robert Aldrich and J. O. Patterson, Jr., its attorneys demurs to the complaint herein, upon the following ground, that it does not state facts sufficient to constitute a cause of action, in this: (1) That it appears upon the face of said complaint, that the defendant company is a corporation created and existing under and by virtue of the laws of the states of North Carolina and Virginia, and therefore is a foreign corporation, and a magistrate's court has no jurisdiction of actions against a foreign corporation. (2) That it appears from the face of said complaint that the claim of \$4.40 for the barrel of flour, alleged to have been lost, has been paid by the defendant company and received by the plaintiff. Wherefore the defendant demands that the said complaint be dismissed, with cost."

The magistrate overruled the demurrer and rendered judgment in favor of the plaintiff, whereupon the defendant appealed to the circuit court upon two exceptions, assigning error in overruling the respective grounds of demurrer. His honor, the presiding judge, sustained both exceptions and reversed the judgment of the magistrate. The circuit judge based his ruling as to the first exception on section 423 of the Code, and the case of *Chafee v. Postal Tel. Co.*, 35 S. C. 372, 14 S. E. 764. The following are the reasons assigned by him in sustaining the second exception: "The act of 1903 provides a penalty of \$50 for failure to adjust and pay the claims referred to in the act, within the period named, but provides 'that, unless such consignee recover in such action the full amount claimed, no penalty shall be recovered.' This being a penal statute, it must be strictly construed, and the penalty provided for kept within the terms of the act; and, the plaintiff having collected and received the amount of the claim prior to bringing his suit, he surrendered his cause of action for the penalty."

The assignments of error are as follows: "(1) That his honor erred, it is respectfully submitted, in holding that a court of magistrate has no jurisdiction of an action against a foreign corporation. (2) That his honor erred, it is respectfully submitted, in holding that the claim of the plaintiff for property lost having been paid by the defendant and received by the plaintiff before the action was brought, the plaintiff could not maintain an action for the penalty."

1. We will first consider the question whether the circuit judge erred in ruling that the magistrate did not have jurisdiction of the defendant, on the ground that the defendant was a foreign corporation. It will be seen by reference to the Acts of 1902, pp. 1311, 1316,

under the head of "Railroad Consolidations," that the defendant was chartered under and by virtue of the laws of the state of South Carolina, and is therefore a domestic corporation. Section 2055 of the Code of Laws of 1902, relative to suits against consolidated railroad companies, provides that "suits may be brought and maintained against such new companies, in any of the courts of this state, for all causes of action in the same manner as against other railroad companies therein." Considering, however, that the court cannot take judicial notice of the fact that the defendant is a domestic corporation, there are other reasons why the magistrate had jurisdiction.

Article 9, § 8, of the Constitution, is as follows: "The General Assembly shall not grant to any foreign corporation or association a license to build, operate or lease any railroad in this state; but in all cases where a railroad is to be built or operated, or is now being operated, in this state, and the same shall be partly in this state and partly in another state, or in other states, the owners or projectors thereof shall first become incorporated under the laws of this state; nor shall any foreign corporation or association lease or operate any railroad in this state, or purchase the same or any interest therein. Consolidation of any railroad lines and corporations in this state with others shall be allowed only where the consolidated company shall become a domestic corporation of this state. No general or special law shall ever be passed for the benefit of any foreign corporation operating a railroad under an existing license of this state, or under any existing lease, and no grant of any right or privilege and no exemption from any burden shall be made to any such foreign corporation, except upon the condition that the owners or stockholders thereof shall first organize a corporation in this state under the laws thereof, and shall thereafter operate and manage the same and the business thereof under said domestic charter." Chapter 44 of the Code of Laws of 1902 sets forth the conditions upon which foreign corporations are permitted to do business in this state. Section 1793 of said chapter provides that, "when a foreign corporation complies with the provisions and requirements of this chapter, it shall ipso facto become a domestic corporation, and shall enjoy the rights and be subject to the liabilities of such domestic corporations; it may sue and be sued in the courts of this state, and shall be subject to the jurisdiction of this state as fully as if it were originally created under the laws of the state of South Carolina." Section 1794 makes it unlawful for any foreign corporation to do business, or attempt to do business, in this state without first having complied with the requirements of said chapter, and provides a punishment for violation of said provisions.

It is true, the complaint alleges that the

defendant is a corporation, created under the laws of North Carolina and Virginia, but it likewise appears upon the face thereof, that the defendant is operating its railroad in Barnwell county, of this state. In 13 Enc. of Law, 895, it is said: "When a foreign corporation avails itself of the privilege of doing business in a state whose laws authorize it to be sued there, by service of process upon an agent, its assent to such service will be implied. It waives the right to object to the mode of service of process which the state laws authorize. The fact that it has not complied with a state law requiring it to appoint and designate an agent for service of process, is wholly immaterial. It is estopped by its actions from denying that it has complied with this requirement." Applying this principle to the case under consideration, the defendant is estopped from contending that it is not a domestic corporation, for if it is not a domestic corporation, then the operation of its railroad is unlawful. It would be against public policy to give effect to such contention. From the fact that the defendant is doing business in this state, the presumption arises that it has complied with the conditions upon which it was lawful for it to operate its railroad. 1 Elliott on Evidence, § 106; 22 Enc. of Law, 1280.

There is another reason why the magistrate had jurisdiction of the defendant. Jurisdiction is of two kinds—of the person, and of the subject-matter. While jurisdiction as to the subject-matter cannot be waived, the law is otherwise as to jurisdiction of the person. *Martin v. Fowler*, 51 S. C. 164, 28 S. E. 312; *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800. In the case under consideration, the question of jurisdiction related to the person. *Ex parte Perry Stove Co.*, 43 S. C. 186, 20 S. E. 980; *Smith v. Walke*, 43 S. C. 381, 21 S. E. 249; *Rosamond v. Earle*, 46 S. C. 9, 24 S. E. 44; *Bird v. Sullivan*, 58 S. C. 50, 36 S. E. 494; *Burckhalter v. Jones*, 58 S. C. 89, 36 S. E. 495; *Baker v. Irvine*, 62 S. C. 293, 40 S. E. 672; *Garrett v. Herring*, 69 S. C. 278, 48 S. E. 254. When the defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, for the reasons stated in the second ground of demurrer, it contested the case upon the merits to the extent of the sufficiency of the complaint. *Duke v. Postal Tel. Co.*, 71 S. C. 95, 50 S. E. 675. This was sufficient to subject the defendant to the jurisdiction of the court. When the defendant raised the question of jurisdiction, it should have relied exclusively upon that objection, if it did not wish to become subject to the jurisdiction of the court. *Garrett v. Herring*, 69 S. C. 278, 48 S. E. 254. The first exception should be sustained.

2 We will next consider whether there was error on the part of the presiding judge in ruling that the plaintiff could not maintain an action against the defendant, by rea-

son of the fact that the claim for the lost property had been paid by the defendant, and received by the plaintiff, before the action was brought. Sections 2 and 4 of the act of 1903 (pages 81 and 82) are as follows:

"Sec. 2. That every claim for loss of or damage to property, while in the possession of such common carrier, shall be adjusted and paid within forty days, in case of shipments wholly within the state, and within ninety days, in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respective herein prescribed, shall subject each common carrier so failing to a penalty of fifty dollars, for each and every such failure, to be recovered by any consignee or consignees aggrieved, in any court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid."

"Sec. 4. That causes of action for the recovery of the possession of the property shipped for loss or damage thereto and for the penalties herein provided for, may be united in the same complaint."

The proper construction of the act is that when a common carrier fails to adjust and pay the consignee's claim within the time specified by the act, it subjects itself to liability (1) for the amount of the loss or damage, together with interest thereon from the date of the filing of the claim therefor, until the payment thereof; (2) for a penalty of \$50 for failure to adjust and pay the claim within the period prescribed by the statute, provided the consignee recovers the full amount claimed, whether in an action when necessary, or by voluntary payment on the part of the common carrier. The mode of determining whether the consignee was entitled to recover the full amount of his claim, is a mere incident and not a condition precedent to his right to recover the penalty. The adjustment and payment of the claim for loss of the property was not intended as satisfaction of the liability incurred as a penalty, nor did it have such effect by operation of law. Section 4 of the act evidently contemplated the bringing of a separate action for the penalty. It seems to me that a contrary construction would sacrifice the spirit of the statute for the letter thereof, and enable a common carrier to defeat the manifest pur-

pose of the act, after it had failed to adjust and pay the claim for loss or damage within the specified time, and when by its conduct it had shown that the consignee was entitled to the full amount claimed. The exception raising this question should be sustained.

For these reasons, I think the judgment of the circuit court should be reversed.

(72 S. C. 465)

ELLIS v. SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina. Oct. 18, 1905.)

1. MASTER AND SERVANT—TORTS OF SERVANT—PERSONAL LIABILITY.

Where the wrongful act of a servant is the proximate cause of an injury, he is liable to a person injured, whether such wrongful act be one of nonfeasance or misfeasance.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 1235, 1236.]

2. SAME—AGENT OF MASTER.

An agent of a railroad company, in exclusive charge of the management of the company at the time of an alleged injury, is not liable for an injury inflicted by the servants employed by him for the company to operate its trains; they being, not the agents of the defendant, but of his principal.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 1211.]

Appeal from Common Pleas Circuit Court of Hampton County; Klugh, Judge.

Action by I. D. Ellis, administratrix of W. J. Ellis against the Southern Railway Company and P. I. Welles. From an order overruling a demurrer to the complaint, Welles appeals. Reversed.

The following is the complaint:

"The complaint of the above-named plaintiff, L. D. Ellis, as administratrix of estate of W. J. Ellis, and in her own behalf and in behalf of the children of the said W. J. Ellis, deceased, respectfully shows to this court:

"(1) That at the times hereinafter mentioned the defendant Southern Railway Company was and is now a railway corporation, duly chartered and existing under and by the laws of the state of South Carolina, and as such is and was operating a railway from the town of Batesburg, in the county of Lexington, and through the counties of Aiken, Barnwell, and Hampton, to the station of Hardeeville, in Hampton county, and elsewhere in this state, and as said railway corporation so operating was engaged in the hauling of freight and passengers for hire to and from said points and elsewhere in this state, and the defendant P. I. Welles was at the time hereinafter mentioned the agent and servant of the said codefendant, and as such was in exclusive charge of the operation and management of the said Southern Railway Company, and still is operating the said railway in behalf of his codefendant, the Southern Railway Company, and as such agent so operating the said railway was and still is liable for acts and doings of the railway company aforesaid.

"(2) That on or about the 3d day of March, 1902, at about 4 o'clock of the morning of that day, W. J. Ellis went to a station on the railway of defendant the Southern Railway Company known as Furman, in Hampton county, S. C., where the said railway crosses one of the public highways of said county of Hampton, for the purpose of getting on one of the passenger cars owned and operated by the defendant, the Southern Railway Company, on its said railway, and becoming a passenger thereon, intending to go to his place of business at Summerfield, Fla.; and that soon after getting to said station the regular train of cars, then due to arrive at said station on defendant's railway, appeared in sight with an exceedingly dim headlight on the locomotive attached to said passenger cars of said defendant's company, whereupon and immediately afterwards the said W. J. Ellis lighted with fire some combustible material, and gave across the railway track aforesaid the usual and customary signal for the train of cars aforesaid to stop, whereupon the agent and servants of defendant's railway company aforesaid in charge of said passenger cars and locomotive on the railway track of defendant's company aforesaid, gave with the whistle on the locomotive attached to the passenger cars aforesaid the usual and customary signal to stop, but, instead of stopping the said passenger cars aforesaid, as they were in duty bound to do, the agents, servants and employees of the defendant's company aforesaid, willfully, maliciously, negligently, carelessly, and wantonly ran, or caused the passenger cars and locomotive aforesaid to run, by the station aforesaid across the public highway aforesaid at an exceedingly high rate of speed, without first continuously for 500 yards before reaching the public highway and station aforesaid ringing the bell or sounding the whistle on the locomotive and train of cars aforesaid on the railway track aforesaid, and willfully, maliciously, negligently, carelessly, and wantonly struck or caused to be struck the person of W. J. Ellis with some parts of the locomotive and train of cars aforesaid on the railway track of defendant's company aforesaid, wounding and instantly killing the said W. J. Ellis.

"(3) That by reason of these willful, careless, negligent, malicious, and wanton acts of the defendant's company, and the killing of the said W. J. Ellis as aforesaid, this plaintiff and the heirs at law of the said W. J. Ellis have been damaged in the sum of \$50,000.

"(4) The plaintiff is the duly qualified administratrix of the estate and effects of W. J. Ellis, deceased.

"Wherefore plaintiff demands judgment in her own behalf and in behalf of the heirs at law of the heirs of the said W. J. Ellis in the sum of \$50,000, with the cost of this action."

Defendant Welles appeals on the following exceptions: "First. To the order permitting amendment: (1) Because it is respectfully submitted that his honor, the presiding judge, J. C. Klugh, erred in permitting the plaintiff to amend her complaint, inasmuch as the said complaint did not state the beneficiaries for whose benefit the action was brought, and therefore did not state any cause of action; and his honor therefore was without authority to permit an amendment to said complaint, in order that it might state such a cause of action.

"Second. To the order overruling the demurrer of the defendant, P. I. Welles: (1) Because it is respectfully submitted that his honor, the presiding judge, erred in not deciding that inasmuch as it appeared upon the face of the complaint that this appellant was an agent and servant of his codefendant, the Southern Railway Company, and that the willful, malicious, negligent, careless, and wanton conduct alleged to have caused the death of plaintiff's intestate, was not committed in the presence of this defendant, but through the willful, malicious, negligent, careless, and wanton conduct of the agents and servants of the said railway company, in charge of a passenger train of cars and locomotive engine upon said company's road, at a station at which the said W. J. Ellis desired to take passage, and where it is not alleged that this defendant was present, then this defendant not being the master or employer of the persons in charge of said train, is not responsible for their actions, under the doctrine of respondent superior, and no cause of action is alleged against this defendant. (2) Because it appears upon the face of said complaint that the conduct of the persons in charge of said train was the cause of the injury to plaintiff's intestate, and it is not alleged that the plaintiff was upon their said train, directing the movements and actions of the persons upon said train, and this defendant is not liable for their conduct; the same not being alleged to have occurred through the misfeasance or positive wrong of this defendant. (3) Because the only charge against this defendant appearing in said complaint is a charge of negligence or conduct amounting to nonfeasance or omission of duty in the course of his employment, and for such nonfeasance or omission, this defendant, not being the master or employer of the persons in charge of said train, is not liable for the death of plaintiff's intestate. (4) That under the laws of this state, an agent is not liable to a third person for damages resulting to him in the non-performance, or neglect of the duty which the agent owes to his principal, and the only charge of negligence, or willful, wanton, or malicious conduct under the allegations of said complaint, if any there are, would make him responsible to his principal, his codefendant, the railway company, and not to

the plaintiff. (5) Because, on the face of said complaint, the only allegations of negligence or misconduct on the part of this defendant, being in general words charging that this defendant was in exclusive charge of the operation and management of the railroad company, his codefendant, and that as such agent, he operated the said railway company, and was liable for its acts and doings, and no specific act of negligence being charged against this defendant except as generally responsible for the negligence of the agents, servants, and employes of the defendant company in charge of the passenger train and locomotive which struck plaintiff's intestate, no cause of action is alleged against this defendant, even if, under the laws of South Carolina, an employe may be held responsible for acts of nonfeasance causing injury to third persons."

Nathaniel B. & Joseph W. Barnwell, for appellant. E. F. Warren and J. P. K. Bryan, for respondent.

GARY, A. J. This is an appeal from an order overruling a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The complaint, together with the exceptions which state the grounds of demurrer, will be set out in the report of the case.

1. The first question which will be considered is whether an agent is personally liable to a third person for an act of nonfeasance causing injury. In volume 1, pp. 288, 289, of Jaggard on Torts, it is said: "The thinness and uncertainty of the distinction between the misfeasance, malfeasance, and nonfeasance leave an exceedingly unstable basis on which to rest an important principle of liability. It would, indeed, seem to be a fair criticism on the subsequent reasoning that the courts have, in applying the distinction, engaged in a solemn game of logomachy. Thus in *Bell v. Josselyn*, 63 Am. Dec. 741, it was said that failure of defendant to examine the state of the pipes in a house before causing the water to be let on would be a nonfeasance, but, if he had not caused water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes, and left them in a proper condition, and then caused the letting on of water, there would have been neither nonfeasance nor misfeasance. As the facts were, the nonfeasance caused the act done to be a misfeasance. The plaintiff suffered from the act done, which was no less a misfeasance by the reason of its being preceded by a nonfeasance." Continuing, on page 289, the author uses this language: "The futility of such reasoning on the word 'nonfeasance' appears fully from the lack of definitiveness of the meaning to be given the term. This solemn legal jugglery with words will probably disappear 'if the nature of the duty incumbent upon the servant be considered.' If the servant owe a duty to third persons, derived from in-

strumentality likely to do harm or otherwise, and he violates that duty, he is responsible. His responsibility rests on his wrongdoing, not on the positive or negative character of his conduct. A wrongful omission is as actionable as a wrongful commission."

The rule is thus stated in *Mecham on Agency*, § 572: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for the injuries sustained by them, because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him, by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing—as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do, under the circumstances, does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation."

In *Mayer v. Thompson-Hutchinson Bldg. Co.* (Ala.) 16 South, 620, 28 L. R. A. 433, 436, 53 Am. St. Rep. 88, the court states the principle as follows: "The liability of the principal or master to third persons does not depend upon any privity between him and such third persons. It is the privity between the master and servant that creates the liability of the master for injuries sustained by third persons on account of misfeasance or nonfeasance of the servant or agent. It is difficult to apply the same principles which govern in matters of contract between an agent and third persons, to the torts of an agent which inflict injury on third persons, whether they be of misfeasance, or nonfeasance, or to give a sound reason why a person, who, acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person, whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury." In a note to this case on pages 433 and 434, 28 L. R. A., after the statement that there are many misleading dicta to the effect that nonfeasance of a servant causing injury to third persons is not generally a ground of action in their favor against the servant, and that these dicta can all be traced to a dictum in a dissenting opinion in *Lane v. Cotton*, 12 Mod. 488, 1 Ld. Raym. 646, we find the following language: "These dicta and text-book statements based upon them have had the pernicious effect of con-

fusing the subject, because they do not distinguish between the direct liability of an agent or servant to third persons for breach of his own duty toward them, and an indirect liability to them for breach of duty to his own employer, and fail to recognize or indicate the fact that an agent or servant may owe duties to third persons at the same time he owes service to his employer, and that the common duty to regard the rights of our fellow men is none the less binding upon a person because he happens to be at the time an agent or servant. An analysis of all the cases on the subject shows that in almost every instance negligence of an agent or servant has been held to make him liable to a third person injured thereby, provided he would have been liable if acting on his own behalf under circumstances otherwise unchanged. The difficulty seems to vanish almost if not entirely when the test of the liability of an agent or servant to a third person on account of his nonfeasance or negligence is taken to be his nonperformance of a duty toward them. Where such duty and neglect thereof appear, it seems utterly unreasonable to say that the negligent person shall not be liable merely because he was the agent or servant of some other person to whom he might also be liable. To say that liability for failure to perform a duty toward a person who is injured in consequence shall not exist, because the guilty person is in the same transaction also guilty of a breach of another and a distinct duty to a different person, is to state a proposition condemned by the analogies of the law as well as by reason."

The court, in *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308, uses this language: "Misfeasance may involve to some extent the idea of not doing, as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, as, for instance, when he does not exercise that care which a due regard for the rights of others would require. This is not doing; but it is the not doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual, in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable." The true rule deducible from the authorities is that the servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of nonfeasance or misfeasance.

2. The next question that will be considered is whether the complaint contains allegations sufficient to show that the injury was sustained as the direct and proximate result of a wrongful act on the part of the defendant Welles. Our construction of the complaint is that it seeks to make

the defendant Welles respond in damages solely on the ground that he was the agent of the Southern Railway Company, and as such was in exclusive charge of the operation and management of said company at the time of the injury. The persons in charge of the train of cars that caused the injury were not the agents of the defendant Welles, even if employed by him, but of his principal, the Southern Railway Company. While the Southern Railway Company may have been responsible for the conduct of the servants in charge of said train of cars, their acts did not render the defendant Welles liable for the injury, as they were not his agents. There are no allegations in the complaint to the effect that the injury was a direct and proximate result of a wrongful act on the part of the defendant Welles. Therefore it fails to state a cause of action against him, and the demurrer should have been sustained.

It is the judgment of this court that the judgment of the circuit court be reversed.

(72 S. C. 474)

ROUNDTREE v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. Oct. 18, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—PLEADING AND PROOF.

Under Code Civ. Proc. 1902, §§ 190-192, providing that no variance between the pleading and proof shall be deemed material until it has actually misled the adverse party, proof that a plaintiff was injured in loading the wheels of a truck is not a variance from an allegation of injury from loading trucks.

2. EVIDENCE—OPINIONS.

In an action for personal injuries, plaintiff may give an opinion as to the amount of damages he has sustained.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2234.]

3. TRIAL—INSTRUCTIONS.

In the absence of a request, failure to charge that there was no evidence to sustain a verdict of punitive damages is not error.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Trial, § 627.]

4. APPEAL—HARMLESS ERROR.

Failure to charge that there was no evidence to authorize punitive damages is harmless error, where so much of the verdict as was for punitive damages is remitted.

Appeal from Common Pleas Circuit Court of Hampton County; Klugh, Judge.

Action by J. E. Roundtree against the Charleston & Western Carolina Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

James W. Moore, for appellant. W. B. Smith and W. B. De Loach, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the negligence of the defendant. The complaint alleges that the plaintiff, at the time of the injury, was employed by the defendant as a section hand

on its line of railway; that, while he was trying to load a heavy truck on a flat car, he was overstrained and hernia was produced on account of the willful, wanton, and knowing negligence of the defendant in failing to provide a sufficient number of hands to lift so heavy a weight. The jury rendered a verdict in favor of the plaintiff for \$1,500 damages and \$450 punitive damages. The defendant made a motion for a new trial on the minutes of the court. The presiding judge granted an order that, unless the plaintiff should remit upon the record all except \$1,500 of the verdict, there should be a new trial, as there was no testimony to sustain a verdict for punitive damages. The plaintiff remitted on the record all in excess of \$1,500.

1. The defendant appealed upon exceptions, the first of which assigns error on the part of his honor, the presiding judge, in refusing the motion for a nonsuit on the ground that there was no testimony tending to show that the plaintiff was injured while loading a truck, but was injured while loading the wheels of a truck. In refusing the motion for nonsuit, the presiding judge said: "Trucks being a technical expression, the meaning of which is known to railroad men, it may or may not mean the four wheels coupled together; and I will leave it to the jury to say whether the railroad was negligent in the manner alleged. As a matter of fact, I do not think it would be taking one by surprise to amend the complaint to conform to the proof."

Sections 190, 191, and 192 of the Code of Civil Procedure of 1902 are as follows:

"Sec. 190. No variance between the allegation in pleading and the proof shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense, upon the merits. Whenever it shall be alleged that a party has been misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

"Sec. 191. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

"Sec. 192. Where, however, the allegation of the cause of action or defense to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof."

The appellant contends that this case comes within the provisions of section 192. These sections were construed in the case of Ahrens v. Bank, 3 S. C. 401, 410, as follows: "Under section 192 [190], no variance is to be regarded as material, unless it has actually misled the party, and in that case his

remedy is to satisfy the court immediately, by proof by affidavit, that he has been so misled. The effect of such proof is not to prevent the court from allowing an amendment to such case, but to entitle the party prejudiced by such amendment either time or such other compensatory terms and conditions as may be reasonable. The object of the Code is to secure to parties acting in good faith the fullest right to rectify by amendment any defect in pleading the result of misapprehension, inadvertence, or accident, but at the same time to protect, as far as possible, the substantial rights of the party prejudiced by such amendment. If the party prejudiced by such variance does not take advantage of the remedy afforded by section 192 [190], then, under section 193 [191], it is the duty of the court to disregard the variance as immaterial, and either to order an immediate amendment, or to direct the fact to be found according to the evidence. Section 194 [192] was intended to guard against the application of sections 192 [190] and 193 [191] to cases which are not, properly speaking, cases of variance, but where the party has proved on the trial a state of facts foreign to the allegations of the pleadings, and having the effect to leave the facts alleged in the pleadings unproved in their 'entire scope and meaning.' It is obvious that variances involving nothing more than technical differences between the allegations and proofs can only be made material in the mode pointed out in section 192 [190]. * * * Under the foregoing provisions of the Code [190 and 191], a motion for a nonsuit is not the proper mode of taking advantage of any variance that might have occurred; nor can this court set aside the judgment, if sustained by the proofs, on the ground of any such variance, in view of the provisions of the Code in question." These principles are in accord with the rule laid down in *Pom. Code Rem.* §§ 553, 554.

While it is true there was no testimony tending to show that the injury was caused by loading a truck, complete in all its parts, nevertheless there was evidence to the effect that the injury was the result of loading the wheels, which were a component part of the truck. It cannot, therefore, be successfully contended that the allegation of the complaint was "not proved, not in some particular or particulars only, but in its entire scope and meaning." Furthermore, the variance was not prejudicial to the defendant, as it requires a smaller force of hands to load wheels of a truck than to load the entire truck.

2. The second exception raises the question whether the presiding judge erred in ruling that the plaintiff could testify as to the amount of his damages. The appellant contends that the testimony was inadmissible on the ground that it was merely the expression of an opinion. This question is conclusively settled by the case of *Oliver v. Ry.*,

65 S. C. 1, 43 S. E. 307. Mrs. Oliver, in answer to the question, to what extent, in her opinion, she had been damaged, was permitted to testify: "I could not put any money value on my health—\$10,000 seems a very paltry sum." This was made the ground of exception, and the court ruled that the question was competent. See, also, *Dent v. Railway*, 61 S. C. 329, 39 S. E. 527, and *Burnett v. Railway*, 62 S. C. 281, 40 S. E. 679.

3. The third exception assigns as error that there was no testimony whatever as to exemplary damages, and that the presiding judge should have charged the jury that plaintiff was only entitled to actual damages. In the first place, the defendant should have presented a request to that effect. In the second place, the plaintiff has remitted upon the record so much of the verdict as was for punitive damages. The appellant, therefore, cannot now complain that the alleged error was prejudicial.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(140 N. C. 151)

HAMRICK v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Dec. 5, 1905.)

1. TELEGRAPHS—MESSAGES—DELAY.

Where delivery of a message informing plaintiff of the serious illness of his wife was delayed for a period of 28 hours, and plaintiff was informed of such delay before he started to his wife's bedside, it was no defense that, in view of the fact that his wife ultimately recovered, he was not damaged, but was in fact relieved of 28 hours' anxiety on account of the delay.

[Ed. Note.—For cases in point, see vol. 45, *Cent. Dig. Telegraphs and Telephones*, § 70.]

2. EVIDENCE—ADMISSIONS OF SERVANT—RES GESTÆ.

In an action for delay in the delivery of a telegram, subsequent admissions and statements of defendant's agent as to why it was not delivered sooner, etc., were hearsay and not admissible as *res gestæ*.

Appeal from Superior Court, Rutherford County; Justice, Judge.

Action by W. D. Hamrick against the Western Union Telegraph Company to recover damages for delay in delivery of a telegram. From a judgment for plaintiff, defendant appeals. Reversed.

F. H. Busbee & Son and W. R. Whitson, for appellant. McBrayer & McBrayer and B. A. Justice for appellee.

BROWN, J. The evidence tends to show that the plaintiff's wife, being very ill, procured one Huntley to send the following telegram from Forest City to the plaintiff at Old Fort, N. C., about 40 miles distant, viz.: "Bill, come home at once, your wife is bad off"—and also that the defendant negligently delayed the delivery of the telegram at Old Fort for some 28 hours. Immediately upon re-

ceipt of the telegram, the plaintiff started home, and on arrival found his wife very ill. She continued so for 11 weeks, and recovered.

1. It is contended by the defendant that the evidence does not disclose a state of facts from which the jury can infer mental anguish; that the plaintiff was relieved of 28 hours' anxiety on account of his wife's condition by reason of the delay; and that inasmuch as he arrived home and found his wife alive, and as she recovered, he has failed to show reasonable grounds for mental anxiety arising from the delay in delivering the telegram. The argument is plausible. But it does not take into account the possibility that when the plaintiff finally received the message his mental anxiety may have become very acute and much increased for fear his wife may have died during the 28 hours of delay. The mental disturbance, vexation, and increased anxiety which the knowledge of the delay may have caused to the plaintiff's mind will readily occur to any one. Now, if the plaintiff had not been informed of the great delay in the delivery of the telegram before he started home, the defendant's contention would be sound. We are of opinion there was some evidence of mental anxiety caused by the unreasonable delay, sufficient to be considered by the jury.

2. During the trial, the plaintiff, being examined in his own behalf, stated that 10 or 15 minutes after receiving the telegram, which was handed to him by an employé of a tanning company, for which company the plaintiff was working, the plaintiff went to the depot and had a conversation with the agent of the defendant company about this telegram, in which conversation the agent made certain statements and admissions with regard to its receipt and transmission, why it had not been delivered sooner, etc. To the introduction of this testimony, detailing conversations had and admissions and statements made by the agent of the defendant company at the time stated, the defendant excepted. In the reception of this evidence there was error. In no possible aspect of the evidence can these declarations be considered as part of the *res gestæ*, as was contended. It seems to be the invariable rule that the declarations of an agent, to be admissible as a part of the *res gestæ*, must have been made at the place where the occurrence happened. No declaration made at a different place and at a different time has ever been treated as any part of the *res gestæ*. *Railroad v. Stein* (Ind. Sup.) 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733; *Simon v. Manning*, 99 N. C. 327, 6 S. E. 101; *Southerland v. Railroad*, 106 N. C. 100, 11 S. E. 189. The authorities are uniform that what an agent says while doing acts within the scope of his agency is admissible as a part of the *res gestæ*. What he says afterwards concerning his acts is hearsay and inadmissible. *Smith v. Railroad*, 68 N. C. 107; *McComb v. Railroad*, 70 N. C. 178; *Branch v. Railroad*, 88 N. C. 575. In the case

of *Western Union Tel. Co. v. Way*, 4 South. 844, the Supreme Court of Alabama holds that statements of an agent of a telegraph company are not competent as against the company to prove that a message was not transmitted, when not made in performance of any duty relating to its transmission. In *Darlington v. Telegraph Co.*, 127 N. C. 448, 37 S. E. 479, it is held that conversations of an agent of a telegraph company before, or declarations by him after, sending a message, are incompetent to fix the company with notice of its importance.

New trial.

(140 N. C. 36)

LYLES v. BRANNON CARBONATING CO.
(Supreme Court of North Carolina. Nov. 22, 1905.)

1. NEGLIGENCE—*RES IPSA LOQUITUR*—BURDEN OF PROOF.

In an action for death caused by negligence, the burden of proof resting on the plaintiff was not shifted to defendant by the doctrine of "*res ipsa loquitur*"; such doctrine being a mere mode of proving negligence as a matter of evidence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 218, 225.]

2. TRIAL—OMISSION TO CHARGE—REQUEST.

In an action for death caused by the explosion of a soda water tank, the court's omission to fully explain the doctrine of "*res ipsa loquitur*" was not error, where plaintiff failed to present a prayer embodying the instruction desired.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 627, 628.]

Appeal from Superior Court, Mecklenburg County; Cooke, Judge.

Action by Jarvis Lyles, as administrator of the estate of Charles Lyles, deceased, against the Brannon Carbonating Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The following issue was submitted: "Was the death of the plaintiff's intestate caused by the negligence of the defendant as alleged in the complaint?" The jury answered it, "No." From a judgment dismissing the action, the plaintiff appealed.

Stewart & McRae, for appellant. Burwell & Cansler and T. C. Guthrie, for appellee.

BROWN, J. The evidence discloses that the plaintiff's intestate was killed by the explosion of a soda-water tank made of copper and lined with block tin, which was being charged with gas at the bottling works of the defendant in Charlotte. The tank did not belong to the defendant, but had been borrowed by it on the same day and an hour or so before the explosion from the Charlotte Drug Company, of which W. M. Wilson was the president; the loan having been made by said Wilson. No negligence is alleged in the complaint as to the manner of charging the tank, or in respect to the actions of the servants of the defendant, upon whom de-

volved the duty of receiving, examining, and charging the tank. The negligence alleged in the complaint consisted solely in using a defective tank. There are several exceptions in the record relating to the admission and rejection of evidence. We have examined them carefully and think they are without merit.

Mr. McRae, the counsel for the plaintiff, in an able argument, rested his main contention upon two alleged errors in the charge of the court: (1) Because his honor erred in instructing the jury that the burden of proof upon the issue was on the plaintiff. (2) Because his honor in his charge failed to explain fully to the jury the doctrine of "*res ipsa loquitur*." It has never been decided in this state that, where the principle of "*res ipsa loquitur*" applied, its effect was to shift the burden of proof upon the issue of negligence. In an action for damages for death by wrongful act, the burden is on the plaintiff, upon the issues of negligence and damages (the only issues in this case), and if an accident happened out of the ordinary, our court has never said that this circumstance established the plaintiff's case, and shifted the burden of proof upon the issue over to the defendant. In those cases where the doctrine is applied, this court regards it as purely evidential, and the inference to be drawn from the fact of the accident is some evidence which the court permits to go to the jury upon the question of negligence, and the plaintiff is not required to prove the actual facts showing the particulars wherein the defendant was negligent, but there is no presumption raised whereby the burden of proof is shifted. "*Res ipsa loquitur*" does not dispense with the rule that he who alleges negligence must prove it. It is simply a mode of proving negligence, and does not change the burden of proof. *Labatt, Master & Servant*, § 834; *Womble v. Grocery Co.*, 135 N. C. 481, 47 S. E. 498; *Stewart v. Carpet Co.*, 138 N. C. 67, 50 S. E. 562. In the latter case, Mr. Justice Walker says: "The law attaches no special weight as proof of the fact of an accident, but holds it to be sufficient for the consideration of a jury, even in the absence of any additional evidence." We think the jury had before them all the circumstances connected with the accident and doubtless gave them such weight as they thought proper, and they seem to have drawn from the fact of an accident no inference of negligence.

As to the other contention of the plaintiff, we think it cannot be sustained. The doctrine that "the thing speaks for itself" relates solely to the evidence which may go to the jury as some proof of an alleged fact. It was therefore the plaintiff's duty, if he desired the court to charge upon this phase of the evidence more particularly, to hand up a prayer for instructions to that effect. This the plaintiff failed to do. He cannot now be heard to complain for the alleged

omission of his honor to charge upon that particular feature of the evidence, which the plaintiff himself did not regard of sufficient importance to call attention to by appropriate prayers for instruction. The charge of the able and careful judge who presided in the court below has been closely examined. It appears to us to fully cover the controversy, and to be a very clear and correct summing up of the contentions of the parties and the law applicable to the case. We find no error in it. The judgment is affirmed.

Affirmed.

(140 N. C. 49)

EDWARDS v. CAROLINA & N. W. R. CO.
(Supreme Court of North Carolina. Nov. 22, 1905.)

1. RAILROADS—CROSSING ACCIDENT—ACTIONS—INSTRUCTIONS.

In an action for death at a railroad crossing while deceased was trying to cross between two sections of a train, an instruction that it was defendant's duty "to ring the bell or blow the whistle," or to give other suitable and sufficient signals and warnings of the approach of its train while moving the same in its yards, and to use all proper and reasonable efforts to avoid injuring any party who might be in its yards on legitimate business, etc., was not objectionable, as contradictory, in that the first part was in the alternative, while the second part required both the giving of signals and the taking of precautions.

2. SAME—USE OF CROSSINGS.

In an action for death at a railroad crossing, an instruction that use of the highways belongs as much to the public as the track does to the railroad company, and that for the company to block the highway without absolute necessity, or to render its use so dangerous as to deter the traveling public or to keep them in fear of life or limb, would be a material or unlawful interference with their rights, and would constitute evidence of negligence, was correct.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 964.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

A request to charge that defendant railroad company was not guilty of any negligence, causing the death of plaintiff's intestate, if intestate was guilty of conduct recited which amounted to contributory negligence, was properly refused.

4. TRIAL — REFUSAL OF REQUEST — CURING ERROR.

A finding that intestate was guilty of contributory negligence cured error in the refusal of a prayer on such issue.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4230.]

Appeal from Superior Court, Lincoln County; Cooke, Judge.

Action by R. S. Edwards, as administrator, etc., against the Carolina & Northwestern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. H. Marion and C. E. Childs, for appellant. D. W. Robinson, for appellee.

CLARK, C. J. At Lincolnton Station the defendant's tracks are on the north side of the depot, and those of the Seaboard Air Line Railway are parallel and on the south

side. On the day in question a long freight train had come in on the defendant's track, and had been engaged in unloading and shifting some half hour, when the passenger train came in on the other road. Thereupon the defendant's freight train was "cut open" where the street leading to the town crossed its track. This street was then used, and had been for many years, as the main and only thoroughfare to and from the trains and depot. After being left open a short while, half the width of the street or less, and before the Seaboard passenger train had left, this interval in the defendant's freight train was closed to three or four feet in width. The plaintiff's intestate, who was the mail carrier between the station and the post office (which was on the north side), came from the Seaboard train pushing a wheelbarrow loaded with mail. He threw the mail across the opening, it being too narrow for his wheelbarrow, and then was trying to cross through himself, when the train came back and killed him. The defendant made the usual motion in negligence cases to take the case from the jury, but his first exception for refusal of a nonsuit needs no discussion.

The second exception is because the court charged the jury that "it is the duty of the defendant's engineer or fireman to ring the bell or sound the whistle, or to give other suitable and sufficient signals and warnings of the approach of its train, while moving its trains in its yards, and to use all proper and reasonable efforts to avoid injuring any party who may be in its yards on legitimate business; and if the jury find from the greater weight of evidence that the defendant failed to give such signal and take such precautions, and the said acts on the part of the defendant resulted in the killing of the plaintiff's intestate, they should answer the first issue 'Yes.' *Smith v. Railroad*, 132 N. C. 824, 44 S. E. 663." The defendant insists that this is contradictory, because the first part of the instruction is in the alternative, "ringing or sounding the whistle," and in the second part "giving the signal and take such precautions." But we do not so find it. The latter part says "signal and precautions," which is merely the equivalent of the alternative "signal" and "proper and reasonable effort" to avoid injury to others mentioned in the first part of that instruction.

The third exception is to the following instruction: "The use of the highways and streets by the traveling public belongs as much to the public as the track does to the railway company; and for the company to block up the highway without absolute necessity, or to render its use so dangerous as to deter the traveling public, or to keep them in constant fear of life and limb, would be a material and unlawful interference with their rights; and if the jury find, from the greater weight of the evidence, that the defendant in this case so blocked up and obstructed a pub-

lic highway in the town of Lincolnton, this would be evidence of negligence, and if such negligence caused the killing of the plaintiff's intestate, then the jury will answer the first issue 'Yes.' *Norton v. Railroad*, 122 N. C. 910, 29 S. E. 893." But we think it a correct statement of the law, and this also disposes of the fourth exception.

The fifth exception to a refusal of a prayer as to contributory negligence need not be considered; for, if it were conceded to have been error to refuse it, the jury cured such error by its finding that the plaintiff's intestate was guilty of contributory negligence. It is true this prayer was that the defendant was not guilty of any negligence, if the intestate was guilty of conduct recited which would amount to contributory negligence, and was properly refused on that ground. There was conflicting evidence as to whether the flagman told the plaintiff's intestate to pass through, or told him not to do so, and whether the train came back on a signal or not. The jury found on the first of these propositions that the intestate was guilty of contributory negligence in trying to pass through the narrow opening, but further found that there was negligence in moving the train back and closing the gap without warning to the intestate of such movement, and that this negligence was the proximate cause of his death. The judge told the jury that if they should "find that, notwithstanding the negligence of the intestate in entering upon the crossing, the defendant, by the exercise of ordinary and reasonable care in the movement of its train, could have avoided striking the intestate, then they should answer the third issue 'Yes.'"

The case was fully and very ably argued here on both sides, but on full examination of the whole case we think that the judgment below should be affirmed.

Affirmed.

(139 N. C. 494)

IN RE POPE'S WILL.

(Supreme Court of North Carolina. Nov. 15, 1905.)

WILLS — EXECUTION — WITNESSES — SUBSCRIPTION.

Where a witness to a will took part in the physical act of writing her name as a witness, by holding the pen while the name was written by another at her direction, which was done *animo testandi*, at the testator's request, and in his presence, she was an effectual subscribing witness to the will, though she was able at the time to write her own name.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 822.]

Appeal from Superior Court, Iredell County; Long, Judge.

Application for probate of the will of Elijah Pope, deceased. From a decree denying probate, Charles Pope appeals. Reversed.

Issue *devisavit vel non* on a paper writing propounded as the will of Elijah Pope, deceased, transferred from the clerk, and

heard before the judge and a jury in the superior court. There was testimony to the effect that there were present at the execution of the paper the alleged testator, D. J. Fulbright, a justice of the peace, Martin Miller, Candace Pope, and Charlie Pope. D. J. Fulbright prepared the paper, and same was signed by Elijah Pope as his last will and testament in the presence of two witnesses. Martin Miller signed his name as subscribing witness, and then wrote the name of the other witness, Candace Pope, who held the pen while this was done, and who had been requested by the testator to subscribe as the other witness. Martin Miller, one of the subscribing witnesses, testified to the execution of the paper writing by Elijah Pope, and that he signed as subscribing witness, and in reference to Candace Pope, who signed as witness, said: "Candace asked me to write her name. She had hold of the pen all the time I was writing her name. She and the old man asked me to write her name." Candace Pope testified: "I am daughter of Elijah Pope, and lived with him. I was there the latter years of his life. Mr. Fulbright came over. Father sent for him. Got there about dusk. Martin Miller was there. Father signed the paper. I signed it. Father asked me to sign it. My name is C. L. Pope. I had hand on the pen. I signed it. Nobody held my hand. When I signed it I was standing at Martin's back. He was sitting at a chair at a table. He had the pen. I held the pen at the end. In this way my name was put to the will. I asked him to hold the pen. My daddy was sitting there. Mr. Fulbright was there. Father was 84 years old at the time. He seemed like he always did. He died about 10 months after that, I think; am not certain. He complained of heartburn; went off to the bottoms and died there; died suddenly, don't know what was the matter with him. His mind was good as usual." It was also in evidence that Candace Pope could write. After the witnesses to the paper writing had testified, the propounders offered the same as the will of Elijah Pope. The caveators objected, for that the subscribing witness C. L. Pope stated that she could write, but did not herself subscribe her name, but authorized the other witness, Miller, to write her name, and she held the end of the pen while he wrote her name, and that therefore she did not subscribe her name agreeably to the requirements of the statute. The objection was sustained. The propounder excepted, and from judgment against him appealed.

L. C. Caldwell and Z. V. Long, for appellant. J. B. Connelly and R. B. McLaughlin, for appellees.

HOKE, J. The point which the parties desired and intended to present, and which the record does present, is thus stated in the case on appeal: "The only question is as to the attestation of the will by one of the subscrib-

ing witnesses, O. L. Pope; her name appearing thereon in the normal handwriting of the other subscribing witness, M. L. Miller, and nothing appearing on the face of the paper to show that Miller had authority to sign her name, or that the subscription is not in her handwriting, except from the evidence which is set forth in the case." On that question the court is of opinion that there was error in the ruling of the judge below; and on the testimony presented, if believed by the jury, the paper writing was properly proven as the last will and testament of Elijah Pope. In construing the statute as to written wills, with witnesses, it is accepted law that the witness must subscribe his name to the paper writing *animo testandi*, in the presence of the testator, and after the testator has himself signed the same. *Ragland v. Huntingdon*, 23 N. C. 563; *In re Cox's Will*, 46 N. C. 321; *Chase v. Kittredge*, 93 Mass. 49, 87 Am. Dec. 687. And it has been long established that the witness may properly subscribe by making his mark. *Pridgen v. Pridgen*, 35 N. C. 259; *Devereux v. McMahon*, 108 N. C. 184, 12 S. E. 902, 12 L. R. A. 205. Some of the courts have also decided that the witness may subscribe by causing a third person to write the name of the witness in his presence and that of the testator, and without such witness taking any physical part in the act. *Jesse v. Parker*, 6 Grat. 57, 52 Am. Dec. 102; *Smythe v. Irick*, 46 S. C. 299, 24 S. E. 69, 32 L. R. A. 77, 57 Am. St. Rep. 684. And the courts of New Hampshire, Kentucky, Kansas, and some recent decisions in New York are to the same effect. There is strong authority to the contrary. *Riley v. Riley*, 36 Ala. 496; *Simmons v. Leonard*, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875; *McFarland v. Bush*, 94 Tenn. 538, 29 S. W. 899, 27 L. R. A. 662, 45 Am. St. Rep. 760; *Horton v. Johnson*, 18 Ga. 396. Our own court does not seem to have passed on this question directly, and it is not necessary to do so in the case before us; for the evidence is to the effect that Candace Pope held the pen during the entire time her name was being written. The witness took part in the physical act of writing her name *animo testandi*, in the presence of the testator, at his request, and thus fulfills every requirement for an effectual subscribing witness to a will. Such requirement is stated by an approved writer as follows: "A person, to become a subscribing witness to a will, must sign his name or make his mark, or do some physical act, affixing or recognizing his name, which he intended as a subscription." *Martindale on Conveyancing* (2d Ed.) p. 554. And in *Underhill on Wills*, vol. 1, p. 274, it is said that not only a mark with the name of the witness attached, but anything that the witness shall write with intent that it shall stand for his name, shall be a valid signing by him. It has also been held that, if the witness puts his name to the paper *animo testandi*, he may subscribe by affixing his initials, and his hand

may be even guided by another. If the witness can effectually subscribe in the many modes suggested, it would seem that he could do so when he holds the pen while his entire name and full signature is written.

The only reason suggested against the validity of this attestation is the fact that the witness was able to write herself, and it is contended that this kind of signature is only sanctioned when the witness is unable to write, or, at most, when temporarily disabled. But the authorities do not support this position. As a matter of fact, in most cases where the witness has been permitted to subscribe in this way, he was unable to write; but this fact was not regarded as essential and should not be controlling. One principal purpose in requiring the attestation of wills is to surround the testator with witnesses who are charged with the present duty of noting his condition and mental capacity. Another is to insure the identity of the instrument and to prevent the fraudulent substitution of another document at the time of its execution. Taking part in some physical act in the presence of the testator by which the name of the witness is affixed to the instrument *animo testandi* is the essential feature of the requirement. In *re Cox's Will*, supra. It is always desirable that a witness who can write his name should be selected, and that he should write the signature in his own hand; but this is a matter of convenience in the probate of the paper, more particularly in case of the death of the witness, and does not bear with special force on the act of execution—the *res gestæ*. Thus, in *Harrison v. Elvin*, 43 Eng. Com. Law, 658, where it was urged upon the court that only a witness who could write should be allowed as a subscribing witness, because otherwise the signature could not be proved after his death, Lord Denman rejected the suggestion as controlling, saying that this was only an inconvenience and likely to arise in any kind of an attestation. It is not of the first importance, therefore, whether the witness could or could not write, and the authorities are to the effect that to become an effectual subscribing witness by making a mark, or in the other ways suggested, it is not necessary to show as a prerequisite that the witness was unable to write. In *Martindale on Conveyancing*, § 190, it is said: "It may be observed that it is not necessary that a party should sign his name; but his mark is sufficient, though he should be able to write." In 3 *Washburn on Real Property*, 286, we find it stated as follows: "Affixing his mark by the grantor against his name, though written by another, is a signing, though it do not appear that he cannot read or write." These authorities are cited with approval in *Devereux v. McMahon*, 108 N. C. 142, 144, 12 S. E. 902, 12 L. R. A. 205. In 1 *Williams on Executors*, 134, it is said that the decisions on the construction of the statute of frauds appear to make it clear that in case of the witness, as well as the testator, the subscription by mark

is sufficient, notwithstanding the witness is able to write. In *Jesse v. Parker*, supra, it is not stated that the witness could not write; and in *Smythe v. Irick*, supra, it expressly appears that the witness could write, and it was held that this fact did not affect the principle. It will be noted that these two last cases are from courts which maintain the position that a subscription can be made without any physical or manual act by the witness at all; but they are apt as authorities on the position now being maintained. The point is expressly decided against the position of the caveators in *Baker v. Denning*, 35 E. C. L. 335, 8 Adol. & Ellis, 94. The witness Candace Pope having taken part in the physical act of writing her name as witness, and this having been done *animo testandi*, at the request of the testator, and in his presence, the court is of opinion that she is an effectual subscribing witness to the will, and that this result is not affected by the fact that such witness was at the time able to write her own name.

There was error in the ruling of the court, and a new trial is awarded.

New trial.

(140 N. C. 18)

BUNKER v. BUNKER et al.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. JUDGMENT—RES JUDICATA.

On an application for construction of a will and for an accounting, a claim for costs in a prior suit and interest was filed as a lien on certain real estate belonging to the estate, payable out of rents and profits by B. It was first allowed, but afterwards omitted from the report of a referee under order of court, to which omission plaintiff excepted. The exceptions were overruled and a final judgment was rendered, which did not in terms include such costs, etc., but provided that plaintiff should only recover a certain sum and the "costs" of the action. No exception was entered or appeal taken from this judgment, and the amount recovered and the costs were paid. *Held*, that such judgment was *res judicata* of B.'s liability to pay the costs of such former suit from the assets of the estate.

2. SAME—REOPENING.

Where a judgment was rendered, and no exception was entered, no appeal taken, and the amount recovered and the costs paid, the vitality of the suit and of the judgment was fully spent, and the latter could not be reopened or the suit revived.

Appeal from Superior Court, Surry County; O. H. Allen, Judge.

Action by C. W. Bunker, as administrator with the will annexed of the estate of Chang Bunker, deceased, etc., against Adelaide Bunker and others, for an accounting. From a judgment for plaintiff, defendants appeal. Reversed.

Plaintiff, C. W. Bunker, in behalf of himself and as administrator with the will annexed of his father, Chang Bunker, and as guardian of Hattie Bunker, another child, brought this action against the defendant Adelaide Bunker, widow of Chang Bunker, for a construction of his will and an account-

ing in respect to certain rents and profits received from the lands devised to her and others in her husband's will. Her codefendants are the other children of the testator and the husbands of those who are married. The clause of the will in question provided that, if the rents and profits of his lands should be more than is necessary for the support of his "single and infant children and his wife," the residue should be equally divided among all his children. The court at August term, 1886, construed the will, and ordered a reference to R. S. Folger to take and state an account of rents and profits in the hands of the defendant Adelaide Bunker, and to ascertain and report the residue, if any, going to the children. The referee reported, and, among other items of the account, charged the said defendant with the sum of \$525.15, amount of costs paid in the suit of Jones v. Bunker, concerning a part of the land, and interest on the same, \$367.68. Defendant Adelaide Bunker excepted to this charge. The court, Judge Boykin presiding, at the spring term, 1893, overruled this exception, and, having sustained certain other exceptions of the said defendant, recommitted the case, with directions, to the referee, to the end that the account might be correctly taken and the true balance ascertained according to law. A new account was taken and stated by the referee and reported to the court. In this account the said defendant was again charged with the costs paid by C. W. Bunker in the suit of Jones v. Bunker, to be paid out of the rents and profits of the land. To this there was no exception, but exceptions were filed to other items, and at the hearing, fall term, 1895, the court, having considered the exceptions, and concluding that the account had been taken on a wrong principle, set it aside and ordered a new account, to be taken in accordance with the directions then given. The referee reported, and in the account stated by him failed to charge, or to make any reference to, the item of costs in the suit of Jones v. Bunker. Among other exceptions of plaintiffs to this report, not necessary to be stated, was the following: That the referee failed to find the amount, \$525.15, paid by C. W. Bunker as costs in the case of Jones v. Bunker, with interest on the same, as heretofore found by the referee to be due C. W. Bunker, to be a first lien on said estate, or to be first paid out of the rents and profits of the land described in the pleadings in this case. At the November term, 1900, the court, Judge Timberlake presiding, after sustaining one of defendant's exceptions to the report and overruling others, and after overruling all of plaintiff's exceptions, including, of course, the one as to the costs in the suit of Jones v. Bunker, "adjudged that the heirs at law of Chang Bunker [plaintiffs and defendants, who are named in the judgment] recover the sum of \$801.51, with interest thereon from the date of the payment, and also the costs of the case, to be taxed by the clerk." There was no excep-

tion to this judgment, and no appeal therefrom. The case disappeared from the trial docket and was transferred to the judgment docket. The amount of the judgment was fully paid, as counsel admitted in this court. At fall term, 1904, on motion of the plaintiffs, after notice, the court ordered the case to be reinstated for further proceedings. After reciting that at spring term, 1893, the plaintiff had been allowed by the court, upon the report of the referee, the amount of the costs in Jones v. Bunker, and that there had been no return or report of rents and profits by defendant Adelaide Bunker since 1897, the court ordered a reference for the purpose of having taken and stated an account of rents and profits since that time, and directed that the amount of the costs in Jones v. Bunker, so allowed by the referee and court at a former term, be paid out of any surplus of rents and profits. The defendants excepted to this order and appealed, for the following reasons, among others: (1) That the order is not supported by the record; (2) that the order reinstating the cause is erroneous, the judgment of Judge Timberlake being final; (3) that the order committing to a referee the claim of plaintiff, C. W. Bunker, for the costs in the suit of Jones v. Bunker, is erroneous, as this item was presented by the exceptions to the report heard before Judge Timberlake, and passed on by him, and no exceptions were filed to his judgment.

Carter & Lewellyn and Manly & Hendren, for appellants. Watson, Buxton & Watson, for appellee.

WALKER, J. (after stating the case). There were several important questions discussed in this case, but the only one we need consider is that which relates to the nature and legal effect of the judgment rendered at November term, 1900, when Judge Timberlake presided. If it was a final judgment, the plaintiffs cannot be heard upon any matter which was litigated in the action and which was necessarily determined by it. In such a case the matter in dispute having passed in rem judicatum, the former decision is conclusive between the parties, if either attempts by commencing another action or proceeding to reopen the question. This doctrine is but an outgrowth of the familiar maxim that a man shall not be twice vexed for the same cause, and the other wholesome rule of the law that it is the interest of the state that there be an end of litigation, and consequently a matter of public concern that solemn adjudications of the courts should not be disturbed. Broom's Legal Maxims (8th Ed.) 330, 331. "If," says Lord Kenyon, "an action be brought and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment." *Greathead v.*

Bromley, 7 Durnf. & East (7 T. R.) 546. And again in another case he says: "After a recovery by process of law there must be an end of litigation. If it were otherwise, there would be no security for any person, and great oppression might be done under the color and pretense of law." *Marriott v. Hampton*, 7 Durnf. & East, 269. "Good matter must be pleaded [or brought forward] in good forme, in apt time, and in due order; otherwise, great advantage may be lost." *Coke*, 303b. If there be any one principle of law settled beyond all dispute, it is this: that whensoever a cause of action, in the language of the law, "transit in rem judicatam," and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever; and so it is, also, that if the plaintiff had an opportunity of recovering something in litigation formerly between him and his adversary, and but for the failure to bring it forward or to press it to a conclusion before the court he might have recovered it in the original suit. Whatever does not for that reason pass into and become a part of the adjudication of the court is forever lost to him. *U. S. v. Leffler*, 11 Pet. 101, 9 L. Ed. 642. Judge Willes thus states the rule: "Where the cause of action is the same, and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action." *Nelson v. Couch*, 15 C. B. (N. S.) 108 (a. c., 109 E. C. L. R. 108). These principles have been fully adopted by us, as will appear in the case of *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108, where the doctrine as to the plea of former judgment is concisely and accurately stated as follows: "The controverted point in that case [*Wagon Co. v. Byrd*, 119 N. C. 460, 28 S. E. 144] was whether a judgment was an estoppel as to the issues raised by the pleadings, and which could be determined in that action, or only as to those actually named in the judgment. The court held the former to be the rule settled by the reason of the thing and by the authorities. It was not held that where [as in the present case] other causes of action could have been joined the judgment was final as to them also. It was only intended to say that the cause of action embraced by the pleadings was determined by a judgment thereon, whether every point of such cause of action was actually decided by verdict and judgment or not. The determination of the action was held to be a decision of all the points raised therein; those not submitted to actual issue being deemed abandoned by the losing party, who did not except." And in *Wagon Co. v. Byrd*, supra, it is said: "The judgment is decisive of the point raised by the pleadings or which might properly be predicated upon them." The doctrine does not extend to any matter which might have been brought into the litigation or any cause of action which the plaintiff might have join-

ed, but which in fact was neither joined nor embraced by the pleadings. *Tyler v. Capeheart*, supra.

Applying the foregoing and familiar principle to our case, we find that the facts bring it clearly within its scope and influence, and certainly, at least, so far as the matter of costs in the suit of *Jones v. Bunker* is concerned. It was an item in the account originally, and was properly considered by the referee, as it is alleged in the complaint, and denied in the answers, that it is a proper charge against the said *Adelaide Bunker* and should be paid out of the rents and profits of the land. It was at first allowed by the referee, and afterwards omitted from his account, reported in obedience to an order requiring a new account to be taken and stated. To this omission plaintiffs excepted, and, if it be conceded that the exception was directed only to the failure of the referee to charge the former allowance upon the rents and profits, and this seems to be so, it nevertheless appears that the plaintiffs permitted what is in form and substance a final judgment to be rendered, which did not in terms include this allowance, but provided, on the contrary, that plaintiffs should only recover a certain sum and the costs of the action, which necessarily excluded from the judgment the recovery of the costs paid in the suit of *Jones v. Bunker*. That this was a final judgment there can be no doubt. It possessed all of the elements and characteristics of such a judgment. It decided the case upon its merits, without any reservation for other and future directions of the court, so that it was not necessary to bring the case again before the court; and when it was pronounced the cause was at an end, and no further hearing could be had. *Flemming v. Roberts*, 84 N. C. 532; *McLaurin v. McLaurin*, 106 N. C. 331, 10 S. E. 1056. All discussion of questions involved in that suit is shut out by the judgment. This ruling applies with equal force, we think, to the other branch of the order, which required the referee to take an account of the rents and profits received since March, 1897. By the very terms of the judgment, the account was closed to the day of its rendition, and no other or further accounting could be ordered in respect to matters not included in that suit. Such relief must be sought in a new and independent action. The judgment was rendered at November term, 1900. No exception was entered and no appeal taken, but the amount recovered and the costs were paid. When this was all done by and with the acquiescence of the plaintiffs, the vitality of that suit and of the judgment therein was fully spent, and the latter could not be reopened and the suit revived by any sort of proceeding known to the law.

The court erred in making the order, and the case is remanded, with directions to set it aside and to deny plaintiff's motion.

Reversed.

(139 N. C. 613)

STATE v. JONES et al.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. EMINENT DOMAIN—STREETS—CONDEMNATION—APPRAISERS—FAILURE TO SELECT—DELAY.

The fact that the owner of land sought to be condemned for a street refused on notice to select an appraiser, as he was entitled to do, and appealed to the superior court, did not delay the opening of the street until the appeal was finally determined.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 632, 672.]

2. SAME—RESOLUTION OF CONDEMNATION—NOTICE.

In proceedings to condemn land for a street, the resolution condemning and appropriating the land to public use was a legislative ex parte act, to which the owner was not a party, and of which he was not entitled to notice.

3. SAME—PAYMENT OF PRICE—DELAY.

In proceedings to condemn land for a street, delay in payment of damages assessed for the land condemned did not stay the exercise of the public's right to take possession.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 630-634.]

4. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EMINENT DOMAIN PROCEEDINGS.

The Creedmoor charter (Priv. Acts 1905, p. 1006, c. 398) provides for the condemnation of land for street purposes, and section 17 prescribes the procedure, and declares that the value of the land condemned shall be appraised by three freeholders of the town qualified to act as jurors, one of whom is to be appointed by the landowner, another by the town, and those two to select a third; that the report of such appraisers shall be signed by at least two of them and filed with the mayor, and lie in his office 10 days for inspection, and authorizes the landowner to appeal to the superior court if dissatisfied. *Held*, that such provision was not unconstitutional, as depriving the landowner of his property without due process of law, for the implication requiring notice is plain and in pursuance thereof notice in fact was given.

5. JURY—RIGHT TO JURY TRIAL—CONDEMNATION PROCEEDINGS.

A proceeding for the assessment of damages for land taken for a street is not a proceeding in which the landowner is entitled to a jury trial.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 116-119.]

6. SAME.

The right of a landowner to a jury trial in proceedings to condemn land for a street, if guaranteed by the fundamental law, is protected by Creedmoor Charter (Priv. Acts 1905, p. 1006, c. 398) § 17, providing for the condemnation of land for street purposes, and authorizing an appeal from the award of damages to the superior court, where all issues of fact are triable by jury.

J. EMINENT DOMAIN—APPRAISERS—QUALIFICATIONS.

Where a right of appeal is given from an award of damages in proceedings by a town to condemn land for a street, or where there is authority in a court of competent jurisdiction to review the proceedings, it is immaterial that the appraisers appointed were freeholders of the town.

8. SAME—STATUTES—CONSTRUCTION.

Creedmoor Charter (Priv. Acts 1905, p. 1006, c. 398) § 17 provides for the condemnation of land for street purposes, and declares that the report of appraisers shall lie in the

mayor's office for purposes of inspection and appeal, and that, unless an appeal is taken from such report, "the land so appraised shall stand condemned for the use of the town and the price fixed shall be paid." *Held*, that such provision applied only to the procedure for fixing the price to be paid, and should be construed to mean that if no appeal was taken from the appraised value the land should stand condemned "at such value," but does not suspend the right of entry if an appeal is taken.

Connor, J., dissenting.

Appeal from Superior Court, Granville County; Council, Judge.

Jesse Jones and others were indicted and tried for forcible trespass, and from a judgment of not guilty on a special verdict, the state appeals. Affirmed.

Winston & Bryant, Graham & Devin, and the Attorney General, for the State. B. S. Royster and T. T. Hicks, for appellees.

BROWN, J. The defendants, acting under the authority of the board of commissioners of the town of Creedmoor, entered upon certain land of S. H. Rogers, the prosecuting witness, within the said town, and proceeded to open and lay out a public street. Rogers was present and objected. We assume that the acts of the defendant Lyon, who was mayor, and his associates constituted a forcible trespass, unless they were duly authorized to enter upon and take possession of said land and open it as a public street. At a meeting of the board on May 16, 1905, the commissioners adopted a resolution condemning the land, upon which the trespass is charged to have been committed, for use as a public street and directing that it be opened. The resolution provided for the appointment of an appraiser on behalf of the town and for notice to Rogers to select his appraiser, and fixed a time and place for Rogers and his appraiser to meet the town appraiser on the premises to fix the compensation. The town of Creedmoor was chartered by the General Assembly of 1905 (Priv. Acts, p. 1006, c. 398). Section 15 (page 1009) of the act gives to the commissioners plenary power to condemn land for streets, sidewalks, and for other town purposes, and makes it their duty to keep the streets in repair. Section 17 prescribes the machinery for condemning land for streets or for other town purposes, and provides that the value shall be appraised by three freeholders of said town qualified to act as jurors and not connected by blood or marriage with the landowner or officially with the town. The section also provides for an appeal. In case no appeal is taken within 10 days the condemnation proceedings are final, and the money awarded shall be paid from the town funds. So far as we can see, the authorities of the town acted in strict conformity to the act in passing the resolution condemning the property. They appointed an appraiser and notified Rogers to select one. The fact that he refused and that he appealed to the superior court could

not have the effect to delay the opening of the street until the appeal was finally determined. The appeal was not from the resolution condemning and appropriating the land to a public use. That was a legislative *ex parte* act, of which Rogers was not entitled to notice, and to which he could not be a party. The appeal was necessarily from the report of the appraisers fixing the compensation. As we shall hereafter see, the delay occasioned thereby in the payment of the money could not stay the sovereign power in taking possession of the land.

We agree with the Attorney General that if the provisions of the charter of Creedmoor are insufficient, so that the power of the eminent domain cannot be lawfully exercised by the town authorities, the defendants would be guilty. It is objected that the charter makes no provision for notice to the land owner, and therefore defendants cannot justify under it. Mr. Mills, in his work on Eminent Domain, states that notice is not absolutely necessary. Seizure is constructive notice, and the character of the proceeding gives notice to the world. Section 94. But we hold that, while the landowner was not entitled to notice, when the Legislature, or the commissioners to whom it has delegated its powers, appropriated his property to a public use, he was, however, entitled to notice and a hearing when his compensation was fixed. Mr. Elliott, in his work on roads and streets (section 200), examines this question carefully, and says: "It is, however, held in most of the cases which have given the subject careful consideration that a statute will be valid which determines without any interference a question of the necessity for the appropriation, or submits it without providing for notice to an inferior tribunal, but that a statute which undertakes to determine the question of compensation, or to submit it to commissioners or appraisers, without providing for notice, is unconstitutional." The same author says, in section 198: "There are some courts of high authority which hold that although notice is indispensable, it is not essential to the validity of the statute that it should provide for notice, and that it is sufficient if due notice is actually given." The authorities he cites are from some of the ablest courts in this country and fully support the author's views.

Of what steps and proceedings is the landowner entitled to notice? Mr. Lewis, in his work on Eminent Domain (volume 2, § 66), answers the question as follows: "All questions relating to the exercise of the eminent domain power, and which are political in their nature and rest in the exclusive control and discretion of the Legislature, may be determined without notice to the owner of the property to be affected. Whether the particular work or improvement shall be made or the particular property taken are questions of this character, and the owner is not entitled to a hearing thereon as a matter of

right." Other authorities hold the same view. The Supreme Court of Ohio says: "It is not upon the question of the appropriation of lands for public use, but upon that of compensation for lands so appropriated, that the owner is entitled of right to a hearing in court and the verdict of a jury." *Zimmerman v. Canfield*, 42 Ohio St. 433. To the same effect, see *People v. R. R. Co.*, 160 N. Y. 225, 54 N. E. 689. While the charter of Creedmoor makes no provision for notifying the land owners of contemplated action by the commissioners, it provides for ample notice when the landowner's property is to be appraised and his compensation fixed. In fact, it gives him the right to appoint one of the appraisers, and provides that one shall be appointed by the commissioners and those two shall select a third. The charter further provides that the report of the appraisers shall be signed by at least two of them, and shall be filed with the mayor and "lie in his office ten days and be subject to inspection." It also provides for an appeal to the superior court by the landowner, if he is dissatisfied. Giving the landowner the right to select one of the appraisers and the right of appeal are tantamount to an express provision requiring notice to him of the appraisal. The board required such notice to be given to Rogers, and it is admitted that he refused to act under it and to appoint an appraiser. If he had not received the notice, he could not have refused to act. Instead of selecting "his man," as the statute provided, at the appointed hour he appeared on the ground and seated himself upon the fence, and thereby endeavored to obstruct the opening of the street. Mr. Randolph, in his work on Eminent Domain (section 338), says: "A condemnation proceeding which does not provide for notice seems to be considered in some decisions as essentially defective. But the better view is that such act may be made effective by actually giving the proper notice. Thus it has been held that notice is plainly intended where the act contemplates the participation of the owner in the proceedings, as where it authorizes him to assist in striking a jury or gives him the right to appeal." See, also, *State v. Jersey City*, 24 N. J. Law. 662; *State v. Trenton*, 36 N. J. Law 499; *Kramer v. Cleveland*, 5 Ohio St. 140; *Swan v. Williams*, 2 Mich. 427; *Belt Ry. v. Baltzell*, 75 Md. 94, 23 Atl. 74; *Peoria, etc., R. Co. v. Warner*, 61 Ill. 52. Mr. Lewis recognizes it as settled law by repeated adjudications that statutes authorizing condemnation and making no provision for notice are valid, if actual notice is given; but it is unnecessary that we should go that far in this case. Lewis on Eminent Domain, § 368. But at the same time he says: "By far the greater portion of the cases proceed upon the principle of implying a requirement to give notice from the provisions of the statute itself." The implication requiring notice in the charter of Creedmoor is plain, and in pursuance thereof

the notice was given. That is the ground upon which we place our decision.

2. Has the statute provided a proper tribunal to fix the compensation? We agree with the learned chancellor of New York that "the government is bound in such cases to provide some tribunal for the assessment of the compensation or the indemnity, before which each party may meet and discuss their claims on equal terms." 2 Kent, Com. 399. There is no constitutional provision in our state which guarantees a jury trial in such proceedings. The Constitution of the state does not refer to the right of eminent domain. The right to condemn and the duty to pay compensation are recognized by the courts as a right and duty appertaining to sovereignty, which the state may exercise freely upon all proper occasions, and which a jury has no right to control, except where an appeal is taken and tried in the nisi prius courts. *Scudder v. Trenton Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756. It is held by this court as early as 1837, in an elaborate opinion by Chief Justice Ruffin, that an assessment for damages in such a proceeding need not be made by a jury of 12 freeholders. It is not a controversy within the meaning of the Bill of Rights, nor is it such a trial by jury as that instrument declares shall be "sacred and inviolable." *Railroad Co. v. Davis*, 19 N. C. 452. If, however, a jury trial were guaranteed the landowner by the fundamental law, his rights in that respect are fully protected by his right of appeal to a court where all issues of fact are triable by jury. *State v. Lyle*, 138 N. C. 738, 51 S. E. 66. The method for the assessment of damages in the Creedmoor charter has been passed upon and fully approved by this court in *State v. Lyle*, 100 N. C. 499, 6 S. E. 379. In that case the charter of Reidsville was under consideration, and the section relating to the appraisement is copied in the opinion of Chief Justice Smith. The two are nearly identical, with the exception that in the Reidsville charter the mayor can appoint an appraiser if the landowner refuses. We do not think such omission in the Creedmoor charter invalidates it, for if the landowner refuses to select an appraiser it is his own folly. It is not necessary for us to decide as to the power of the mayor to fill the vacancy on the board of appraisers occasioned by the obduracy of the landowner. As he has taken an appeal, his damages will be assessed de novo by a tribunal whose jurisdiction is undoubted. Certainly the stubbornness of the landowner cannot be permitted to put a stop to the exercise of an undoubted and necessary power given to all towns by the General Assembly. The fact that the appraisers are freeholders of Creedmoor makes no difference. The question has been decided in other states, as well as our own, and it has been held that, where there is a right of appeal, or where there is authority in a court of competent jurisdiction to review the proceedings, the common council

of the town seeking to appropriate the land may appoint all of the appraisers. *Elliott on Roads & Streets*, § 281, and cases cited. In the Reidsville charter, passed upon by this court in *Lyle's Case*, the statute provided that all the appraisers should be freeholders and citizens of the town. *Lyle's Case* is practically on all fours with this, and, as it has remained unchallenged since 1888, we see no reason to overrule it now. It is cited and approved in several cases; the latest being *Railroad v. Newton*, 133 N. C. 134, 45 S. E. 549.

3. As soon as the commissioners in the exercise of the powers delegated to them appropriated the land to a public street, they had the right to enter and open it without awaiting the payment of damages. *State v. Lyle*, supra; *Cooley*, Const. Lim. § 480. This question is fully discussed in *Lyle's Case*, and sound reasons given why the public needs should not await the assessment and payment of damages. We think that decision is supported by the great weight of authority. *Railroad v. Davis*, supra; *Railroad v. Parker*, 105 N. C. 246, 11 S. E. 328; *Railroad v. Newton*, supra. The present chief justice says in *Newton's Case*: "Formerly the landowner had no right to a jury trial in fixing compensation upon condemnation of the right of way, nor was the compensation required to be paid before entry. Code, § 1946, changed this as to railroads by requiring the company to pay into court the sum assessed before entry." This opinion was approved by a unanimous court and delivered in 1903. A distinction is made as to the time of payment in cases where the seizure is made by the sovereign, as in this case, and where the land is condemned by a quasi public corporation exercising the power of eminent domain. In the former case, and in the absence of constitutional restrictions, it is held in most of the states that the making of compensation need not precede an entry upon the property, where, as in this case, provision is made by the sovereign power for the payment of the money. *Lewis on Eminent Domain*, § 456, and notes thereto, citing all the cases to that effect; *Randolph on Eminent Domain*, § 291; *Am. & Eng. Encyc. (2d Ed.)* vol. 10, p. 1139, and cases cited; *Elliott*, § 241. In *Mills on Eminent Domain*, § 125, North Carolina is put down as one of the states where in it is held that compensation need not precede the entry, but that there may be an entry and adjustment afterward. *Johnston v. Rankin*, 70 N. C. 550; *Railroad v. McCaskill*, 94 N. C. 746. The statute requires the report of appraisers to lie in the mayor's office for 10 days for purposes of inspection and appeal, and provides that, unless an appeal is taken from such report, "the land so appraised shall stand condemned for the use of the town and the price fixed shall be paid," etc. We think that this applies only to the procedure for fixing the price to be paid, and means that, if no appeal is taken from the appraised

value, the land shall stand condemned at such value. The appeal is not allowed to postpone the right of entry. Such a construction as that would seriously interfere with and indefinitely delay public works, such as opening or extending streets and the like. "Public policy forbids the suspension of operations on works of internal improvement during the pendency of litigation to ascertain the damage to which parties may be entitled." *Phifer v. Railroad*, 72 N. C. 434.

For the reasons given we are of opinion that the entry of defendants was rightful, and that upon the special verdict they are not guilty.

The judgment of the superior court is affirmed.

WALKER, J. (concurring). The defendants are indicted for a criminal trespass, and questions which might be open for discussion and decision, if there had been a direct attack made upon the proceedings for a condemnation of the land, by appeal or otherwise, are not to be considered in this collateral proceeding. It may be regarded as settled law that the power to take private property for public uses belongs to every independent government exercising sovereign power, for it is a necessary incident to its sovereignty and requires, therefore, no constitutional recognition. *U. S. v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015. No provision for condemnation has ever been inserted in our Constitution, but the right of eminent domain or the right to condemn private property for public uses has always been conceded as essential to the due exercise of the powers of government and to the promotion of the public welfare. Legislation in the exercise of this inherent power, though subject to judicial control, is said to be practically unlimited, if the purpose be a public one and sufficient provision is made for compensation to the owner of the property proposed to be taken. *Railroad v. Davis*, 19 N. C. 451; *Secombe v. Railroad*, 23 Wall. 108, 23 L. Ed. 67. The mode of exercising the power of eminent domain, unless otherwise provided in the organic law, rests in the sound discretion of the Legislature, subject, however, to the principle, just stated, that there must be sure and adequate provision for compensating the owner. *McIntire v. Railroad*, 67 N. C. 273; *Secombe v. Railroad*, supra; *Searl v. School Dist.*, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740; *Cherokee Nation v. Railroad*, 135 U. S. 641, 10 Sup. Ct. 935, 34 L. Ed. 295. If the facts of this case are examined in the light of the foregoing principles, it cannot be doubted that the Legislature has assumed to exercise its unquestionable right to have land condemned in the town of Creedmoor for public streets. The Legislature has conferred upon the town commissioners general authority to act in the premises, where lands are required for the purpose of opening and laying out streets

or for other public purposes, and has also provided a perfectly fair and sufficient method for ascertaining and paying just compensation to the landowners, whose property may be taken for the purpose. *Priv. Laws 1905*, p. 1006, c. 398. In this case the prosecutor did not see fit to avail himself of the privilege given him to appoint one of the appraisers, but willfully and obstinately refused to do so. He thus set the law at defiance. Not only did he attempt to shorten and weaken, but actually to paralyze, the arm of the law when stretched forth in an effort to promote the public welfare, and for no good reason whatever. There is and can not be any suggestion in this case that he was about to be wrongly or oppressively treated, or that his property was about to be taken without due process of law. When such has been the case, resistance to the last ditch is not only the privilege, but the duty, of the citizen, in the protection of his own property and in the vindication of constitutional right. Such conduct is not stubbornness, but lawful resistance. But willful and unreasonable obstruction to the due and orderly course of government and to the administration of law as declared by the proper authority is not only unwarranted, but entitles the offender to little or no consideration at the hands of the court, where there has been no clear violation of his rights. If he has lost any advantage secured to him by the statute through his refusal to accept it, why should we hear him now complain of the alleged imperfect execution of the law, growing out of his own misconduct, unless we propose to reverse or abolish the salutary maxim that no man shall be permitted to take any benefit of his own wrong, by which principle, if it is to stand unimpaired, he should be judged? The statute gave him a perfectly fair and adequate remedy for the full protection of his property, and for the recovery of just compensation, if the public required that it should be taken. Will the courts allow him to thus trifle with the law, and to make his trifling the foundation of his complaint that it was not well executed?

But, apart from these considerations, he has not lost any right by the supposed irregularity in the proceedings. The object in appointing the appraisers is to ascertain the measure of compensation, and nothing else. If he is dissatisfied with the decision of the appraisers, he is given the right of appeal, and of this right he has availed himself. The way is now open to him for the ascertainment of his damages by a jury, the most impartial body known to the law, before whom his rights can be determined both as to the facts and the law. That he cannot complain under such circumstances has been definitely and conclusively settled by this court, if we are not to disregard, but to follow, its solemn adjudications, and one in particular, which seems to me to dispose of all the disputed questions in this case, and

a decision, too, which received full consideration from a court of exceptional learning and ability. In *Johnston v. Rankin*, 70 N. C. 550, it appears that the sheriff had not only not notified the landowner of the day on which the appraisal of his land proposed to be condemned for a street would be made, but, worse than this, he notified him that the jury would appraise it on one day, when in fact they appraised it on a different day, thus not only failing to give him notice, but misleading him. The court said he was not bound by the proceeding, and "he might perhaps have regarded all after proceedings as trespasses, being under a warrant which was void as to him for want of notice," or he might have had the proceeding quashed. "But," says the court, "he appeals, and thus vacates the assessment during the pendency of the appeal. By voluntarily becoming a party he waives the irregularity of want of notice, and gives the appellate court jurisdiction to hear the case on the merits." "He clearly waived, by appealing, any objection to the defect in the proceedings, which would otherwise have invalidated them," says the court in another part of its opinion. This case also definitely decides that the commissioners are the sole judges of the public use and of the necessity for taking the land, and that the appeal involves nothing but the amount of compensation. "There is, therefore, nothing to forbid the defendants from proceeding with the improvement pending the appeal. The law of this state does not require compensation to be first made, as that of some states does." I have examined the charter then under review, and find that it nowhere expressly authorizes entry upon the land before compensation is made; but it provides that, on payment of the amount of the appraisal, the streets may be opened. In *McIntire v. Railroad*, 67 N. C. 278, the court says: "If the owner of land overflowed by a milldam could bring his action on the case for damages every day, no public mill could be established. In like manner, if the owner of land taken by a railroad for its track could bring his action of trespass every day, no railroad could be built. * * * If the officers of the company cannot enter on lands and make surveys without a trespass, they could never locate the road. And if the road were located, and its construction delayed until the damages to all the landowners on the route were ascertained under the act, the delay would be indefinite, and of no benefit to any one. To hold that, during the pendency of a proceeding by the company to have the lands condemned, it could not prosecute its works without being exposed daily to an action of trespass, would effectually defeat the policy of the act." To the same effect are *Railroad v. McCaskill*, 94 N. C. 746; *Railroad v. Davis*, 19 N. C. 451. In *Phifer v. Railroad*, 72 N. C. 433, it is held that the appeal carried the whole case into the superior court, "where the plaintiffs [the landowners] can have every right

which they seek in the action adjudged and determined." And in *State v. McIver*, 88 N. C. 686, it was said to be the rule in this state, in reference to the taking of private property for public uses, that the compensation to the owner need not precede the act of appropriation, if sufficient provision is made for compensation to the owner. Numerous other cases of like import might be cited, but those already mentioned will suffice to show the result of actual decision by this court upon the subject, and they are conclusive against the contention of the prosecution.

The words of this act, that if an appeal is not taken within 10 days "the land so appraised shall stand condemned for the use of the town and the price fixed by the appraisers shall be paid from the funds of the town," evidently mean that the appraisal shall stand as fixed by the appraisers, and not that the town shall have no right to take the land until the time for appealing has expired, for condemnation always precedes appraisal. Much stronger language was used in the charter of Asheville, construed in *Johnston v. Rankin*, *supra*, and yet the court held in that case that the town could enter and proceed with the work of laying out the street. But giving to the words we have quoted their broadest meaning, that the title did not pass until the time for appealing had expired, the town was not thereby forbidden to go upon the land for the purpose of laying out and constructing the street. We should always go to the farthest permissible length in protecting the rights and property of the citizen from unlawful interference, but some regard must also be had for the rights of the public, and we should be careful to see that the public welfare is not prejudiced by an undue consideration for private interests.

CONNOR, J. (dissenting). I should be content to note my dissent from the conclusion reached in this case, but for the fact that I am deeply impressed with the conviction that the opinion, of course unconsciously, weakens the security of private property and invites laxity, both of sentiment and conduct, on the part of those to whom the Legislature is constantly committing the exercise of the highest act of sovereignty. "Laws which authorize the taking of private property for public use should be strictly construed and closely scrutinized. Nothing justifies such an invasion of private right but an imperative public necessity, and the exercise of this right of eminent domain, under color of which so many iniquities have been committed, should be held strictly within the bounds provided by the Constitution and the laws." *Refining Co. v. Elevator Co.*, 82 Mo. 121. "The appropriation of private property under the right of eminent domain is an exercise of sovereign power, and, when reliance is placed upon statutes conferring the right, those statutes, being in derogation

of common right, must be strictly construed, and the right cannot be exercised, except in strict conformity to the power conferred." *Harvey v. Railroad*, 174 Ill. 295, 51 N. E. 163. "The privilege sought to be obtained by the application is against common right, and the law should be construed strictly against the privilege; and no question is better settled in this state than that, where a special and limited jurisdiction is conferred by statute upon an individual or a court, the record must affirmatively show a compliance with all the requisitions of the statute." *Martin v. Rushton*, 42 Ala. 239. "The law is jealous of the right of property holders, and adopts these formalities of procedure for their protection. * * * The right of eminent domain, that of taking the property of the private citizen without his consent and devoting it to the use of the general public, is an exercise of the highest act of sovereignty. It can only be called into existence by the authority of the Legislature and by the tribunal provided by law. This statute prescribes the mode, and I have no doubt whatever that it is mandatory. The failure of the city council to comply with it is fatal." *City of Madison v. Daley* (C. C.) 58 Fed. 753. "In cases like the present it is always to be borne in mind that these acts of Parliament are acts of sovereign and imperial power, operating in the most harsh shape in which that power can be applied in civil matters. * * * Whoever considers the effect of this must see the consequences which frequently do happen to individuals. Property to which they have attached their whole fortunes and interests may be taken from them by an absolute exercise of imperial power, and their whole circumstances and situation in life may be entirely altered for a sum of money to be fixed by somebody else. * * * The hardship imposed on individuals, I think, and I am glad to think, has of late years been subject to a more anxious consideration than it used to be. Probably the frequency of applications for such acts of Parliament and the vast expense of the works have occasioned that particular consideration. * * * It would be a strong measure indeed to allow men's property to be summarily taken from them, on the notion of the general benefit, when the parties taking it have not done those things which are incumbent on them to secure their capacity and ability to complete the whole undertaking." Lord Langdale, M. R., in *Gray v. Railway Co.*, 9 Beav. 391. "So high a prerogative as that of divesting one's estate against his will should only be exercised when the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection." *Cooley*, Const. Lim. 763. "All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its

exercise and operation than any other; one judge saying: 'An act of this sort deserves no favor. To construe it liberally would be sinning against the rights of property.'" *Lewis*, Em. Dom. 254. "In construing statutes which are claimed to exercise the right of eminent domain, a strict, rather than a liberal, construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property." *Matter of Bridge Co.*, 108 N. Y. 483, 15 N. E. 601.

I have noted the expressions of these jurists and authors, both in this country and in England (and hundreds more of like import can be found), to emphasize the fundamental rule of construction of statutes conferring upon corporations, either public or private, the power of eminent domain in respect to the matter of procedure. In the light of the decisions of this court, beginning with *Railroad v. Davis*, 19 N. C. 451, I concede that the Legislature may confer upon a corporation, having the right to condemn, the power to enter upon the land and subject it to the burden before compensation is made. In this opinion I do not care to controvert the proposition that power to enter may be conferred even before the assessment of damage is made. For the purpose of this discussion, I fully concede the right, in as full and complete measure as it is asserted in the opinion of the court. My dissent is based upon the construction of the statute. While I do not concede the necessity of invoking the rule, I insist that, in the light of authority and upon sound reason, the statute must be construed strictly, and all reasonable doubt resolved in favor of the owner. It is said that the power to condemn is political, and not judicial, and from this proposition, which is conceded, the conclusion is reached that, immediately upon the exercise of the power by a declaration of condemnation, the right to enter upon and occupy the property is vested in the corporation without notice to the owner; that the institution of proceedings fixing the compensation and providing for the payment is secondary, both in point of time and importance. It seems to be conceded that the owner is entitled to some sort or kind of notice at this time. However this may be, the proposition, startling to the citizen who has been educated in the belief that he lives under a government of laws and not of men, has judicial warrant for its support. It would serve no good purpose to discuss the foundation of this power, which resides in all forms of government. In view of the fact that the power is conferred upon all sorts and kinds of corporations at every session of the General Assembly, it would seem wise to require a substantial, if not a strict, compliance with the requirement of

the statutes in regard to procedure by which the state parts with and delegates to others the exercise of this sovereign power, so vitally concerning the rights of the citizen and the honor of the sovereign.

The real question in this case is whether the charter of the town of Creedmoor confers upon the authorities the power to enter upon the property of the citizen until it is condemned, and whether it is condemned until the assessment of damages is made by the persons and in the manner prescribed by the charter. Section 17, c. 398, p. 1009, Priv. Laws 1905, being the charter of the town, provides that, whenever it shall become necessary to condemn land for streets, the value of such land shall be assessed by "three freeholders of said town. * * * One of said appraisers shall be appointed by the board of commissioners of said town, one by the land owner or his agent, and the third to be selected by the two so appointed." It is provided that the appraisers shall be sworn and shall file their report with the mayor within one week after the appraisement, etc. "Said report shall be signed by not less than two of the appraisers, and shall lie in the mayor's office for ten days and be subject to the inspection and examination of the landowner or his agent, and unless an appeal is taken, and such appeal shall lie to the superior court of Granville county in term time, during said period of ten days by the town or the landowner, the said land so appraised shall stand condemned for the use of the town, and the price fixed by the appraisers shall be fixed from the funds of the town." It will be observed that no power is expressly conferred upon the officers of the town to enter upon the land and open a street. Of course, such power is incident to condemnation and need not be expressly given. I find in several charters granted to railroad companies in this state the power to enter upon the land and construct the road before condemnation proceedings are instituted. Such power is given in the charter of the Raleigh & Gaston Railroad Company, which was before the court in *Railroad v. Davis*, supra. In the charter of the Wilmington & Raleigh, afterwards the Wilmington & Weldon, Railroad Company, no such power is given. On the contrary, it is provided that if it be necessary to take land a petition shall be filed, etc. After providing for the assessment of damages, etc., it is said the corporation may "thereupon, and also if no damage is due, enter upon the land and construct," etc. Power of entry to make surveys is given before condemnation. Chapter 49 of the Code, providing for the organization of railroad companies and prescribing the manner in which they shall proceed to condemn land, contains this language: "If the said company, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said company may enter, take pos-

session of and hold said land, notwithstanding an appeal," etc. Section 1948. I note the provisions of these charters to show that, when the Legislature intended to confer the right to enter before the assessment is made or the damage paid, it has so declared in express terms.

In this case, it is found by the special verdict that the commissioners met on May 16, 1905, and adopted a resolution declaring that it was necessary and convenient for the public that a street be opened through the land of Rogers, appointing an appraiser on the part of the town, and directing that the owner be notified to appoint an appraiser, and fixing the time at which they should meet and assess the damage. The owner was notified by the mayor. He declined and refused to select an appraiser. Thereupon, on May 24, 1905, the board of commissioners selected a second appraiser to act with the one formerly appointed. The two selected a third appraiser, and the three persons thus selected went upon the premises and laid out the street, not in conformity to the resolution, and assessed the damages. They filed their report on May 25, 1905. At a meeting of the board on May 27th the report was adopted, and on the 29th the prosecutor gave notice of an appeal. The report stated that they had taken 250 feet of land; whereas, the true quantity included in the street was 800 feet. On the 29th of May the defendants entered upon the land in the manner set forth in the special verdict. The correctness of the judgment below depends upon the answer to the question whether the land stood condemned on the 29th of May; and the answer to this is dependent upon the question whether, by the resolution of May 16, 1905, the land stood condemned. It cannot be successfully contended that any right of entry was given in the charter until condemnation was had. It would seem that the plain language of the statute would put an end to the controversy. When the appraisers have been appointed, have acted, and the report of their action has been in the mayor's office 10 days, eliminating the provision in regard to an appeal, "the said land so appraised shall stand condemned," etc. The charter is the authority, and the only authority, by which the power is conferred, and by which its terms and extent are to be measured. How is it possible for the court to say that this language is of no effect? Was it not most natural for the prosecutor to put the only reasonable construction upon this plain language, and to assert his ownership, until by the law of the land he has been divested of it? If the land stood condemned by the resolution, why should the Legislature have done a vain thing and declared that land already condemned should again "stand condemned"? If by the resolution of May 16, 1905, his land had been taken, it is immaterial for the purpose of this appeal to inquire whether the appointment by the

board of two appraisers, when the statute empowered it to select only one, was authorized. If, on the contrary, the appointment and action of the appraisers are essential to the completion of the condemnation, it is important to inquire whether the refusal of the landowner to choose an appraiser conferred the power on the board to do so. It is said that he was stubborn, and by his stubbornness forfeited his right to have his property condemned according to the charter. The record does not disclose why the owner of the land refused to name an appraiser, nor is it of any moment in the decision of this case. It is sufficient to say, conceding that he was stubborn, this did not authorize the defendants to proceed, otherwise than in accordance with the law, to take his property. Some of the most sacred rights of person and property have been preserved by men who were stubborn. Doubtless Hampden was so considered when he resisted the payment of ship money. We may not dismiss a man's cause because in our opinion he was stubborn. If those upon whom the Legislature has conferred the right to exercise the highest acts of sovereignty fail to proceed according to the character, the citizen not only has a right, but it is his duty, to be stubborn. I do not question the motives of the defendants. I presume they were acting in good faith. But, when we deal with the sacred rights of person and property, nothing short of full and complete authority will justify.

In other charters directing the appointment of appraisers, as this does, provision is made for the appointment by the sheriff or clerk, if the owner of the property refuses to name an appraiser. It is no answer to the objection that the law has not been complied with to say that it is the fault of the property owner. The charter is the guide for the corporation. The Legislature has prescribed the terms upon which and the manner in which the corporation must accept the authority. The citizen is not consulted. He is told that the condemnation of his property is the exercise of sovereign power, and he is not entitled to be heard. Certainly, when he finds that in delegating that power to a corporation the Legislature has fixed the tribunal, provided for its selection, and prescribed the manner in which his property is to "stand condemned," he may make this last stand for his rights, and should not be told that it is immaterial whether the corporation observes the provision of the charter. I respectfully, but firmly, insist that this is to dispense with fundamental principles founded upon the experience of the ages. I am at a loss to see what right the commissioners had to select two appraisers, when the charter gave them power to select only one. That the manner of selecting the appraisers, when prescribed by the charter, is essential, and compliance therewith a condition precedent to condem-

nation, is abundantly sustained by the authorities. In *Loucheim v. Hemsley*, 59 N. J. Law, 149, 35 Atl. 795, the statute directed that the appraisers be of different political parties. The court said: "Neither in the communication nor in the minutes is any reference made to the statutory qualifications of the commissioners. This omission is fatal. A special authority delegated by statute to particular persons to take away a man's property and estate against his will must be strictly pursued, and must appear to have been so pursued on the face of the proceedings in which the authority is exercised." In *Fore v. Hoke* 48 Mo. App. 254, the statute required the petition for condemnation and assessment to set forth that the parties could not agree. The petition failing to do so, the court said that the averment was jurisdictional. In *Adams v. Clarksburg*, 23 W. Va. 203, Woods, J., says: "The taking of private property for public use, without the owner's consent, can only be justified for the uses, in the modes, upon the conditions, and by the agencies prescribed by law for its appropriation. Whenever the private property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual. These conditions must be regarded as conditions precedent which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must show affirmatively such compliance. All the authorities concur in holding that as private property can be taken against the consent of the owner only in such cases and by such proceedings as may be specially provided by law, and as these proceedings are contrary to the course of the common law and are in derogation of common right, they are to be strictly construed, and that the party who would avail himself of this extraordinary power must comply fully with all the provisions of the law entitling him to exercise it." In this case a provision required 10 day's notice to be served on the owners before the court could appoint the commissioners. The court held that a failure to give the notice rendered the proceeding void. This, because the statute required the notice. In *Madden v. L. & N. R. R.*, 66 Miss. 258, 6 South. 181, the statute provided that the commissioners be "disinterested." The court said: "This being the case, it is material to the validity of the appropriation that a strict compliance with the terms of the charter be apparent in the record. It nowhere appears, either in the appointment of the commissioners, in their return, or in any order entered therein, that they were "disinterested." And, if they were not, there has not been any condemnation of the land. This case was upon a "suggestion of error" reargued, and the decision affirmed.

In *Mitchell v. Railroad*, 68 Ill. 286, it is said: "It is a sound and inflexible rule of law that, when special proceedings are authorized by statute by which the estate of one person may be divested and transferred to another, every material provision of the statute must be complied with. The owner has the right to insist upon a strict performance of all the material requirements, and especially those designed for his security, and the nonobservance of which may operate to his prejudice." In *Paret v. Bayonne*, 39 N. J. Law, 559, Depue, J., says: "The officers of a corporation are agents, with only special powers such as are delegated to them by the act of incorporation, or such as are necessarily implied from the powers delegated. * * * In the performance of these functions they are required to conform strictly to the method of procedure prescribed." In *Stewart v. Wallis*, 30 Barb. 344, it is said: "The form by which private property may be taken for public purposes having been prescribed, it must be strictly pursued, or the attempt will be ineffectual and the proceeding void, and all persons acting under the color of them will be trespassers." We may apply the words of the court in *Chl. & Alt. R. R. Co. v. Smith*, 78 Ill. 98, to all works of public character: "Whilst all persons at that day were desirous to see railroads constructed, it was not intended that it should be done at the sacrifice of all private rights. Those acting for the company knew, or should have known, that in acquiring their right of way they were pursuing an extraordinary and summary remedy, and in doing so the law imperatively demanded that they should observe all of the requirements of the statute under which they were acting. And this is a requirement which lies at the foundation of our system of jurisprudence." *Railroad v. Railroad*, 106 N. C. 16, 10 S. E. 1041; 15 Cyc. p. 815.

This is probably the first instance in which the property of the citizen has been taken against his consent and its value fixed by appraisers, two of whom are selected by the party taking, and they selecting the third. I submit that to sustain it is destructive of elementary principles of natural justice and judicial procedure. It is no answer to say to the citizen, deprived of his property at a valuation fixed by appraisers so appointed, that he may appeal. He is entitled in the first instance, and at every step in the proceeding, to demand a strict observance of the written law. The provisions in regard to the mode of procedure before the land shall "stand condemned" are not empty forms. To so construe them puts the state in the attitude of keeping the promise to the ear and breaking it to the sense. Let us suppose a similar provision in the charter of a railroad company or telegraph company in regard to the appointment of appraisers—and there is no difference in principle; would it be contended that, if the owner, feeling that his rights

were being unlawfully or unjustly invaded, refused to name an appraiser, a superintendent or other officer of the corporation could name two of the appraisers and say to the owner, if he was not satisfied, he could appeal. I do not so understand the guaranties which the law throws around the citizen. The right to appeal is of value, and not to be denied; but the right of the citizen to demand at all stages of the proceeding due process of law is not to be denied or abridged.

Holding, therefore, that the assessment was of the essence of the condemnation proceeding, I am forced to the conclusion that the land did never "stand condemned," because there was never any lawfully constituted appraisers, and that the report should not under the terms of the charter be confirmed, until the expiration of 10 days. It would seem, also, that the appeal suspended further action by the board. It is usually provided that, if the corporation deposit the amount of the award, an appeal shall not suspend the right of entry. I see no reasonable objection to such a provision. It is said, however, that the question is settled by this court in *State v. Lyle*, 100 N. C. 497, 6 S. E. 379. The extent to which a question becomes closed and is crystallized into positive law by a single decision binding upon the same court is often difficult to define. Without undertaking to do so, I think it permissible and safe to say that it should not extend beyond the clear and unmistakable language of the judge who writes the opinion. I should feel myself bound both by reason of my respect for the opinion of the learned chief justice who wrote, and the associate justice who concurred in, that opinion, as well as the learned judge who tried the case below, unless my convictions were so strong that to adopt the conclusion did violence to my sense of duty as a judge. I do not think that I am placed in this embarrassing position in respect to that case. Fully conceding that it is permissible to cite the case as in some measure sustaining the conclusion reached by the court, I think that a careful examination of the opinion discloses that the question upon which this case turns is not considered or decided. Smith, C. J., says: "The controversy in the present case turns upon the construction of the charter, which has been recited in full, and whether, in providing the method for ascertaining the compensation to be paid the owner and the means by which it is to be done, a *prepayment* is necessary before the property can be taken, and this following the condemnation in the mode pointed out in the enactment." The discussion following this statement of the question in controversy shows clearly that no other question was in the mind of the writer. This view is strengthened by the concluding portion of the opinion, citing Judge Cooley to sustain the proposition that the corporation may, if authorized, take "*without first making payment.*" (Italics in opinion.) This is the only

question discussed or decided, and, as said, it is not controverted.

In *Freedle v. Railroad*, 49 N. C. 89, and in *McIntire v. Railroad*, 67 N. C. 278, the question presented here did not arise. In *Johnston v. Rankin*, 70 N. C. 550, the charter of Asheville is not set out. The only point decided in respect to the right to proceed with the work is that the law did not require compensation paid before the taking. If, as contended, these cases hold that, without clearly expressed power in the charter, a board of town commissioners or directors of a private corporation may, without notice to the owner, locate a street or road on his property, and immediately, without other notice to him than the appearance of a number of men on his premises, tear away his houses and fences, cut down his trees, and take his property, then I most respectfully, but earnestly, dissent from them. To sustain the exercise of such arbitrary power, there should be unmistakable language used in the statute. How far the Legislature may permit it is not, in my opinion, a closed question. It may be said that it is of little importance to the owner, whose property is taken by an ex parte exercise of political sovereignty, either by a board of town commissioners or a board of nonresident directors of a corporation, to whom has been delegated this sovereign power, how, when, or by whom the assessment is made; and it must be conceded that much judicial warrant is found to sustain the position. I cannot hope to change the current of judicial thought in this court, and it is doubtless a vain assumption on my part to question its correctness. I hope, however, that another department of the government, to which, it seems, the citizen must look to safeguard his rights in this respect, will come to a state of mind which will enable us to say, in the language of the English Court of Chancery: "The hardship imposed on individuals, I think, and I am glad to think, has of late years been subject to a more anxious consideration than it used to be." The material wealth and prosperity of the country should, and we hope will, continue to grow. The great principles by which the security of life, liberty, and property has been preserved, the preservation of which is so essential and has contributed so largely to the present happy condition in which we live, may not be either sacrificed or in the slightest degree weakened by the demands of corporations, either public or private, to trespass upon the land of the citizen otherwise than is permitted by the clearly expressed will of the lawmaking power. A man's land should "stand condemned" when, and only when, every step which the law prescribes to that end has been taken. Every reasonable doubt should be resolved in favor of the citizen. It is well known that charters are obtained by those most interested in securing the largest delegation of power possible. The owner, whose property is to be con-

demned, has no opportunity to be heard. The constitutional provision requiring notice of the introduction of private laws has, by custom and construction, been practically abrogated. Power is ever aggressive, and often indifferent to individual rights. Recognizing these truths, taught by experience, the courts have wisely declared that all grants of power are to be construed strictly against the grant, and liberally in favor of the citizen.

In my opinion, under the clear terms of the charter, the land of the prosecutor did not "stand condemned" on May 29, 1905, and the entry thereon by the defendants was a trespass. There are other phases of the case which I do not care to discuss. I do not dissent from what is said in regard to notice given.

(140 N. C. 106)

GATTIS v. KILGO et al.

(Supreme Court of North Carolina. Nov. 22, 1905.)

LIBEL—COMMUNICATIONS—QUALIFIED PRIVILEGE.

The publication of proceedings of a college board of trustees in the investigation of charges against one connected with the college, which pamphlet was intended for circulation among the patrons of the college and among those likely to become such, was qualifiedly privileged, and therefore could not be made the basis of an action for libel, in the absence of proof of malice.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 133.]

Appeal from Superior Court, Wake County; Moore, Judge.

Action by Thomas J. Gattis against J. C. Kilgo and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Graham & Devin, Guthrie & Guthrie, Argo & Shaffer, C. B. Watson, A. A. Hicks, S. M. Gattis, and J. N. Holding, for appellant. Robt. W. Winston, B. S. Boyster, T. T. Hicks, F. L. Fuller, and Aycock & Daniels, for appellees.

PER CURIAM. The court is of the opinion that the investigation of the charges against defendant Kilgo before the board of trustees of Trinity College was not absolutely, but qualifiedly, privileged, and so was the publication of the proceedings in the pamphlet known in the case as the "Blue Book," which was intended for circulation among the patrons of the college and among those likely to become its patrons. Any statement or communication is conditionally privileged when made bona fide about something in which (1) the speaker has an interest or duty (2) the hearer has a corresponding interest or duty, and (3) when the statement or communication is made in protection of that interest or in performance of that duty. It must be uttered in the honest belief that it is true. The standard of privilege is the standard of the law,

not of the individual, and the privilege depends, not on what the individual may have supposed to be his interest or duty, but upon what a judge decides, as matter of law, his interest or duty to have been. The court determines what is and what is not privileged. The effect of the privilege is to cast on the plaintiff the burden of showing malice on the defendant's part in uttering or publishing the alleged slanderous words. If one exceeds the privilege, its protection to him ceases, and the ordinary rules of liability apply. Whether he has exceeded it, and whether he was actuated by malice, are ordinarily questions for the jury. 1 Jaggard on Torts, 530, 531. Proceedings before school boards, and religious, fraternal, and like organizations, are within the class having only a qualified privilege, and are protected by such privilege when it is properly used and not abused. 1 Jaggard, 539. Absolute privilege is generally confined to judicial and legislative proceedings and official communications of a public nature, where the interest of the public is directly concerned. 1 Jaggard, 526 et seq.

The plaintiff, having declared on the publication of the pamphlet, must show that the defendants were prompted by actual or express malice in making the publication. There is no cause of action alleged against the defendant Kilgo for slander in making his speech before the board, nor is there any alleged against the defendants Duke and Kilgo for libel in publishing the speech in the Morning Post and other newspapers. Testimony as to the latter publication was introduced to show malice in publishing and circulating the pamphlets. A majority of the judges sitting are of the opinion that there is no evidence of malice as to the defendant Duke, and that there is no evidence that the defendant Kilgo participated in the publication of his speech in the newspapers. Upon the question whether there is any evidence that the defendant Kilgo was actuated by malice in publishing the pamphlets, the judges are equally divided in opinion; two of the judges holding that there is evidence in the case—certainly when coupled with what was improperly excluded—which requires that the cause be submitted to the jury, and the other two judges holding that there is no such evidence.

It is not deemed necessary to review the evidence or to discuss the case, so far as the defendant Duke is concerned. No useful precedent would be furnished, as a case resembling this, even in its general features, is not apt to be again presented, and no new or important principle of law is involved. As to the defendant Kilgo, it has not been usual to do more than merely announce the result when there is a divided court, as diverse opinions of the judges in such a case could not possibly have the weight of precedents. There could be no opinion of the court. Governed by the law, as determined

upon the facts by a majority of the court in respect to the defendant Duke, and by the course and practice of this court (when its members are equally divided in opinion) in respect to the defendant Kilgo, we must affirm the judgment of the court below, and the action will stand dismissed.

Affirmed.

CLARK, C. J., did not sit.

(140 N. C. 52)

R. T. WILSON & CO. v. LEVI COTTON MILLS.

(Supreme Court of North Carolina. Nov. 22, 1905.)

1. CONTRACTS — CONSTRUCTION — QUESTIONS FOR COURT OR JURY.

The construction of a contract, whether committed to writing, contained in correspondence, or merely verbal, is a matter of law, and the meaning of its terms, if precise and explicit, is a question for the court, but if such meaning is doubtful and uncertain, or in case the terms of a verbal contract are disputed, it may be submitted to the jury under proper instructions.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 767-770.]

2. SALES—TIME OF DELIVERY—EXTENSION BY BUYER.

Where plaintiffs sold cotton to defendant, to be shipped in April, May, or June, at plaintiffs' option, an order subsequently given plaintiffs by defendants to sell if July cotton should reach a certain price operated to extend the time of delivery until the last day of the month of July.

3. SAME—DELIVERY OF GOODS—EXCUSES FOR DEFAULT—REFUSAL TO RECEIVE.

Where a buyer broke its contract by refusing to accept the goods before the expiration of the time of delivery, the sellers were excused from making a tender and delivery of the goods, and were entitled to recover their price if they were ready, willing, and able to deliver, and otherwise to comply with their contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 363, 435.]

4. SAME—UNNECESSARY DELIVERY.

A buyer cannot complain of the act of the seller in making an unnecessary delivery, after the buyer's refusal to accept the goods, nor can he obtain any benefit thereby.

5. SAME—ACTIONS FOR PRICE—ISSUES.

In an action for the price of goods, issues submitting to the jury whether defendant refused to perform its part of the contract, and what damage, if any, plaintiff had sustained, were broad enough to permit defendant to present in every phase the defense of plaintiff's failure to deliver within the time fixed by the contract, and it was not reversible error to refuse further issues tendered by defendant.

6. SAME—ACTIONS FOR PRICE—DAMAGES.

In an action for the price of cotton, the loss in weight of the cotton should not be deducted in assessing the damages, where the allowance of such a loss was agreed upon in the correspondence constituting the contract of sale.

Appeal from Superior Court, Mecklenburg County; Cooke, Judge.

Action by R. T. Wilson & Co. against Levi Cotton Mills. From a judgment for plaintiffs, defendant appeals. Affirmed.

Action for the price of cotton. Plaintiffs alleged that in March, 1904, they sold to the defendant 100 bales of cotton at \$14.42 per 100 pounds, to be shipped by them and delivered at Rutherfordton, N. C., in April, May, or June, at their option, and to be paid for in lots of 25 bales each on the 10th, 20th, 25th, and 30th of July, of that year. This the defendant admitted. Plaintiffs further alleged that afterwards, by agreement of the parties, the day of shipment was postponed until July 29, 1904, at which time it was shipped to the defendant, who refused to receive the same. Defendant denied the postponement, but admitted its refusal to receive the cotton, and alleged that it was shipped after the time of shipment had expired. The evidence tended to show that after some telegraphic correspondence as to canceling the sale, upon request first made by defendant, the latter wrote the plaintiffs as follows: "Yours of June 15 is at hand and noted. Would it be satisfactory to delay shipment 20 days? Please advise as to this. Do you expect a corner in July or August cotton? If you can sell 50 bales when July reaches \$12.50 or over, you may do so. This order is subject to cancellation any time before your placing order. May get you to sell other 50 bales." Plaintiffs replied June 20th that they could probably delay shipment 20 days, and would do so if they could, but they did not care for it to stand in the way of a favorable offer. They also stated that they would sell 50 bales when July contracts reached \$12.50 or more. On June 25th defendant wired the plaintiffs as follows: "Sell, unless order revoked, first 50 bales July reaches eleven quarter or over." Plaintiffs replied: "We will execute this order if July reaches that point, which we fear is somewhat doubtful, unless we have some bad crop news." There was no other communication between the parties until July 23d, when plaintiffs, through their agent, Mr. Lee, inquired of defendant if it had any further directions to give in regard to the disposition of its cotton, to which the defendant replied that plaintiffs had not complied with their contract, and it did not then need the cotton, which was afterwards shipped and tendered to defendant, who refused to receive it. The issues submitted to the jury, with the answers thereto, were as follows: "(1) Did the defendant refuse to perform its part of the contract? Ans. Yes. (2) What damage, if any, has the plaintiff sustained? Ans. \$1,710, and interest from July 23, 1904." The jury were instructed that, as the contract was in writing, it is the duty of the court to construe it, and that, if they believe the evidence, their answer to the first issue should be 'Yes.' Upon the second issue the court charged that the measure of damages is the difference between the contract price, \$14.42, and the market price of the cotton at the place of delivery fixed by the contract, which witnesses testi-

fied was 11 cents, and that if they believed the evidence their answer to the second issue should be \$1,710 and interest from June 23, 1904, the day on which defendant refused to receive the cotton. There was a judgment for the plaintiffs, and defendant appealed.

Stewart & McRae, for appellant. Pharr & Bell, for appellees.

WALKER, J. (after stating the case). There can be no doubt but that the construction of a contract is a matter of law. If committed to writing, the meaning of the terms, when they are precise and explicit, is a question for the court; but, if doubtful and uncertain, they may be submitted to the jury, with proper instructions, given hypothetically, as the case may require, to ascertain the meaning and intent of the parties. The law is the same as to verbal contracts. If the terms are explicit, the court determines their effect simply by declaring their legal meaning. If the parties dispute about the terms of the agreement, an issue of fact is raised as to the terms, to be decided by the jury, who should be guided by instructions from the court. *Massey v. Belisle*, 24 N. C. 170; *Sizemore v. Morrow*, 28 N. C. 54; *Festerman v. Parker*, 32 N. C. 474; *Harris v. Mott*, 97 N. C. 108, 1 S. E. 547. *Gaston, J.*, says, in *Young v. Jeffreys*, 20 N. C. 216 (reprint, 357): "Where a contract is wholly in writing, and the intention of the framers is by law to be collected from the document itself, then the entire construction of the contract—that is, the ascertainment of the intention of the parties, as well as the effect of that intention—is a pure question of law, and the whole office of the jury is to pass on the existence of the alleged written agreement. Where the contract is by parol, the terms of the agreement are, of course, a matter of fact, and if those terms be obscure or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written instrument." This language summarizes the whole doctrine and is quoted with approval in the more recent case of *Spragins v. White*, 108 N. C. 449, 13 S. E. 171, where the question is fully discussed. The principle applies, of course, to agreements evidenced by written correspondence. *Simpson v. Pegram*, 112 N. C. 541, 17 S. E. 430; *Lindsay v. Ins. Co.*, 115 N. C. 212, 20 S. E. 370. As the contract in this case was in writing, and as its terms, we think, are explicit and the meaning of the parties unmistakable, it becomes our duty to construe it and declare its legal effect.

Plaintiffs sold the cotton to defendant in March, 1904, subject to the stipulation expressed in the contract that they might at their option deliver in the following April,

May, or June. Defendant on the 18th day of June asked for an extension of the time fixed for delivery to July 8th. The request was not granted absolutely; but, if it had been, we do not think it would change the legal aspect of the case, or cause us to come to a different conclusion, because, before the time for delivery had fully expired—that is, on June 25th—defendant ordered plaintiffs to sell the cotton when the price for July reached 11¼ cents or more. This was a plain direction to hold the cotton for sale in July at not less than the price stated, as it could not be determined whether the price of cotton would reach that figure until the full month had expired, or until the last day of the month, as the market price is subject to fluctuation, and sometimes, as we know, to sudden and decided changes, and the event on which plaintiffs were authorized to sell might have happened on that very day. The correspondence shows, therefore, by strong and irresistible implication, that plaintiffs were to hold the cotton during the month of July or until the price specified could be obtained. We have no doubt that this is the true meaning of the contract as evidenced by the several writings. The order of defendant could not well have been executed under any other construction.

Defendant does not deny that it has failed to comply with the contract, if this is its proper meaning. Counsel in their brief frankly state that the sole question is whether the cotton was delivered within the time fixed by the contract; their contention being that the time of delivery was never changed by the defendant's letter of June 18th and the telegram of June 25th and the answers of plaintiffs thereto. They argue that the order to sell was not tantamount to an order to delay the shipment of the cotton, and that it could not be so unless the order to sell was for an indefinite time, and that plaintiffs did not so construe the order, as they did actually ship on July 29th. The position is not tenable. The order to sell was confined by its very terms to the month of July, the sale to be made when the price reached 11¼ cents. No inference adverse to the plaintiffs can be drawn from the fact that they shipped the cotton on the 29th, as defendant on the 22d had refused to take the cotton. This was a breach of its contract, and plaintiffs were not required to make any delivery—the refusal dispensing in law with any tender, and plaintiffs then being entitled to recover, if they were ready, willing, and able to deliver, and otherwise to comply with the contract on their part; and as to this there was no dispute. *Grandy v. Small*, 48 N. C. 10; *Blalock v. Clark*, 133 N. C. 306, 45 S. E. 642; *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586. If plaintiffs did more than the law required of them, the defendant has no reason to complain on that account and cannot benefit by it.

The issues submitted were broad enough

for the defendant to present its defense in every possible phase. We have recently said: "It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on the merits." *Deaver v. Deaver*, 137 N. C. 240, 49 S. E. 113; *Warehouse Co. v. Ozment*, 132 N. C. 839, 44 S. E. 681. The issues submitted were sufficiently comprehensive within the rule stated, and the court properly rejected those tendered by the defendant. At least, there was no reversible error in doing so.

The loss in weight of the cotton should not have been deducted in assessing the damages, as it appears from defendant's letter of March 23, 1904, that a loss "not to exceed 3 pounds per bale from the invoice weights" was to be allowed.

We have carefully considered the case and weighed the arguments, so well presented in the briefs of counsel, and have not been able to discover any error in the rulings of the court.

No error.

(140 N. C. 100)

CALDWELL v. LIFE INS. CO. OF VIRGINIA.

(Supreme Court of North Carolina. Nov. 22, 1905.)

1. INSURANCE — FALSE REPRESENTATIONS — RECOVERY OF PREMIUMS PAID.

Where an illiterate woman was induced to take out life insurance by the agent's representations that she could "draw out" her claim at the end of ten years, where in fact the policy as written gave her no such privilege, she could, on discovering that fact, recover the money paid as premiums.

2. SAME—ACTIONS—INSTRUCTIONS.

In an action to recover an amount paid as insurance premiums on the ground of false representations which induced plaintiff to take out the policy, a charge to the effect that, if plaintiff paid the premiums after having ascertained that the policy was not what she contracted for, she could not raise the question of fraud unless she paid the premiums under protest, was not erroneous, as not based on the evidence, where there was evidence that when plaintiff first learned that there was something wrong with her policy she endeavored without success to have the matter adjusted, and went from one agent to another in her efforts to obtain satisfaction until her policy was finally canceled.

3. SAME—DAMAGES.

The measure of relief for false representations which induced plaintiff to take out a life insurance policy in the belief that she would be entitled to withdraw her claim at the expiration of 10 years, whereas in fact she was not entitled to anything at that time, is the amount of premiums paid by her, with interest.

Appeal from Superior Court, Mecklenburg County; Justice, Judge.

Action by Dinah Caldwell against the Life Insurance Company of Virginia. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff alleges that sometime during the year 1895 she was induced by the representation made to her by defendant's agent to take out policies upon her own life and the lives of her children in defendant company; that the agent represented to her, as an inducement to take out said policies, that at the end of 10 years she could withdraw the amount due her; that after paying the premium on said policies for a number of years she learned that she was not entitled to withdraw her money at the end of 10 years as represented. She charges that the representations upon the faith of which she took out the policies were false and fraudulent, and that she was deceived by them. She demands the return of the money paid by her, etc. Defendant company denies the material allegations of the complaint, and avers that, if she was misled by any statements made by the agent at the time the policies were issued, she soon thereafter had full knowledge thereof, and continued to pay the premiums, whereby she waived any right which she may have had, and ratified the contract as it was made and set out in the policies; that she failed to pay the premiums in accordance with the terms of the policies and forfeited the amount paid. The case was submitted to the jury upon a single issue. From a judgment following a verdict for the plaintiff, defendant appealed.

W. B. Rodman, for appellant. Plummer Stewart and C. D. Bennett, for appellee.

CONNOR, J. (after stating the case). The testimony on the part of the plaintiff tends to show that she is an illiterate colored woman having ten (10) children; that some time during the year 1895, while she was engaged as a cook at the Buford Hotel, in Charlotte, the superintendent of the defendant company sent for her to come to his office; that upon going to the office he asked her if she had any objection to being "written up," to which she replied that she knew nothing about it—did not know what insurance meant. He said that he would tell her, to which she replied that, if he did, she would know nothing about it then, to which he replied, "You will have a nice hearse, nice carriage, and a nice funeral." She said, "I can't feel the ride in the hearse, and I can't see the funeral procession." He said, "You will have a heap of money," to which she responded: "I don't want the money, if I am dead. I have got to go to work at 3 o'clock in the morning, and am not going to take my money to pay insurance." He said: "I will tell you what you can do. You can come in for 10 years, and after 10 years you can go out." She said: "I don't know anything about this. I have been living with white people ever since I was born. I don't know anything about it, and I don't want to fool with it." He said: "Aunty, you can go in for 10 years." He said "that after 10 years I could draw out the claim, and if anything happened to me the claim would be paid"; that upon the faith of these

representations she took the policies, paying for some years the weekly installment or premiums thereon; that some time thereafter a lady with whom she was employed read the policies, and in consequence of what she said to plaintiff she saw Col. Jones, a lawyer in Charlotte; that she afterwards went to the agents of the company and complained that the policies were not as represented; that some of the policies were taken up, and others given her in their stead; that after much going and coming she refused to pay any further premiums. She told the agent that her time was up, and he told her that if she got anything she would have to get it by law. We have not set out all of the testimony of the plaintiff. That portion which we have set forth, and there was nothing in her testimony contradictory thereof, shows the gist of the transaction. Defendant demurred to the evidence and moved the court to dismiss the action. We concur with his honor in his refusal to grant the motion. There was ample evidence that the plaintiff was led to believe that she could "draw out" at the end of 10 years. She had in her own, but unmistakable, way refused to be beguiled by the attraction held out to her regarding a fine funeral and a "heap of money" at her death. It was only when the agent held out the inducement that she could "draw out," which she understood, and he must have intended that she should understand, to mean getting the amount due her, at the end of 10 years, that she consented to take the policies, or, as the agent expressed it, "be written up." In what way, other than receiving the amount due her at the end of 10 years, was she to "draw out" her claim at the end of that period? It is hardly probable that it was in the mind of the agent to gain her confidence and secure her application by assuring her that, if at the end of 10 years she grew weary of paying the weekly installments, she should have the privilege of drawing out empty-handed, leaving the whole amount paid in the vaults of the company. She does not appear to be a person who would consent to be "written up" on such terms. If her testimony is true, she was induced to insure upon the representation made to her, as an inducement, that in her old age she should reap the fruits of her industry and economy during the 10 years. Her testimony in this respect is uncontradicted. The superintendent, with whom she had the conversation, was not introduced.

His honor carefully and correctly explained to the jury the law governing the case, placing upon her the burden of proof in the strongest language which this court has approved in cases where mutual mistake was alleged. He said: "The burden is upon the plaintiff to show by clear, strong, and convincing proof that this transaction was fraudulent, and that she was making these payments under representations made by the defendant that were not true. The burden, I

say, is on the plaintiff to satisfy you that this was a fraudulent transaction." He instructed the jury, at considerable length, what constituted fraud in a transaction of this character, at all times putting upon the plaintiff the burden of proof. We find no error in this respect. He further charged them: "If you find that there was fraud in the transaction, and that afterwards the plaintiff ascertained that the policies were not what she contracted for with the agents, and that after this she went on and paid the premiums, and kept her life and the lives of the others insured, and took the benefit, then she could not raise this question of fraud, although there may have been fraud in the beginning, unless you further find that the defendant's collecting agent and local superintendent lulled her into security and led her to believe that she would get the face of the policies at the end of 10 years, or unless she paid the premiums under protest." To the last clause of this instruction the defendant excepted, for that there was no evidence that she paid under protest. Without undertaking to set forth the testimony, it is sufficient to say that we have given it a careful examination and find that when she first learned that there was something wrong with her policies she endeavored to get them straight, without success. She says that she would go to one agent, and he would send her to another, and this course was continued until they finally canceled the policies. She narrates her trials in her own simple and natural way, showing that she was bewildered in the intricate mazes and confusing obscurities of life insurance policies. In this respect she is not singular. In the only way open to her she was constantly protesting that something was wrong about her insurance. She does not appear to have received much light from the source to which she went and was entitled to go.

There was ample evidence to sustain his honor's charge and the verdict of the jury. She proved an excellent character. Her testimony, both in manner and matter, was well calculated to carry conviction to the minds of the jurors. The plaintiff is evidently one of the few remnants of a type of her race illustrating its highest virtues. In the simple duties of life incident to her station, she exhibits a store of saving common sense. When sought out and invited by an insurance agent to visit his office to discuss the most intricate, promising, and sometimes disappointing mode of investing surplus earnings, she tells the agent that she knows nothing of it, and will know nothing when he has illuminated the subject. It is not strange that she gets into trouble. She could not read the policies, and it is no serious reflection upon her intelligence to surmise that, if she could have done so, she would not have been very much wiser. She did resist the blandishment to which those of her race usually succumb—"a nice funeral"; nor did she surrender to the persuasive assurance, for which many accredit-

ed with more wisdom spend a life of slavery, "a heap of money" at her death. There is a vast deal of sound philosophy and sense in the answers made by her to the agent. When, however, the appeal is made to that fear which so constantly throws its dark shadow over human life, poverty in old age, and the assurance is given, as found by the jury, that at the end of 10 years she could draw out her claim, she consents to "be written up." His honor correctly announced the law which gives relief. The jury upon ample evidence have found the facts as testified by the plaintiff. It is admitted that the policies do not entitle her to receive the amount paid in, or any other amount, at the end of 10 years; that, on the contrary, she forfeits all that she has paid. Upon the verdict the law declares that, as she cannot have what was promised to her, she must have her money back, with interest. If the defendant has been compelled to carry the risk during the life of the policies without compensation, it must look to its accredited agent, whom the jury find made the false representation. This court has uniformly held that in such cases the measure of relief is the amount paid, with interest. *Braswell v. Insurance Co.*, 75 N. C. 8; *Lovick v. Insurance Co.*, 110 N. C. 93, 14 S. C. 506; *Makely v. Legion of Honor*, 133 N. C. 307, 45 S. E. 649.

The judgment must be affirmed.

(129 N. C. 526)

JONES et al. v. BALLOU et al.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. LOST INSTRUMENTS—DEEDS—ACTION TO ESTABLISH.

Though an action to establish a lost deed is only ancillary to some other relief, Clark's Code, § 233, subd. 3, providing that a complaint must contain a demand for such relief as complainant deems himself entitled to, having been construed to authorize any relief to which complainant is entitled under the facts and not inconsistent with the complaint, and Pub. Laws 1893, p. 37, c. 6, giving the right to bring an action to prevent a cloud on title, the superior court has jurisdiction of an action to establish a lost deed; the remedy before the clerk, under Clark's Code, § 56, not being exclusive.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lost Instruments, § 12.]

2. APPEAL—PRESUMPTION—ABANDONMENT OF EXCEPTIONS.

Exceptions not relied on in an appellant's brief are presumably abandoned.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4256.]

3. LOST INSTRUMENTS — ESTABLISHMENT — DEEDS—EVIDENCE.

In a suit to establish a lost deed, there was no error in rejecting testimony as to the statement of a certain person that he owned no interest in the property; plaintiff not having claimed under such person, and he not being a party to the action.

Appeal from Superior Court, Ashe County; W. R. Allen, Judge.

Action by T. J. Jones and another against J. R. Ballou and others. From a judgment

in favor of plaintiffs, defendants appeal. **Affirmed.**

F. A. Linney and T. C. Bowie, for appellants. R. A. Doughton, for appellee.

CLARK, C. J. This is an action to establish a lost deed, the record of which is also alleged to have been destroyed. The defendants moved to dismiss upon the ground that the action should have been brought before the clerk under section 56 of the Code. This motion was properly refused. That section is an enabling act, giving an additional, but not an exclusive, remedy. Jurisdiction in the superior court was held in *McCormick v. Jernigan*, 110 N. C. 406, 14 S. E. 971, and was tacitly recognized in *Tuttle v. Rainey*, 98 N. C. 513, 4 S. E. 475. See, also, 19 A. & E. Enc. 550, with authorities. In *Cowles v. Hardin*, 91 N. C. 231, *Mobley v. Watts*, 98 N. C. 284, 8 S. E. 677, and *Hopper v. Justice*, 111 N. C. 420, 16 S. E. 626, it was held that a party whose deed with its registration had been destroyed, instead of having it set up and recorded, could depend upon the rules of the common law to establish its contents whenever an occasion might arise, as in the course of a trial. *Cowles v. Hardin*, 79 N. C. 577, relied on by the defendants, simply holds that when the proceeding is brought by virtue of Code, § 56, the requirements of that section must be complied with. It is true that originally there was no relief at common law or in equity to decree the re-execution of a deed, except as an ancillary remedy to some other relief as ejectment or to enjoin a recovery and the like (*Adams, Eq. § 167; McCormick v. Jernigan, supra*); but chapter 6, p. 37, Pub. Laws 1893, gives the right to bring an action to prevent a cloud upon title, and this additional relief the plaintiffs are entitled to besides the decree for setting up and recording the deed, whether such relief is prayed for or not (*Clark's Code [3d Ed.] § 233 [3], and cases there cited*).

No other of the exceptions taken are relied upon in the appellant's brief, and we presume were abandoned (*State v. Register*, 133 N. C. 751, 46 S. E. 21) except the sixth, which was to the rejection of the evidence of C. D. Moore of a statement by Calvin Graybeal that he owned no interest in the property. The plaintiffs do not claim under said Calvin, and he is not a party to the action.

No error.

(140 N. C. 28)

In re STEWART.

(Supreme Court of North Carolina. Nov. 22, 1905.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW AND CHILDREN—STATUTES.

Rev. St. § 3061, provides that a year's allowance of \$300 shall be made to the widow of a deceased person and \$100 in addition thereto for every member of the family beside the

widow; and section 3062 defines "family" as every person, to whom the deceased or widow stood in place of a parent, who was residing with the deceased at his death, whose age did not then exceed 15 years. Held that, where the widow refused to assume the control and maintenance of two stepchildren under 15 years of age for a year after the death of her husband, she was only entitled to an allowance of \$300; the allowance for the children being payable to their guardian.

Appeal from Superior Court, Stokes County; Cooke, Judge.

Application by Irene E. Stewart for a year's allowance to her as the widow of Frank P. Stewart, deceased. From a judgment of the superior court reducing a justice's allowance of \$500 to the widow to \$300, and making a further allowance of \$200 to two of deceased's minor children, the widow appeals. **Affirmed.**

Application for year's allowance for Irene E. Stewart, widow of Frank P. Stewart, instituted before a justice of the peace. From the finding of the commissioners there was an appeal to the superior court, and from the ruling of the clerk an appeal was taken to the judge at term. The matter was heard upon an agreed statement of facts, of which the following are material to a decision of the case: Frank P. Stewart died testate on November 1, 1904, leaving an estate of the value of \$3,490, all of which he bequeathed to Maud S. Haywood, his eldest child. W. W. Haywood, husband of the legatee, qualified as administrator cum testamento annexo on November 16, 1904, and took possession of the decedent's estate. At that time the widow, Irene Stewart, was ill at the home of her mother in Sampson county. On December 2, 1904, she dissented from the will of her husband, and on December 28th of the same year applied for her year's allowance. At the time of the death of Frank P. Stewart there lived with him two of his children by a former marriage, George B. and Frank P. Stewart, Jr., both under 15 years of age. While the widow was at the home of her mother, these two children were carried by the administrator to his home in Charlotte, where they have since resided and now reside. On March 15, 1905, the administrator wrote to the widow proposing to pay her an allowance of \$500, if she would take the children of her deceased husband and keep them for one year, which proposition she declined, and made application to a justice of the peace for the allotment of her year's support. The justice allowed her \$500, and upon appeal to the clerk of the superior court this allowance was affirmed. In the hearing before the clerk, W. W. Haywood, who had qualified as guardian of the two Stewart children, was made a party to this proceeding. Upon appeal from the ruling of the clerk to the judge in term, judgment was rendered reducing the widow's allowance to \$300, and by consent of the administrator and legatee an allowance of \$200 was made to the two children.

The widow excepted to this judgment, and appealed.

J. T. Morehead, W. P. Bynum, Jr., and G. S. Ferguson, Jr., for appellant. W. F. Harding, for appellee.

BROWN, J. (after stating the facts). In this proceeding for the allotment of a widow's year's allowance, the appellant contends that she is entitled to receive \$300 for herself and \$100 for each of the children for her use and benefit. The appellee, administrator of the estate and guardian of the two members of the family of the deceased under the age of 15 years, contends, on the other hand, that, inasmuch as the widow has declined to take the two children and keep them for one year and apply a portion of the money received as her allowance to their support, she is entitled to only \$300, and not to an additional \$100 for each of the children. We are of opinion that the contention of the appellee is right, both upon reason and authority. Statutes providing for the allotment of a portion of the property of a deceased person for the support of the widow and family for one year have been in force in this state since 1796 (chapter 469). The Legislature of that year recognized the hardship of the laws then existing whereby it was in the power of the administrator to expose to sale the whole crop and provisions of the deceased, and thereby deprive the widow of the means of subsistence for herself and family; and it was to prevent this hardship that they provided for the allotment to the widow of such part of the crop, stock, and provisions as may be "necessary and adequate for the support of the widow and family for the space of one year." Under this act the amount of the allotment was determined by the number dependent upon it for support. The purpose of the act was to provide support for the widow and to enable her to keep her family about her until provision could be made for their final disposition. Subsequent acts relating to this subject have not changed the original purpose of the Legislature in passing the act of 1796, but have merely made more definite the measure of the allotment, defined the word "family" as used in the act, and provided that in case there is no widow, or she dies before her allowance is allotted, there shall still be an allotment for the benefit of the members of the family surviving under the age of 15 years. This latter provision of our present statute (Rev. St. § 3063) apparently meets the objection to the former statute sustained in *Kimball v. Deming*, 27 N. C. 418, and subsequent cases, wherein it was held that the allowance was personal to the widow, and could not be set

apart for the members of the family if there was no widow, or if she died before the allotment. The latest expression of the Legislature on this subject is contained in Rev. St. §§ 3060-3063, and it is upon the construction of this statute that the case before us depends.

Section 3061 (similar to section 2118 of the Code) provides for an allowance of \$300 to the widow and "one hundred dollars in addition thereto for every member of the family besides the widow." Section 3062 (Code, § 2119) defines the "family" as "every person to whom the deceased or widow stood in place of a parent, who were residing with the deceased at his death and whose age did not then exceed 15 years." "The object of this last clause," says the present Chief Justice in *Hollomon v. Hollomon*, 125 N. C. 29, 34 S. E. 99, "was to exclude from the bounty children who might come in after such death to make themselves 'members of the family,' and evidently was not meant to embrace those who, as in the present instance, cease as a consequence of the death to be members of the family and chargeable as such to the widow; for Code, § 2116, says that the year's provision is 'for the support of herself and family.' The \$300 is for her support. The additional \$100 for each child under 15 years of age is not for her benefit, but to enable her to provide for such children, if any there be, who are members of the family. It would be 'sticking in the bark,' indeed, to take \$200, which must come out of the property placed in the hands of the guardian for the support of these very children, and give it to the step-mother, who by the will is deprived of their custody and relieved of all expense of their support." We can see no distinction between the *Hollomon* Case and the case before us. The practical effect of the decision in that case is that membership in the family, which ceases upon the death of the father, cannot be made the basis for determining the amount of the widow's year's allowance, and the \$100 designated by the statute as the amount allowed for each member of the family under 15 years of age must be used for their support. The refusal of the widow to accept the children, in the present case, as members of her family and contribute to their support, operates as a bar to her right to the allowance of an additional \$100 for each of them just as effectually as if she had been deprived of their care by will. To permit her to use this money and refuse to contribute to the children's support would be a perversion of both the letter and spirit of the statute.

Affirmed.

(104 Va. 512)

PENCE v. LIFE.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. FRAUDS, STATUTE OF—ORAL CONTRACT FOR SALE OF LAND—PART PERFORMANCE.

A purchaser, after entering into possession of land under the contract of purchase and the payment of a part of the purchase price, entered into an oral agreement modifying the contract. He continued in possession. *Held* not a part performance sufficient to take the parol contract out of the operation of the statute of frauds.

2. WILLS—ELECTION—PROVISIONS FOR WIFE.

Code 1887, § 2271 [Va. Code 1904, p. 1182], authorizing a widow to elect to waive a provision for her in her deceased husband's will and demand her dower, only provides how a widow must proceed who desires to reject the provision made for her by her husband's will out of property other than her own; and, where a husband disposes of his wife's property and makes a provision for her by his will, she has the same right of election as any other person.

3. SAME—ELECTION BY WIDOW.

A husband disposed, by his will, of land belonging to his wife and also made provision for her. After his death and before the probate of his will she conveyed the property to a purchaser with covenants of general warranty. *Held*, that the wife elected to claim the land as her own by title paramount to the will, and her purchaser acquired a good title.

4. SPECIFIC PERFORMANCE—CONTRACT TO PURCHASE REALTY—DECREE.

A decree of specific performance of a contract for the sale of land should comply with the terms of the contract, and the purchaser should not be required to purchase without being given the privilege of executing a deed of trust to secure the price unpaid, as authorized by the contract.

Appeal from Circuit Court, Augusta County.

Suit by Josephine F. Life against James M. Pence. From a decree for complainant, defendant appeals. Modified.

Defendant, sued for the specific performance of a contract to purchase real estate, admitted the execution of the contract sued on, but alleged that it was superseded by a subsequent oral contract. Under the written contract possession was to be given defendant on March 15, 1902. He took possession on or before that date, and also paid a part of the purchase price. This was prior to the alleged parol agreement, and the purchaser continued in the possession.

J. M. Perry and H. H. Blease, for appellant. W. H. Landes and A. C. Braxton, for appellee.

BUCHANAN, J. This was a suit for the specific execution of an agreement for the sale and purchase of land.

Two grounds of defense were relied on by the grantee—one, that after entering into the contract sued on its terms had been changed by a subsequent parol agreement, under which he had gone into possession; the other, that the title to the "Ross parcel," nearly one-fourth of the tract purchased, was defective.

1. The alleged subsequent parol agreement

was not proved as stated in the grantee's answer, and, if it had been, the acts of part performance proved were not sufficient to take it out of the operation of the statute of frauds.

As to the alleged defect in title to the "Ross land":

2. One of the parties through whom the vendor claimed to derive title to that parcel of land was Lettie Freeman. William Ross, who died in 1812, devised that land (115 acres) to his daughter, Lettie, who afterwards intermarried with Richard Freeman. He died February 6, 1870, leaving a will by which he gave to his wife, Lettie, certain personal property and a life estate in a farm designated as his "home place," which included the "Ross parcel" owned by his wife. Subject to the life estate given his widow, he devised that portion of the "home place" which embraced the "Ross parcel" to his granddaughter, Signora C. Swisher, and the residue to his daughter, Margaret M. Life. On the 16th day of that month his widow conveyed the "Ross parcel" in fee simple, with covenants of general warranty, to Margaret M. Life and her husband, Samuel Life. On the 28th of the same month, Richard Freeman's will was admitted to probate. On the 17th of the following May his widow departed this life without having renounced her husband's will in the manner prescribed by section 2271 of the Code of 1887 [Va. Code 1904, p. 1182]. On January 1, 1873, Margaret M. Life and her husband conveyed the land which was devised her by her father, and the "Ross parcel," to James K. McComb, and on the next day McComb conveyed both parcels to Samuel Life. The latter, by his will probated August 24, 1894, devised all his lands, including the "Ross parcel," to Josephine F. Life, his second wife, the vendor and appellee.

The contention of the appellant (the vendee) is that the title of the appellee is defective, in this: that Lettie Freeman, the widow of Richard Freeman, having failed to renounce the provisions of her husband's will in the manner provided by section 2271 of the Code, is presumed to have elected to take under the will, and consequently only had a life estate in the "Ross parcel," and at her death it passed in fee to Signora C. Swisher, to whom Richard Freeman had devised it.

The provisions of that statute have no application, as we understand them, to a case like that we are now considering. They were intended to provide how a widow must proceed who desires to reject the provisions made for her by her husband's will out of property other than her own, and to take such interest in his lands as the law gives her. Where a testator disposes of property belonging to his wife in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person, and whether

or not she has elected to take under or against the will is to be determined as in other cases. *Penn. v. Guggenheimer*, 76 Va. 889, 849, 850; *Kinnaird v. Williams*, 8 Leigh, 400, 31 Am. Dec. 658; *Taylor v. Browne*, 2 Leigh, 419.

In *Penn. v. Guggenheimer*, supra, the testator had disposed of certain property owned by his wife and also made provision for her by his will. It was held that the wife was put to her election, and that she could not choose both her own estate and the bequests and devises made in her favor. It was further held that her election need not be express, but might be implied, as in other cases of election, from her conduct, acts, omissions, and mode of dealing with the property.

In *Taylor v. Browne*, supra, the question was whether the wife's election could be made in any other way than by a renunciation of the will in the manner prescribed by statute. This court held that the act of assembly had no relation to a case of election to take by title paramount to the will or under the provisions of the will.

In *Kinnaird v. Williams*, supra, the testator, after giving several small legacies, devised all his real estate and slaves to his wife for life, and an interest in the proceeds of his other personal property after the payment of his debts. He devised the remainder interest in the lands to and for the benefit of other persons. Within a year after the testator's death, his widow instituted a suit against the other persons interested in the real estate under the dispositions thereof made in the will, claiming the whole of the lands as her own, by title paramount to the will, and recovered the same. After her death her sole devisee, who was her personal representative, instituted suit against the executor of her husband, claiming that she had, by recovering the real estate devised by her husband, renounced his will, and that she was entitled to the same interest in his personal estate as if he had died intestate. The trial court held that by recovering the land in fee, and thereby defeating the intentions of the testator, his widow was precluded from claiming as legatee, and that her failure to renounce the provisions of the will in her favor, in the manner and within the time prescribed by statute, precluded her from claiming as distributee of the personal estate, if such renunciation would, after the election she made, have conferred such right, and that consequently her devisee and personal representative was not entitled to recover upon either ground. Upon appeal that decree was affirmed by this court.

These cases and the authorities cited in them show, not only that the widow has the same right of election as other persons, where her husband disposes of her property and also makes provision for her by his will, but they also show that such election may be made expressly or impliedly. In the last-

cited case it was held that claiming the land devised by title paramount to the will, suing for and recovering it from the parties interested under the will, was not only an election to take against the will, but was an actual taking in contravention of the will.

There can be no question of the election of the widow of Richard Freeman to claim the "Ross parcel" of land as her own by title paramount to the will. Her action in conveying it in fee simple with covenants of general warranty can be explained in no other way. Being the owner of the Ross parcel by title paramount to the will, and having elected to take against the will, she had the right to sell and convey it to any one who desired to purchase, whether that person was a devisee or legatee under her husband's will, or a stranger to it. This being so, it clearly appears that the alleged defect in the appellee's title is groundless, and that she is entitled to have the agreement sued on specifically enforced.

The trial court properly so decided, but its decree does not conform as clearly as it ought to the terms of the agreement of sale. No good reason existed why the appellant should be required to carry out the terms of the contract on his part and yet be denied the right to execute a deed of trust to secure the payment of the purchase money bonds not yet due, as he had the right to do under the agreement. See *Watts v. Kinney*, 3 Leigh, 293, 23 Am. Dec. 266.

In so far, therefore, as the decree appealed from varies the terms of the agreement of sale beyond what was rendered necessary by the fact that further installments of purchase money had become due and payable, it is erroneous, and to that extent should be corrected; but, as another installment of purchase money has become due since that decree was entered, this court will not modify it, but will affirm it in all other respects, and remand the cause to the circuit court, for further proceedings to be had, not in conflict with the views expressed in this opinion, awarding costs to the appellee as the party substantially prevailing.

(104 Va. 615)

LANE BROS. & CO. v. BOTT.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. APPEAL—IMPROPER ADMISSION OF EVIDENCE—HARMLESS ERROR.

The general rule that the improper admission of evidence which may have been prejudicial, though it is doubtful whether it was or not, constitutes reversible error, is subject to the exception that if in such case there is a demurrer to evidence, and an alternative verdict, the admission of illegal evidence will not reverse, where, under the rules governing demurrers to evidence, the remaining evidence suffices to sustain a judgment for the demurree.

2. TRIAL—DEMURRER TO EVIDENCE—EFFECT.

Where, in an action for personal injuries, the evidence as to plaintiff's alleged contributory negligence is conflicting, and defendant, by de-

murring to the evidence, withdraws that question from the consideration of the jury, the court must find plaintiff not guilty of contributory negligence, if the jury might have so found.

3. MASTER AND SERVANT—INJURIES TO SERVANT—EXPLOSION OF BLAST IN ROCK QUARRY—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, a quarry employé, during whose absence a hole for blasting was loaded, and who on his return was told by the superintendent, in response to his direct inquiry, that it was unloaded, was injured by an explosion while attempting to drill out the hole, in compliance with the superintendent's orders, he was not guilty of contributory negligence, as he had a right to rely on the superintendent's assurance, without employing precautions which ordinary prudence might otherwise have suggested.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 675-677.]

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where plaintiff, a quarry employé, had his left hand broken and otherwise injured, his face cut and burned with powder, and a section of his teeth knocked loose, his wage-earning capacity being reduced from \$1.25 to \$1 per day, a verdict of \$1,205 was not excessive; there being no pretense that the jury was actuated by prejudice or partiality.

Error to Circuit Court, Shenandoah County.

Action by W. J. Bott against Lane Bros. & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

Duke & Duke and Cabell & Cabell, for plaintiff in error. O'Flaherty & Fulton and Robert F. Leedy, for defendant in error.

WHITTLE, J. This is a personal injury case, in which judgment was rendered on behalf of the defendant in error (the plaintiff in the trial court) upon a demurrer to the evidence. It is a companion case to that of Lane Bros. & Co. v. Bauserman, 103 Va. 146, 48 S. E. 857, and, as both cases had their origin in a common accident, reference may be had to the opinion in the latter for a concise statement of the facts in the former case.

The Bauserman Case was submitted to a jury, and from an adverse verdict and judgment Lane Bros. & Co. obtained a writ of error to this court. The case was affirmed in all respects, except that the refusal of the lower court to permit certain questions to be answered was held to be reversible error. Hence it may be remarked that most of the assignments of error relied on here have been resolved adversely to the pretensions of the plaintiffs in error in the Bauserman Case.

The open questions in this case involve, for the most part, the action of the trial court with respect to the admission of certain alleged illegal testimony.

The general rule on the subject is that the improper admission of evidence, which may have been prejudicial, constitutes reversible error; and this is true, even though it be doubtful whether in fact such evidence was or was not prejudicial. Insurance Co. v.

Trear, 29 Grat. 255; Payne's Case (Va. Rep. Anno.) 31 Grat. 855, and note; N. & W. Ry. Co. v. Briggs, 103 Va. 105, 48 S. E. 521.

But the general rule is subject to the exception that "if in such case there is a demurrer to evidence, and an alternative verdict, and after disregarding upon such demurrer such illegal evidence, and treating the balance of the evidence as is proper under the rules applicable to demurrers to evidence, there is plainly enough evidence to sustain a judgment for the demurree, the admission of the illegal evidence will not reverse; otherwise, it will." Taylor v. B. & O. R. Co. (W. Va.) 10 S. E. 29.

From the standpoint of a demurrer to the evidence, applying the foregoing exception to the case in hand, the admissible relevant evidence is ample to sustain the judgment under review. In that aspect, the case presented is briefly as follows: The defendant in error, who was a laborer in the rock quarry of the plaintiffs in error, was absent from the quarry when the hole in question was loaded, and on his return several days afterwards was ordered by the acting superintendent to drill out the hole, when, in response to the direct inquiry, he was informed that it was not loaded. In obedience to orders, and relying upon the assurance of the vice principal, he and his unfortunate companions, operating a heavy, 12-foot steel churn drill, drove down upon a charge of powder, capped with an electric exploder, whereupon the explosion which resulted inflicted the injuries complained of.

The plaintiffs in error seek to escape liability on the ground that the defendant in error was guilty of contributory negligence. The evidence on that point was conflicting. The burden of establishing it rested upon the plaintiffs in error, who saw fit by demurrer to the evidence to withdraw that question from the consideration of the jury. The rule in such case is that, if the jury might have found the demurree not guilty of contributory negligence, the court must so find. But it is not necessary to invoke that principle in order to sustain the judgment of the trial court in this instance. The superintendent had lulled the defendant in error into a delusive sense of security by the false statement that the hole was unloaded, and he had a right to rely upon that assurance without employing precautions which ordinary prudence might otherwise have suggested.

Under these circumstances it is obvious that, upon a demurrer to the evidence, no other judgment could have been properly rendered in the case.

The remaining assignment of error, that the damages assessed by the jury (\$1,205) are excessive and unreasonable, is without merit. There is no pretense that the jury were actuated by prejudice or partiality in

arriving at their verdict, and the serious character of the injuries sustained by the defendant in error fully justified their finding. His left hand was broken and otherwise injured, his face cut and burned with powder, and a section of his teeth "knocked loose." Besides, it appears that his wage-earning capacity has been reduced from \$1.25 to \$1 per day.

Upon the whole case, the judgment is plainly right, and must be affirmed.

(58 W. Va. 317)

CAMPBELL et al. v. DOOLITTLE, Judge, et al.

(Supreme Court of Appeals of West Virginia. Nov. 14, 1905.)

1. JUDGE—POWER IN VACATION—PROHIBITION—ISSUE OF WRIT.

The last clause of section 1 of chapter 110 of the Code of 1899, authorizing the issuance by a judge of the Supreme Court of Appeals, in the vacation of said court, of a rule to show cause why the writ of prohibition shall not issue, is not unconstitutional.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 129.]

2. MUNICIPAL CORPORATIONS—REMOVAL OF OFFICERS—MINISTERIAL ACT.

The action of the council of a city or town in removing from office officers who are by law removable by such body at pleasure, without notice and without cause, is not judicial or quasi judicial in character, although involving discretion, but only ministerial or administrative.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 32.]

3. PROHIBITION—WHEN LIES—REMOVAL OF CITY OFFICERS.

In attempting to interfere with such action by prohibition, a circuit court acts without jurisdiction.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 32.]

(Syllabus by the Court.)

Petition by C. W. Campbell and others for writ of prohibition against E. S. Doolittle, judge, and others. Writ allowed.

Holt & Duncan, Wallace & Fitzpatrick, Geo. I. Neal, and W. K. Cowden, for petitioners. Lace Marcum, Geo. J. McComas, E. E. Williams, and C. E. Hogg, for respondents.

POFFENBARGER, J. Five members of the police force of the city of Huntington obtained from the judge of the circuit court of Cabell county a rule against the council of said city to show cause why a writ of prohibition should not issue against that body to prevent it from removing them from office by the votes of a smaller number of members thereof than is required by the charter in such case. Afterwards C. W. Campbell and five others, all members of said city council, obtained from a judge of this court a rule requiring the judge of said circuit court to appear in this court to show cause against the issuance of a writ of prohibition to restrain him from further proceeding upon the said rule so issued by him.

The full membership of said council is

12, but one had resigned, and a controversy was pending as to whether his successor had been elected. On the occasion of the motion of said policemen from office, another member was absent, and the removal was effected by a vote of 6 to 4. The application for the prohibition against the council was based upon alleged illegality of the action taken; it being claimed that the charter required the votes of 7 members to effect such removal, a majority of the whole number of councilmen required by the charter. As ground for discharging the rule and dismissing the petition, unconstitutionality of the statute authorizing the awarding of such process in the vacation of the court is advanced. The Constitution merely confers upon this court original jurisdiction in cases of prohibition, without indicating the particular mode of its exercise. In doing so, it impliedly conferred upon the court all the powers inherent in and necessary to the exercise of such jurisdiction, and among these is the awarding of process to bring the parties before the court. Citation in every legal proceeding is the first, and an indispensable, step. Power to give it must exist in the court, else the exercise of jurisdiction is impossible.

A law of nature and necessity, as well as of convenience, prevents the court from remaining in continuous session. The Constitution does not contemplate it. But it guarantees protection to life, liberty, and property, and contemplates the exercise, through the courts, for the accomplishment of this great purpose, the chief desideratum of all government, of the functions and powers which by the common law are inherent in the courts of the land, and especially of the extraordinary writs, designed for the maintenance of regularity and due process of law in the proceedings of the inferior courts. For these vital purposes it declares that "the courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have a remedy by due course of law; and justice shall be administered without sale, denial or delay." Article 3, § 17. The power to award process, the incipient action in every exercise of jurisdiction, must exist somewhere at all times; else the courts are not open in obedience to this mandate. Long before the adoption of the Constitution, the common law and its principles obtained here, permeating and interwoven with every fiber of our political and social compact. The great guarantees just quoted from the Constitution are themselves part of that law, having been taken from Magna Charta, into which they had been incorporated as the ancient safeguards of liberty, long antedating in origin the Great Charter.

For what common-law powers courts and judges have we look to the methods of procedure of the old English courts. Prohibition, mandamus, and habeas corpus were in constant employment, especially in the great struggles for the maintenance of the suprem-

acy of the common law over the Roman civil and ecclesiastical systems of law, and the constitution of the realm against encroachment of the sovereign. For these as well as other remedies the courts were always open, and a means of redress at hand for every injury, however suddenly it might occur. Process was ordinarily issued by the clerks of the courts, and extraordinary writs by the law courts, when in session, and, when not, resort might be had to the court of chancery for prohibition. 17 Vin. Abr. 547; *Iveson v. Harris*, 7 Ves. 257; *In re Bateman*, 9 Eq. Cas. L. R. 660; *Saunderson v. Cloggett*, 1 P. Wms. 663; *Montgomery v. Blair*, 2 Sch. & Lefr. 136; *In re Foster*, 24 Beav. 428; *Anon*, 1 P. Wms. 476. From an alteration in the number and arrangement of courts, no inference of intent to deprive the jurisdiction by prohibition of its virtue and efficacy arises, and its efficacy exists wherever original and general jurisdiction by that remedy is lodged. Such jurisdiction having been conferred upon this court, it takes necessarily the power to award through its judges in vacation process to bring the cause within the cognizance of the court, so that the remedy may be always available. Upon application of these principles, the Supreme Court of Missouri came to this conclusion in *State ex rel v. Rombauer*, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502, and we think they fully sustain it.

Prohibition can only go against judicial action, or quasi judicial action. *Fleming v. Commissioners*, 31 W. Va. 609, 8 S. E. 267; *Brazie v. Commissioners*, 25 W. Va. 213; *Hassinger v. Holt*, 47 W. Va. 348, 34 S. E. 723; *Hartigan v. Board of Regents*, 49 W. Va. 14, 33 S. E. 698. Those policemen were removable at the pleasure of the council, without notice and without cause being shown. Acts 1901, pp. 401, 402, c. 150, §§ 15, 19; Acts 1905, p. 116, c. 8, § 1. No element of judicial power is perceived in this. The function is, in our opinion, purely administrative or ministerial. That the exercise of discretion enters into it does not make it judicial. There is judicial and nonjudicial, or legislative and executive, discretion. *County Court v. Boreman*, 84 W. Va. 87, 11 S. E. 747; *County Court v. Armstrong*, Id. 323, 329, 12 S. E. 488; *Town of Davis v. Filler*, 47 W. Va. 413, 35 S. E. 6; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774. Prohibition will not go against such action, though discretionary. *Williamson v. County Court*, 56 W. Va. 33, 48 S. E. 835.

As under no circumstances could such action be controlled by prohibition, said circuit court acted without jurisdiction in awarding the rule; and as upon application the judge thereof refused to discharge it, a writ of prohibition must go from this court against him and his co-respondents, the relators in his court, according to the prayer of the petition, with a judgment for costs to the relators here against all the respondents except the said judge.

(58 W. Va. 321)

WOOD v. GORDON, Mayor, et al.

(Supreme Court of Appeals of West Virginia. Nov. 14, 1905.)

MUNICIPAL CORPORATIONS—COUNCIL—MAJORITY VOTE.

Whenever the words, "the council for the time being shall by a majority vote of all the members elected," or words of like import, shall occur in the charter of a municipal corporation relative to the members of the common council thereof, they shall be construed to mean a majority of the whole number of members to which the common council is entitled under its charter.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 207.]

(Syllabus by the Court.)

Petition by Warren Wood for writ of mandamus against H. C. Gordon, mayor, and others. Writ denied.

Holt & Duncan, Wallace & Fitzpatrick, Geo. I. Neal, and W. K. Cowden, for petitioner. Lace Marcum, Geo. J. McComas, E. E. Williams, and C. E. Hogg, for respondents.

McWHORTER, J. The common council of the city of Huntington, in the county of Cabell, is composed, under its city charter, of a mayor and 12 councilmen. At a meeting of said common council held at its council chamber in said city on the 19th day of June, 1905, the mayor presiding and 11 of the 12 members of council were present, when George L. Pickering, who was one of the members at the time, tendered his resignation as a member of the council, which resignation was accepted. The council then proceeded to the election of a member to fill the vacancy thus created. When Warren Wood and I. R. Titus, respectively, were placed in nomination, on a vote being taken, 6 of the councilmen voted for Wood and 4 voted for Titus, and the mayor declared Wood elected to fill the vacancy of the unexpired term of George L. Pickering, resigned, and Wood took and subscribed the oath of office as a councilman, and caused a certificate of said oath to be filed with the clerk of said city on the 20th day of June, 1905. On the 3d day of July, 1905, the circuit court of Cabell county awarded an alternative writ of mandamus against the mayor, requiring him to change said ruling made by him at the meeting of June 19th, whereby he had declared Wood elected councilman to fill the said vacancy, and to declare that neither the said Wood nor any other person was elected to fill the said vacancy. At a meeting of said council, held on the 3d day of July, 1905, the mayor changed his ruling in obedience to said alternative writ of mandamus, and declared that said Wood was not elected to fill the said vacancy in said council, and that no one was elected, and that said vacancy still existed; and the clerk of said council, who was present for the purpose of recording the proceedings and minutes of

the council, refused under the direction of the mayor to enroll said Wood as a member of the council, and both the clerk and the mayor refused to recognize the said Wood as a member of the council. A motion was then made by a councilman that the minutes of the meeting of June 19, 1905, as read by the clerk, and showing that said Wood was duly declared by the mayor to have been elected a member of the council to fill the said vacancy, be approved, which motion the mayor refused to entertain, and likewise refused an appeal therefrom demanded by members of the council; but, the motion for appeal being put to a vote by a member of the council, the motion was carried by a vote of 6 for and 5 against, and the minutes of the meeting of June 19, 1905, as read by the clerk, were approved. On the 17th day of July, 1905, the alternative writ awarded against the mayor by the circuit court on the 3d of July was made peremptory, and the court declared that Warren Wood was not elected to fill the said vacancy, and that the same still existed. On the 17th day of July, 1905, the council again met in regular session, the mayor presiding, and took up for consideration the filling of the vacancy in the council declared by the circuit court to exist. When the same persons, Wood and Titus, were nominated for the position, a vote was taken, and out of 10 members of council present, 6 voted for Wood and 4 voted for Titus, when the mayor, presiding, declared that neither said Wood nor said Titus was elected, and that said vacancy still existed, from which ruling of the chair an appeal was taken, on which, by a vote of 6 against to 4 for, the decision was not sustained, and the said Wood was by the council declared elected a member of the council to fill the said vacancy, and said Wood again took the oath of office, and presented himself before the mayor and council, and demanded of them recognition as a member of the council; but the mayor refused to recognize said Wood as a member of the council, and the city clerk refused, under the direction of the council or in any way, to recognize him.

Warren Wood filed his petition in this court, praying for an alternative writ of mandamus to be directed to the common council of the city of Huntington, and to the said mayor and the 11 members of the council and the clerk of said city, naming the mayor, councilmen, and clerk, commanding them and each of them to permit said Wood "to participate in all the meetings and deliberations of said common council and to be accorded the privilege of voting upon all questions arising before said common council upon which other members thereof have the right to vote, and to otherwise recognize your petitioner as a member of said common council of said city, or show cause, if any, they or any of them can, why they or any of them should not do so."

The only question involved in this case is the construction of section 14, c. 150, p. 400, of the Acts of 1901, said chapter being the charter of the city of Huntington. Said section is as follows: "Wherever a vacancy shall occur from any cause in the office of mayor, councilman, treasurer, city clerk or city assessor, the council for the time being shall by a majority vote of all the members elected, fill the vacancy until the next general election, at which time a successor shall be elected by the qualified voters of said city."

The rule is well established that in the construction of statutes effect must be given as far as possible to every part thereof. Evidently the Legislature had some object in providing that a vacancy should be filled "by a majority vote of all the members elected." The number of members elected to said council was 12, of which 7 are required for a majority. If a majority of a quorum, or of the number then constituting the council after one or more had died or resigned, had been intended, the Legislature would have so provided by saying that a majority of the council as then constituted, or a majority of a quorum, as might be intended, should fill the vacancy. *Pollasky v. Schmid*, 128 Mich. 699, 87 N. W. 1030, 55 L. R. A. 614, 92 Am. St. Rep. 560, is a case exactly in point, where the Supreme Court of Michigan holds that "the number of votes necessary to pass an ordinance over a veto, under a statute providing that it shall be two-thirds of all the members elected to the council, must be based on the total number elected, although at the time of the vote one member has died and one resigned." And in *Pimental v. San Francisco*, 21 Cal. 351, the act provided that no ordinance should be passed, "unless by a majority of all the members elected to each board." The board of assistant aldermen was composed of eight members, and one of the eight had resigned, and four of the seven remaining had voted for the ordinance, and the court held that "the ordinance in question, therefore, not having received the vote of a majority of all the members elected, was never passed. It was in fact rejected, as much so as if every member had cast his vote against its passage. It was, therefore, for all purposes an absolute nullity." See, also, *McCracken v. San Francisco*, 16 Cal. 591; *San Francisco v. Hazen*, 5 Cal. 169.

It is contended by counsel for petitioner that these cases do not apply in case at bar because they have reference to the passage of ordinances. I fail to see the force of this contention. The Legislature is providing for a vote of the council on a proposition before it, and, when it provides the number of votes to sustain or carry such proposition by the act of the council, it matters not what is intended to be done, the number of votes designated must be given or the motion fails. But it is further

contended that there is no West Virginia or Virginia Case to the same effect as the cases cited. The question was never before this court, except in the case of *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640, and that was a case in which the passage of an act was called in question because the Senate, having 22 members when full, but having one vacancy, had but 21 members, and the act had been declared passed by the Senate, by but 11 votes; that being a majority of 21. The act was sustained by the court on the principle that an act of the Legislature must be held to be constitutional if there can be any doubt in its favor, and the court in some manner worked up a doubt, of which it gave the act the benefit, and saved it, while it says: "For these reasons, with all respect, it was the duty of the Senate to have declared the bill not passed." The constitutional convention which assembled in 1872, seeing the dilemma in which the Supreme Court was placed in order to save the act of the Legislature, which had so clearly conflicted with the Constitution, by section 32 of article 6 of the Constitution then adopted by it, provided against any similar action in the future. The writ of mandamus is refused.

(140 N. C. 123)

HUTCHISON v. SOUTHERN RY. CO.
(Supreme Court of North Carolina. Nov. 28, 1905.)

1. RAILROADS—OPERATION—TRAIN SERVICE—REGULATIONS—REASONABLENESS.

A regulation established by a railway company, providing that certain trains shall not stop at all stations, is reasonable, provided there are enough trains to serve the purposes of local travel.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1068; vol. 41, Cent. Dig. Railroads, § 715.]

2. CARRIERS — PASSENGERS — CONTRACT OF TRANSPORTATION — DISCHARGING PASSENGER AT DESTINATION.

Where a person having a ticket calling for a regular station as her destination was permitted without objection to take a train which did not stop at that station, and she did not know that the train did not stop there, and there was nothing on the face of the ticket to show that it was not good on that train, it was the duty of the company to stop the train at that station to permit her to alight.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1068.]

3. SAME — CARRYING BEYOND DESTINATION — PUNITIVE DAMAGES.

A passenger, recklessly and willfully carried, against her protest, beyond her destination, may recover punitive damages, under Code, § 1063, providing that passengers shall be put off at the destination to which they have paid, and that carriers shall be liable to the party aggrieved for any neglect or refusal in the premises.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1083.]

Appeal from Superior Court, Catawba County; Council, Judge.

Action by Mattie Hutchison against the

Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. J. Ervin, for appellant. Self & Whitener and Hufham & Williams, for appellee.

CLARK, C. J. The feme plaintiff, a widow, bought a ticket from Hickory, N. C., to Liberty, S. C. The agent at Hickory told her she would make connection with the 1 p. m. train at Charlotte. On arriving at Charlotte, where she had to change cars, her train missed connection, and she took the next train, which left there at 10:20 p. m. This was a train which did not stop at all stations, Liberty being one of those at which, by the defendant's printed schedule, it did not stop; but the plaintiff testified that she was not aware of that fact, and no one so informed her. On the contrary, the conductor on the train, before getting to Charlotte told her she would miss connection, but that this 10:20 p. m. train from Charlotte would take her to Liberty that night; that in the 18 months previous she had twice traveled on that same 10:20 train, and each time had been put off at Liberty; that soon after leaving Charlotte the conductor, on taking up her ticket, exclaimed in a loud, imperative, and commanding tone: "What are you doing in here? You have no business in here. Who told you to get on here?" He kept repeating this, rebuking her, and she was deeply humiliated. She says she asked him to give her back her ticket and put her off at the first station (Gastonia); that, if he had done this, she would have spent the night there, and have gone on in the daytime next morning to Liberty, but, instead of this, he kept the ticket and later came back again, rebuking her in a loud voice, heard distinctly all over the coach, telling her she had no business in there, and saying, "I want to know who told you to get on," adding that she knew the train did not stop at Liberty; that he spoke in a very ill-natured tone and loud voice; that she tried to reason with him, and again asked him to put her off at the first stop; that he came back the third time with the same loud, boisterous charges; that when she did not reply, being very nervous and humiliated, he "looked at her very furiously and said, 'What if he didn't put me off there?'" To this she says she replied finally that she had paid her fare and did not deserve such indignities, and that he would hear from her; that at Gastonia he did not return her ticket, as requested, so she could stop; that he did not stop at Liberty, where her people were on the platform as she passed, having telegraphed her daughter from Charlotte that, having missed connection, she would be on that train, but she was carried past to Seneca, about 25 miles further on, where she was put out at 2:30 at night, and had to sit on the platform alone till 4:30, when she took the train back, reaching Liberty before daylight in a shat-

tered, nervous condition, and walked in the dark up to her son-in-law's house alone, a half mile away, and was so exhausted by the nervous strain and exposure to the night air that she was ill, called in a physician, and was confined to her bed several days. The conductor, in his testimony, denied any discourtesy or rudeness, but says that he was polite and carried her on to Seneca because he suggested to her that she would get to Liberty 6 hours earlier by taking the north-bound train back than if she stopped at a station this side and waited for a south-bound train to Liberty, and that she consented to this.

In this conflict of evidence the jury found upon the issues submitted to them: "(1) Did the defendant wrongfully refuse to stop its train at Liberty and permit the plaintiff to depart therefrom? Yes. (2) Did the defendant maliciously or willfully, wantonly, and rudely mistreat and humiliate the plaintiff while a passenger on its train? Yes." The latter was a pure issue of fact, and the finding of the jury is conclusive; the judge having refused to set the verdict aside. As to the first issue, it is a reasonable regulation of the defendant that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel, and it does not appear that there was not. If the plaintiff had been aware that this train did not stop at Liberty, she could not complain if she had been put off at Gastonia, the first stop, with her ticket indorsed with leave to pursue her journey by the next train stopping at Liberty. But she testifies that she had no such information; on the contrary, that she had twice in 18 months previously been on the same train, which stopped and put her off at Liberty. The notice on the printed schedule of the company was not brought home to her, and there was no evidence that she had any actual notice. There was nothing on the face of her ticket to show that it was not good on that train. It was the duty of the defendant to have had an agent at the gate (as is usual) to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into this train without objection, with a ticket calling for Liberty, a regular station, as her destination, and she not knowing that this train did not stop there, it was the duty of the defendant to stop the train at that point for her.

On the question of damages his honor correctly instructed the jury that if the conductor maliciously or with wanton recklessness carried her by her station, or if he maliciously or wantonly mistreated and humiliated her, the jury could assess punitive damages. The authorities are plenary that the passenger is entitled to recover punitive damages for insult or mistreatment on the part of any employé of the common carrier. *Williams v. Gill*, 122 N. C. 970, 29 S. E. 879;

Strother v. Railroad, 123 N. C. 197, 31 S. E. 386; and many other cases. It is equally true that Code, § 1963, provides that passengers shall be put off at the destination to which they have paid, and that the carrier "shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises," and that when the refusal to take on or discharge a passenger, where he is entitled to be received or discharged, is reckless and wanton, punitive damages may be recovered. *Purcell v. Railroad*, 108 N. C. 417, 12 S. E. 954, 956, 12 L. R. A. 113; *Hansley v. Railroad*, 117 N. C. 570, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600; *Coleman v. Railroad*, 138 N. C. 355, 50 S. E. 690. Certainly the plaintiff, an unprotected female, was entitled to recover, if recklessly and willfully carried against her protest 25 miles beyond her station, put out at 2:30 at night at a strange station, where she sits at dead of night two hours alone on the platform, and at last reaches her destination before day, to be met by no one, and has to walk to her daughter's house alone, and with shattered nerves has to take her bed and call in a physician. *Holmes v. Railroad*, 94 N. C. 323; *Knowles v. Railroad*, 102 N. C. 66, 9 S. E. 7. The authorities are uniform, here and elsewhere, that, if the passenger is carried by his station, he is entitled to damages, and if it is done recklessly or willfully, as the jury here find, he is entitled to punitive damages. The only decision we can find in the books to the contrary is *Smith v. Railroad*, 130 N. C. 304, 41 S. E. 481, which holds that, if there is no bodily harm or actual damages, a recovery cannot be had. That decision was by a divided court, and is in conflict with the statute (Code, § 1963) above quoted, and unsupported by precedent, and we take this first opportunity to correct and overrule it. In *Thompson on Carriers*, 86, it is said: "Carrying a passenger beyond his destination, in disregard of his request to be put off there, will afford a good ground of action; and this, though no bodily harm, mental suffering, insult or oppression, or pecuniary loss be shown"—citing *Railroad v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Porter v. The New England*, 17 Mo. 290; *Railroad v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703; *Railroad v. McArthur*, 43 Miss. 180; *Railroad v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Sunday v. Gordon*, 1 Blatchf. & H. 569, Fed. Cas. No. 13,616; *Thompson v. Railroad*, 50 Miss. 315, 19 Am. Rep. 12. To the same purport, 1 Fetter, *Carriers of Pass.* § 300, citing *Caldwell v. Railroad*, 89 Ga. 550, 15 S. E. 678; *Dave v. Steamboat Co.*, 47 La. Ann. 576, 17 South. 128; *Strange v. Railroad*, 61 Mo. App. 586; and there are many other cases to the same effect.

Upon examination of all the exceptions, and without discussing them seriatim, we find no error.

(140 N. C. 58)

CAVINESS v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Supreme Court of North Carolina. Nov. 22, 1905.)

1. EXECUTORS AND ADMINISTRATORS — DEVASTAVIT — PAYMENT OF FUNDS — REFUNDMENT.

Where an administrator, who was also one of the distributees of the estate, wrongfully paid therefrom money in excess of the amount to which he and his brother were entitled to R. for the purchase of certain stock for the benefit of himself and his brother, and R. had knowledge that the money so paid belonged to the estate, he was liable, in the absence of debts against the estate, to return to the administrator *de bonis non* only the excess over the amounts to which the administrator and his brother were entitled as distributees.

2. SUBROGATION—LIABILITY OF SURETY.

Judgment having been rendered against the administrator's surety for the amount of the devastavit, such surety was subrogated to the rights of the administrator *de bonis non* against R.

3. SAME.

Where an administrator wrongfully paid money belonging to the estate to purchase stock from R. for the benefit of the administrator and his brother, and R., with knowledge that the money so paid belonged to the estate, retained the stock as security for the balance of the price, the administrator's surety, on being compelled to make good the devastavit, was entitled to subject the administrator's interest in the stock to the payment of such liability, either by an equitable execution or by supplemental proceedings in the particular case.

Appeal from Superior Court, Randolph County; Peebles, Judge.

Action by J. M. Caviness, as administrator *de bonis non* of the estate of J. E. Cole, deceased, against the Fidelity & Deposit Company of Maryland. From a judgment directing defendant W. S. Russell to pay into court \$1,148.45 to be applied on a judgment in favor of plaintiff against defendant surety company and its principal, J. E. Cole, the surety company appeals. Affirmed.

L. W. Humphrey and Elijah Moffitt, for appellant. H. A. London & Son, for appellee Russell.

CONNOR, J. James E. Cole qualified on November 11, 1902, as administrator of J. E. Cole, deceased, and executed his bond in the penal sum of \$18,000 with the defendant company as surety. On March 3, 1904, he was removed, and the plaintiff appointed administrator *de bonis non* of the estate. This action is prosecuted by the plaintiff against J. E. Cole and the surety company to recover the amount remaining, or which ought to be, in his hands belonging to the estate. The defendant surety company in its answer alleges that \$5,000 of the assets of the estate were paid by the administrator to W. S. Russell on account of certain stock purchased by the administrator and his brother, T. A. Cole; that Russell had knowledge that the said sum was a part of the asset and property of the estate. The de-

fendant claimed that it was subrogated to the rights of the plaintiff to call upon Russell to refund so much of said amount as should be necessary to indemnify it from loss on account of the devastavit of the administrator. Russell was made a party defendant, and filed an answer denying the material allegations of the defendant company's answer. From the admissions in the pleading, findings by his honor, and the verdict of the jury upon issues submitted, we gather the following facts: J. A. Cole died intestate leaving five distributees, two of whom were the administrator and his brother, T. A. Cole. Prior to February 5, 1903, the administrator received, on account of the estate, about \$9,600. He held a note against one of the distributees for \$1,136.92, and owed a note himself of \$1,000. Subsequent to February 5, 1903, he received about \$400. The total indebtedness of the estate did not exceed \$200, the larger portion of which was paid prior to February 5, 1903, leaving in the hands of the administrator on that day about \$9,400. On said February 5, 1903, he drew a check upon the assets of the estate in the Bank of Randolph, payable to himself and his brother, T. A. Cole, for \$5,000, which was deposited in bank to their credit. On the same day he and his brother purchased from defendant Russell 180 shares of stock in the Enterprise Manufacturing Company, for \$20,000, and, on account thereof, gave him a check on their bank account for \$5,000; Russell retaining a lien on 166 shares of stock for the balance of the purchase price. Russell had knowledge of the source from which the \$5,000 was obtained.

The court below found by an inspection of the accounts of the administrator that the balance due the plaintiff administrator *d. b. n.* from Cole, former administrator, was \$3,699.58, and that the interest of said J. E. Cole and T. A. Cole in the estate was \$3,851.55. It appeared that on October 15, 1903, the administrator paid to himself and his brother each \$2,000 from the assets of the estate. On said day he paid Mrs. S. F. Caviness, one of the distributees, \$2,000—the payment being made by surrender of her note and \$862.08 cash. On November 10, 1903, he paid Mrs. Green, another distributee, \$500. He paid the Marble & Granite Company \$400, and for taxes, charges of administration, etc., about \$200. He did not pay the note of \$1,000, but it is charged to him in his account. His honor states that, in ascertaining the interest of J. E. Cole in the estate, he has deducted said note, and that he was of the opinion that defendant Russell was liable to account for the amount received by him, but was entitled to deduct therefrom the interest of J. E. Cole and T. A. Cole, which he ascertains to be \$3,851.55, from the \$5,000, leaving a balance of \$1,148.45, for which he gives judgment against Russell, directing him to pay it

into court, to be applied to the judgment for \$3,699.58 against J. E. Cole and the surety company. From this judgment, the defendant surety company appealed.

No testimony is set out in the record or case on appeal; hence we cannot pass upon the second contention, which his honor said was made for the first time in the case on appeal. As between the plaintiff and the defendant J. E. Cole, there can be no doubt as to the correctness of the ruling and judgment. This is demonstrated by a simple calculation. The amount recovered will pay to the distributee, who has received nothing, the one to whom \$500 has been paid, and the one to whom \$2,000 has been paid, the amount due on their distributive shares, and leave in the hands of the plaintiff the exact amount due J. E. and T. A. Cole to equalize their share. The principle by which his honor was guided is announced in *Grant v. Bell*, 90 N. C. 559. The estate, so far as the plaintiff is interested, is settled by the judgment. The defendant surety company insists that it is subrogated to the rights of the plaintiff, and is entitled to call on the defendant Russell to refund to it the amount received from Cole, just as the plaintiff could have done. We entertain no doubt that in equity the company is subrogated to the rights of the plaintiff against Russell. Has it any other or higher right than the plaintiff had? Certainly, as between the other distributees and Cole, the latter was entitled to pay them and to retain himself, at any time during the administration, the amount to which each was entitled. No one except creditors could complain. If he paid more or retained more than was due, he was liable personally and on his bond for the excess. The defendant surety company says that the payment to T. A. Cole and appropriation by himself of the \$5,000 was a devastavit. This is true so far as the amount was in excess of their interests. It is elementary that one asserting the right of subrogation stands in the shoes of the creditor to whose right he is subrogated. His rights are exactly those of the creditor whose debt he has paid. There is no privity of contract between Russell and the surety company. It is insisted that an administrator commits a devastavit by paying out the asset to a distributee before the expiration of one year from the date of administration. If there be debts unpaid, this is undoubtedly true; or if he pays one distributee more than his share, to that extent which is a devastavit.

This court has held that while the administrator is allowed by statute two years within which to settle the estate, he should, when there are no debts or other exigencies requiring the retention of the funds, pay them to the distributees, and that they may within the two years maintain an action for them. In *Clements v. Rogers*, 91 N. C.

63, this court refused to dismiss an action brought within the two years, when it was admitted that there were no debts outstanding. In *Allen v. Royster*, 107 N. C. 278, 12 S. E. 134, it was held that the plaintiff distributee was not required to allege the non-existence of debts; *Merrimon, C. J.*, saying in response to a motion to dismiss because the complaint did not negative the existence of debts: "It need not necessarily allege that two years have elapsed next after the administrator qualified as such, and before the action begun, because the administrator might consent to account fully or partially with the next of kin before such lapse of time, and if there should exist a valid reason why he should not, he should set it up as matter of defense in a proper way. It might turn out that the court would require the administrator to account with the distributees in some measure, and stay the final account until the end of two years." If the distributees had sued the administrator at the time he paid the amount to his brother and himself, the court, upon the facts as they existed on that day, would have sustained the action, and required him to pay over the amount in his hands to all of the distributees. In the condition of the estate on February 5, 1903, no devastavit was committed in paying over to himself and his brother the amount due them; to that extent the payment was rightful. Russell is fixed with notice of the conditions as they existed on that day. If he had been called to account on February 6, 1903, Russell would have been compelled to the other distributees the difference between the amount received by him and the amount which was due J. E. and T. A. Cole. The fact that more than six months thereafter (October 15, 1903) he paid to himself and his brother \$4,000, which was a devastavit of which Russell had no knowledge, cannot change or increase his liability, for that was fixed at the time he received the money, February 5, 1903.

We concur with the court below that Russell was not liable for any shortage on the part of Cole, administrator, which occurred after February 5, 1903. Suppose that he had paid Russell the exact amount due his brother and himself on February 5th, and six months thereafter committed a devastavit by appropriating other money belonging to the estate, is it possible that thereby Russell would have been made liable? Certainly there was no wrong done in paying T. A. Cole to the extent of his interest, and we are unable to perceive any reason why he was not entitled to retain the amount due himself on that day. The receipt of Russell in excess of the amount due, with knowledge of the facts, was wrongful, and, to the extent of the wrong done, he must answer to the surety company, just as he would, if called upon by the distributees, have been required

to do. There is no suggestion that there was any actual fraud intended by Cole or Russell at the time of the payment. While the payment of the excess was unlawful, it is not inconsistent with an honest mistake in respect to the amount of their interests in the estate. It is sufficient that we find in the principles of the law a remedy commensurate with the wrong. If the defendant Russell still holds the stock, we can see no reason why the defendant surety company may not subject Cole's interest by an equitable execution or by supplemental proceedings. As all parties are before the court, it would seem this could be done in this action. Other parties may be brought in, and pleadings amended for that purpose, if the defendant company be so advised.

With the right to take further action as indicated, the judgment is affirmed.

Affirmed.

(140 N. C. 33)

LOWERY et al. v. BOARD OF GRADED SCHOOL TRUSTEES IN TOWN OF KERNERSVILLE.

(Supreme Court of North Carolina. Nov. 22, 1905.)

1. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.

Statutes must be construed with reference to the Constitution, and, if susceptible of two constructions, the courts will adopt that one which renders them constitutional.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 46.]

2. SAME—DISCRIMINATION BY REASON OF RACE—PUBLIC SCHOOLS.

Although Act 1905, entitled "An act to establish a graded school in the town of Kernersville, Forsyth county, North Carolina" (Laws 1905, p. 30, c. 11), uses the term "graded school" in the singular, yet, inasmuch as it is provided by section 4 that all children resident in the district within school age shall be admitted, it must be construed as directing the establishment of one school in which the children of each race are to be taught in separate buildings and by separate teachers, and, when so construed, it is not in violation of Const. art. 9, § 2, prohibiting discrimination in favor of, or to the prejudice of, either race.

3. SCHOOLS AND SCHOOL DISTRICTS—EXTENT OF DISTRICT.

Under Acts 1905, p. 30, c. 11, entitled "An act to establish a graded school in the town of Kernersville," providing (section 1) that the town of Kernersville is made a public school district, called the "Kernersville Graded School District," the district defined must be confined to the limits prescribed, and cannot include contiguous territory for the colored schools.

4. STATUTES—PARTIAL INVALIDITY.

If the general scope and purpose of a statute are constitutional, and constitutional means are provided for executing such general purpose, the entire statute will not be declared void because one or more of the details are not in accordance with the Constitution, provided the invalid part may be eliminated without affecting the general purpose.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 58-66.]

5. CONSTITUTIONAL LAW—DISCRIMINATION BY REASON OF RACE—PUBLIC SCHOOLS.

Acts 1905, p. 31, c. 11, § 7, establishing a graded school in the town of Kernersville, pro-

vides that the moneys which shall from time to time be apportioned under the general school law of the state to the said school district shall be turned over by the treasurer of the county to the treasurer of said school trustees, and that in apportioning the school fund said graded school shall be allowed the proportion of said fund per capita to the white children of school age. Held that, it being the apparent purpose of such section to empower the use of all public school fund apportioned to the graded school district to the white schools, it is in violation of the Constitution.

6. SCHOOLS AND SCHOOL DISTRICTS—CREATION OF DISTRICTS—STATUTORY PROVISIONS.

Acts 1905, p. 30, c. 11, § 4, establishing a graded school in the town of Kernersville, expressly confers on the board of trustees "exclusive control of the public interests, funds and property of the graded school district." Held, that such provision is sufficient to authorize the board to receive the money apportioned to both races and apply it in a way provided by the Constitution, independently of section 7 (page 31) of the act, which is unconstitutional.

7. SAME—DISTRICT PROPERTY.

Acts 1905, p. 31, c. 11, § 8, establishing a graded school in the town of Kernersville, provides that the property of the public schools for white children in the district shall become the property of the board of trustees, and that they may in their discretion sell the same and apply the proceeds to the use of the public graded school to be established. Held, that this does not authorize the board to take the school building previously provided for the colored children and use it for the whites.

8. SAME—FUNDS—APPORTIONMENT BETWEEN WHITE AND COLORED SCHOOLS.

The special tax directed by Acts 1905, p. 31, c. 11, § 6, establishing a graded school in the town of Kernersville, is not to be apportioned between the races per capita, but the school term for each race shall be of the same length during the year.

9. CONSTITUTIONAL LAW—DISCRIMINATION BETWEEN RACES—PUBLIC SCHOOLS.

The erection of a necessary school building for a large number of white children of the district is not a discrimination against the much smaller number of colored children of the district, for whom an ample building has been supplied.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 723.]

Appeal from Superior Court, Forsyth County; Bryan, Judge.

Action by W. A. Lowery and others against the board of graded school trustees in the town of Kernersville. From a judgment vacating the restraining order and refusing the injunction asked, plaintiffs appeal. Affirmed.

At the session of 1905 of the General Assembly an act was passed and ratified entitled "An act to establish a graded school in the town of Kernersville, Forsyth county, North Carolina" (Laws 1905, pp. 30-32, c. 11). The portions of said act material to be noticed in the discussion of the exceptions by plaintiffs to the judgment appealed from are: Section 1. The town of Kernersville is made a public school district, to be called the "Kernersville Graded School District." Section 2 provides for the election of a board of trustees, consisting of five members. Section 3 directs the organization of the board and the election of proper officers. Section 4, that the trustees shall have exclusive control

of the public school interests, funds, and property in the graded school district, shall provide rules for their government not inconsistent with law, fix the compensation of teachers, etc., shall make an accurate census of the school population of said district, as required by law, etc.; that all children resident in said district, between the ages of 6 and 21, shall be admitted to the school free of tuition charges. Section 6 directs the levying of a special tax, etc., provided that the question be first submitted to the qualified voters of said district at the municipal election in May, 1905. It is also provided that at the same time the proposition be submitted to the voters to issue coupon bonds, not to exceed the sum of \$4,000, to be used in the erection of a suitable school building in said school district. Section 7, that the moneys which shall from time to time be apportioned under the general school law of the state to the said school district be turned over by the treasurer of Forsyth county to the treasurer of the said school trustees for the benefit of said school; provided that, in apportioning the school fund of said county, said graded school shall be allowed the proportion of said fund per capita to the white children of school age. Section 8, that the property, both real and personal, of the public school for white children, shall become the property of said graded school, and shall be vested in the said board of trustees, and their successors in trust, for the said graded school, and the said trustees may, in their discretion, sell the same, or any part thereof, and apply the proceeds to the use of the public graded schools to be established in said school district of Kernersville. Section 9 provides for issuing the bonds, etc., if approved by voters.

Plaintiff alleges that, pursuant to the provisions of said act, an election was held in the prescribed territory, on the first Tuesday in May, 1905, and that a majority of 16 of the voters of said district cast their votes in favor of levying the tax and issuing the bonds provided for by the act; that only nine days' notice of said election was given, whereby some electors who would have been against schools were prevented from voting; that the defendants who were elected trustees at said election have organized as provided in said act, and that the bonds have been prepared and delivered to them, and that they now threaten to sell them, etc.; that the board of commissioners of the town of Kernersville threaten to levy a tax upon the property and polls in said district for the support and maintenance of said schools, etc.; that the board of education threatens to turn over to defendants the property of the public school for white children and do all other acts and things directed by said act in that respect; that the town of Kernersville has a population of about 1,200, counting both white and colored persons; that the colored persons in said town own property valued for taxation at \$8,534; that the

said act is unconstitutional and void, in that it provides for no graded school for colored children within said district, that it discriminates to the prejudice of the children of the colored race, and gives to the children of the white race advantage denied to the children of the colored race; that the election was irregular and unlawful, for that only nine days' notice was given, and that it was held on Tuesday, instead of Monday. They demand that the defendants be enjoined from proceeding with the issuing of the bonds, etc., or levying the taxes, or doing any other of the several acts under and by virtue of the said act, etc. A restraining order was issued, with an order to the defendants to show cause why a permanent injunction should not issue, etc. Defendants answered, admitting the provisions of the act, the manner and time of holding the election, and that they were proceeding to discharge the duties imposed upon them by the several sections of the statute. They deny several immaterial allegations in this respect. They say they are advised that by the provisions of the act they are entitled to take charge of the colored school property in the district, and intend to do so, and use it for the purpose of a graded school for white children in the district, until they can build a schoolhouse suitable for school purposes as provided by the act; that they intend to use the money collected from the white and colored people of the town for the support and maintenance of the white graded school and colored school, so as to afford equal facilities for the school children of both races, as provided for the public schools in the several counties of the state. They further say that the county board of education have already turned over the property of the public school for white children of the district to the board of school trustees, and have already directed the money apportioned to the white children of the district to be turned over to said trustees for the benefit of the white schools under the provisions of the act; that the board of education have also ordered the treasurer of the county to pay to the school committee of the colored public school district, which embraces the town of Kernersville and considerable contiguous territory, the money to be applied to the maintenance of the school in the district, as heretofore, under the school law, which is amply sufficient to maintain the school for a period of not less than 4½ months, on conditions heretofore existing; that the public school district for colored people has in no way been changed or interfered with by these defendants, but they believe the money should have been turned over to the graded school trustees for said purposes, as well as the colored school property; that the colored school children within school age in the district number 68, and the white school children within said age number 307 (these numbers are ascertained by a census taken by defendant board of trustees); that

heretofore there have been in the corporate limits of the town two public schoolhouses, used by each race separately; that the public school money raised in the county has already been assigned and apportioned to the colored school district, without regard to the act establishing the new graded school district. They further deny that the act discriminates against either race; that it nowhere provides that the tax collected from the colored residents of the town shall be applied exclusively to the support of the white school, nor exclusively to the colored school; nor do the defendants intend, nor have they ever intended, to apply the money arising from the taxes on property or polls of the colored residents exclusively to either race, there being nothing in the act requiring them so to do or forbidding them to apportion to the public school for the colored children sufficient sums of money to afford them equal school facilities with the children of the white race; that the house now used for the colored schools is amply sufficient to accommodate the children of that race. They further say that they are advised that the election was held in accordance with law and was fairly conducted; that the voters of the town knew of the day and attended the election, casting their ballots as they wished, etc. The defendants filed affidavits tending to sustain their answer.

Judge Bryan, upon the hearing, found that the election was held substantially as required by the act; that the qualified voters in the town had ample opportunity to register; that the proceeds of the bonds proposed to be issued were to be applied to building a schoolhouse for the white children in the district; that the building for white children is insufficient to accommodate them, and the erection of a building for additional accommodations was necessary; that the school building for the colored children was amply sufficient and commodious for said children. Being of opinion that the act provided a graded school district embracing all of the territory within the limits of the town of Kernersville for both races, without any unlawful discrimination for or against the children of either race resident therein, the court below held it was not unconstitutional, and vacated the restraining order and refused the injunction. The plaintiffs appealed.

Lindsay Patterson and T. F. Baldwin, for appellants. Watson, Buxton & Watson and Sapp & Hasten, for appellee.

CONNOR, J. (after stating the facts). If we concurred in the construction put upon the act by the learned counsel for the plaintiffs, we should feel compelled to declare it violative of the Constitution. We do not propose to bring into question the decisions made by this court in *Quitt v. Commissioners*, 94 N. C. 709, 55 Am. Rep. 688, and *Riggsbee v. Durham*, 94 N. C. 800. The principle

announced in those cases and uniformly adhered to by this court, that a law which directs the tax raised from the polls and property of white persons to be devoted to sustaining schools for white children and that raised from the polls and property of negroes to schools for negro children, is unconstitutional and void. In both of those cases, the language of the statute directing such distribution of the tax collected was clear and explicit. Smith, C. J., says: "The fund is divided by race distinctions, depending on the source from which the moneys are derived. This, as the judge decides, is forbidden by the Constitution, and, as the objects in view cannot be accomplished by using the funds as directed, or for any other purpose than the statutory requirements, it clearly ought not to be taken from the taxpayers at all, because this is but a means of effecting an illegal law." Conceding that, under the explicit language of section 2, art. 9, of the Constitution, there must be no discrimination in favor of or to the prejudice of either race, we proceed to ascertain whether there is imposed upon the defendant trustees any duty in respect to the establishment and maintenance of the Kernersville graded school, provided for by the act of 1905 (Laws 1905, p. 30, c. 11), inconsistent with this provision.

In discussing the language of the statute, it will be well to keep in view the universally recognized rule of construction which requires us to read the act in the light of and with reference to the Constitution of the state. The principle is well stated in *Sutherland on Statutory Construction* (Lewis' 2d Ed.) § 82: "Every presumption is in favor of the validity of an act of the Legislature and all doubts are resolved in support of the act. In determining the constitutionality of an act of the Legislature, courts always presume in the first place that the act is constitutional. They also presume that the Legislature acted with integrity and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution." Peckham, J., in *People v. Terry*, 108 N. Y. 1, 14 N. E. 815, says: "In construing a statute which is susceptible of two constructions, one of which will render it valid and the other void, and both are equally reasonable, it is familiar learning that courts incline to and will adopt the construction which renders the act valid, rather than the one which avoids it." We will never assume that the Legislature intended to pass an unconstitutional act. "The courts may resort to an implication to sustain one act, but not to destroy it." *Atlantic Water Co. v. Const. Water Co.*, 44 N. J. Eq. 427, 15 Atl. 581. This rule is quite elementary, and finds expression and application in the courts of every American state. It must be conceded that the act is not so clear as could be desired, nor does it conform in many important respects to the

many other acts found in our statutes establishing graded schools.

Its defects are to be seen rather in omissions than positive provisions. We notice, first, the several criticisms made by the learned counsel for the plaintiffs. They say that it is manifest that it was never contemplated that there should be a school in the graded school district for the colored race; that only a school for the white race is provided for. We do not attach any importance to the term "graded school." While in other acts which we have examined the plural is used, we see no difficulty in finding in the act a positive direction to establish one school in which the children of each race are to be taught in separate buildings and by separate teachers. The Constitution expressly commands it to be done. This was well known to the draftsman and the Legislature. It will be noted that by section 4 the trustees are required to cause an accurate census of the school population in the district to be taken. It also expressly provides that all children resident in the district within the school age shall be admitted into the school free of tuition. It could not have been contemplated that, in defiance of the express language of the Constitution, all of the children of both races in the district should be admitted into one school building. The fair and only reasonable implication is that under one board of management, one superintendent, the school should be so arranged and separated as to meet the constitutional requirement in that respect. We do not suppose that the power of the defendant board to divide the district into as many sections, departments, or schools as the convenience or necessity of the children of the district demanded, would be questioned. It is a matter of common observation and knowledge that in the larger towns of the state the trustees of the graded or city schools divide it into sections and locate each section or school to meet the convenience of the people, and this is done under the general power to establish a graded school for each race. If the white children are so numerous and the territorial limits of the district so large that in the opinion of the board two school buildings with a separate corps of teachers are necessary, certainly, if within their means, they may establish them under the power to establish a school for white children. The same principle applies to a school for colored children. When a duty is imposed and power conferred upon a public agency, by necessary implication the duty and power to do the thing in the manner directed by the Constitution attach. In this connection it may be proper to say that we do not concur in the suggestion contained in the answer that the graded school district of Kernersville can be confined to the limits prescribed by the act in regard to the white school and include contiguous territory for the colored

school. The school district prescribed by the act must include both races, and the taxes levied and collected upon the property and polls of both races in the district must be applied to the support and maintenance of a graded school for the children of both races—the schools to be separated and the children of each race to be taught in a separate school. In carrying out the provisions of the act, the imperative mandate of the Constitution that there shall be no discrimination in favor of or to the prejudice of either race must be observed. Thus construed, the constitutional requirement is complied with.

The act (section 4) expressly confers upon the board of trustees "exclusive control of the public school interests, funds and property in the graded school district as hereinafter provided." It is said that there are provisions in the act controlling this general grant of power which discriminates against the children of the colored race. Before discussing the provisions objected to, we wish to note that another well-settled rule in the construction of statutes is enforced by the courts. If the general scope and purpose of the statute are constitutional, and constitutional means are provided for executing such general purposes, the entire statute will not be declared void, because some one or more of the details prescribed or minor provisions incorporated are not in accordance with the Constitution, provided such invalid parts may be eliminated without destroying or materially affecting the general purpose. The rule is thus stated: "Where the unconstitutional portions are stricken out, and that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained." 26 Am. & Eng. Enc. 570, in which a large number of illustrative cases are cited. This court has frequently recognized and enforced the rule. *Berry v. Haines*, 4 N. C. 311; *Darby v. Wilmington*, 76 N. C. 133; *Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488. The difficulty is usually found in the application of the rule. The general purpose and scope of the act under examination are declared to be to establish a graded school in the town of Kernersville. This purpose is not only in accordance with the Constitution, but in furtherance of the right of the people to have the privilege of education and the duty of the state to guard and maintain that right. Dec. of Rights, § 27. The particular form and method of securing the right by the establishment of graded schools, when adopted by the people in accordance with law, has been uniformly maintained by this court. The district is clearly defined. The establishment of the school and levy of the tax are made dependent upon the will of all of the qualified voters within the district at an election to be held for that purpose. The tax is uniform upon all the property in the district,

and the constitutional equation upon property and polls observed. All of the children within the school age are admitted, and, as we have endeavored to show, by reading the act in the light of the Constitution, this includes children of both races, to be taught separately. There is no discrimination in regard to the application of the tax in respect to races. A board of trustees is provided with ample power to execute the law.

The plaintiffs suggest that by section 7 it is provided that the money which shall be apportioned under the general school law to the school district shall be turned over to the treasurer of the trustees of the district for the benefit of said school, provided, that in apportioning the school fund of the county, the said graded school shall be allowed the proportion of the fund due per capita to the white children of school age. We are not quite sure that we correctly interpret this section. We find in other acts establishing graded schools a similar provision in regard to the application of the fund from the general school tax apportioned to the children within the district, but such fund is usually directed to be received by the trustees and applied under their direction. If it is the purpose and effect of the seventh section to empower the use of all of the public school fund apportioned to the graded school district for the white schools, it is clearly in violation of the Constitution. This money, after apportionment, belongs to the children of both races, and should be applied to the support of the schools for both races, without discrimination or prejudice. Some light is thrown upon the subject by the answer of the defendants. It seems that prior to the passage of this act the school district for the white children comprised the town of Kernersville, containing 307 children of school age; that the district for the colored children included contiguous territory, the number of colored children within the limits of the new district being only 68; that the public money from the general school fund has already been apportioned to the colored school district regardless of the act of 1905; and that it is only the money apportioned to the white children which is to be paid over to the defendant board. We gather from the answer that the defendant board supposed that the act of 1905 in no way changed the district established for the colored children. In this view his honor did not concur, nor do we. It is permissible for the school authorities, under the general school law in each county, to so arrange the districts as to meet the needs of each race, that they may be of different territorial boundaries. The reasons for doing so in many cases are obvious. When, however, a new district is created by the Legislature, with power to levy a special tax and maintain a graded or large public school under the control of a separate and special board, we are unable to see how the uniformity which the Constitution requires, as con-

strued in *Pruitt's Case*, can be maintained, unless the district includes the children of both races. The difficulties in doing so are apparent. We think, therefore, that so much of section 7 as undertakes to distinguish between the races in regard to the money apportioned from the public school fund is invalid. This, however, does not affect the other portions of the act. We can see no reason why the defendant board may not, under the general power "to control the public school interests, funds and property in the graded school district," receive the money apportioned to both races and apply it in the way provided by the Constitution. There is nothing in the section prohibiting them from doing so.

Section 8 is also obscure in its terms. It provides that the property of the public school for white children in the district shall become the property of the board of trustees, and that they may in their discretion sell the same and apply the proceeds to the use of the public graded school to be established. We infer from other provisions of the act that it was deemed necessary to give the board express power to sell this property, for the purpose of providing another building with the amount received, together with the proceeds of the bond which they are by section 9 empowered to issue. The answer of the defendants in respect to their purposes in regard to this property is obscure. They say they are advised and believe they are empowered to take charge of the colored school property in the district, and that they are intending to use the property for the purpose of a graded school for white children in the district until they can build a more suitable house for school purposes. While the language of the answer would seem to be capable of the construction that they intend to take the property of the colored school and apply it to the use of the white school, this cannot be reconciled with other portions of the answer, in which they declare their intention to maintain a school for both white and colored children, affording them equal school facilities. They further say, and his honor so finds, that the present school building for the colored school is amply sufficient, whereas the building for whites is totally inadequate. Of course, the defendants have no right to take the school building now provided for the colored children and use it for the whites. We assume they have no such purpose. Their entire answer repels any such construction. However all this may be, it does not render the portions of the act establishing the school invalid.

It is the duty of the defendant board of trustees to proceed to establish a graded school, in which all the children of school age within the new district may attend; to separate the schools into two sections or departments, in one of which the white children shall be taught and in the other the colored children. The effect of the act is to take out

of the original colored school district all of the property and children within the limits of the new district created by the act. In the provision made for executing the law, the board shall not discriminate against either race, but shall afford to each equal facilities. It is not intended by this that the taxes are to be apportioned between the races per capita, but that the school term shall be of the same length during the school year, and that a sufficient number of teachers, competent to teach the children in each section or building, shall be employed at such prices as the board may deem proper. If the board or its successors shall refuse to establish and maintain the school upon a constitutional basis and in accordance with the constitutional provisions, the courts have power, by the writ of mandamus, to compel them to do so. We gather from the answer that the defendants propose to execute the important trust reposed in them in accordance with law. There can be no possible room for doubt or controversy in respect to the two principles underlying and always controlling the establishment and maintenance of the public school system of this state. This system includes all public schools, or schools receiving for their support public taxes, either general or local. First, the two races must be taught in separate schools; and, second, there must be no discrimination for or against either race. Const. art. 9, § 2. In Revisal 1905, § 3990, the Legislature codified the Constitution and all statutes then in force involving these essential principles. They express the well considered and matured opinion of the people of the state upon this subject, of such vital importance to the welfare of all the people. Keeping them in view, the matter of administration is left to the Legislature and the various officers, boards, etc., appointed for that purpose. This court would be reluctant to declare invalid an act establishing any public school, when it had received the sanction of the people directly and locally interested, unless it was manifest that these principles were violated. Much must be left to the good faith, integrity, and judgment of local boards in working out the difficult problem of providing equal facilities for each race in the education of all the children of the state. Local conditions, relative numbers, and other well-recognized factors enter into the problem, and must be dealt with in a spirit of justice to all concerned, and to promote the honor and welfare of the state. In no sphere of our system of local self-government, under the guidance of a general superintendence and constitutional limitations, is the capacity of the people to govern themselves more strongly illustrated.

In this connection we wish to say that the language used in the opinion in *Hooker v. Greenville*, 130 N. C. 473, 42 S. E. 141, which seems to hold that in no other way than by a per capita distribution of all taxes collected for public schools can the Constitution be ob-

served, does not meet our approval. It was not necessary to the decision of that case, and we call attention to it to exclude the conclusion that it is regarded as the opinion of this court. The learned and always candid counsel for the plaintiffs stated in his argument that he did not so construe the Constitution.

In regard to the bonds proposed to be issued, the proceeds to be used in the erection and furnishing of a suitable school building in the school district, we find nothing in the act to indicate that the use directed is prohibited by the Constitution. His honor finds that there are 307 white children and 68 colored children in the district, and that the erection of the building for additional accommodation of the white children is necessary; that the public school building for the colored children is amply sufficient and commodious. We are unable to perceive how or why the erection of a necessary school building for 307 white children is a discrimination against 68 colored children, for whom an amply sufficient and commodious building had been supplied. To require the same size building for 68 children as is furnished to 307 would be to keep the law neither in letter nor in spirit.

We have given anxious and careful consideration to the language of the act and the arguments of counsel, and we conclude that the general purpose and scope of the act are not in violation of the Constitution; that such sections as are subject to criticism do not so affect the statute as to render it invalid. The defendant board of trustees will, we are sure, as they express their purpose to do, discharge their duties so that all the children of both races shall have equal facilities to attend the schools under the constitutional restrictions provided. If they should not do so, the courts would promptly aid any class of persons discriminated against.

We concur with his honor that the election was valid. The judgment vacating the restraining order and refusing the injunction must be affirmed.

(140 N. C. 32)

SOUTHERN CHEMICAL CO. v. LACKEY
et al.

(Supreme Court of North Carolina. Nov. 22, 1905.)

APPEAL—ORDER OF RE-REFERENCE.

An appeal from an order for a re-reference to find a fact, entered on the hearing of exceptions to the report of the referee, is premature, and will be dismissed.

Appeal from Superior Court, Alexander County; Webb, Judge.

Action by the Southern Chemical Company against C. A. Lackey and another, executors of R. F. Lackey, deceased. From an order for a re-reference to a referee to find a fact, plaintiff appeals. Dismissed.

L. M. Swink, for appellant. R. Z. Linney and J. L. Gwaltney, for appellees.

PER CURIAM. Upon the hearing of the exceptions to the referee's report, the court ordered a re-reference to the referee to find a fact which the court deemed material. From this order the plaintiff appealed. The appeal is premature. Some things are settled, and this is one of them. The appeal is dismissed. *Wallace v. Douglas*, 105 N. C. 42, 10 S. E. 1043.

Appeal dismissed.

(139 N. C. 640)

STATE v. JOHNSTON.

(Supreme Court of North Carolina. Nov. 22, 1905.)

1. INTOXICATING LIQUORS—RETAILING WITHOUT A LICENSE—EVIDENCE.

Defendant, who was not licensed to sell liquor, met B., and told him that he was going to another city and wanted to know if B. wanted any whisky. B. replied that he wanted one-half gallon, for which he paid defendant a dollar, without agreeing to pay any of defendant's expenses of the journey. Defendant returned next day, and delivered the whisky to B. in the city where the contract was made in which the sale of liquor was prohibited. *Held*, that such facts constituted a sale of liquor within the prohibited territory.

Appeal from Superior Court, Mecklenburg County; Cooke, Judge.

Monroe Johnston was indicted for retailing liquors without a license, and from a judgment finding defendant not guilty on the special verdict, the state appeals. *Reversed*.

The Attorney General, for the State. Stewart & McRae, for appellee.

BROWN, J. It is unnecessary to set out the lengthy special verdict. It appears therein: That the sale of liquor is prohibited in the city of Charlotte, and was on July 15, 1905. That on the evening of July 15, 1905, Tom Brown, between the hours of 6 and 7 o'clock p. m., near the Southern Depot in the city of Charlotte, Mecklenburg county, N. C., met the accused, Monroe Johnston. The said Monroe Johnston told him that he was going to Salisbury, and wanted to know if he wanted any whisky. Tom Brown told him he wanted a half gallon of whisky. Monroe Johnston, the prisoner, agreed to bring him one-half gallon from Salisbury, for which he paid Monroe Johnston one dollar. That he was not to pay Monroe Johnston anything towards his fare to Salisbury and return. It further appears that on next morning defendant delivered to Tom Brown, in pursuance of his contract, the half gallon of whisky within said city.

In the view we take of this case, it is unnecessary to discuss the question of agency and the other legal aspects of the case, so ably and elaborately presented by the Attorney General in his argument and brief. We think the facts set out in the special verdict plainly disclose an agreement or contract to deliver to Tom Brown one-half gallon of

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whisky, entered into in the city of Charlotte on July 15th by the defendant, and a receipt of the agreed price; also a delivery of the whisky by the defendant the next morning in pursuance of the agreement. These facts constitute a sale of liquor upon the part of the defendant within the prohibited territory. The superior court should have adjudged the defendant guilty.

Let the case be remanded, with instruction to proceed to judgment.

Reversed.

(140 N. C. 9)

HILL v. DALTON et al.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. BOUNDARIES—DESCRIPTION—PREDOMINANT CALLS.

Whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be, or however short of or beyond the distance specified.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 6-13.]

2. SAME.

Where a line was actually run by the surveyor, and was marked and a corner made, the party claiming under the patent or deed will hold accordingly, notwithstanding a mistaken description of the land.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 25.]

3. SAME—ESTABLISHMENT—BURDEN OF PROOF.

In a proceeding under Laws 1893, p. 44, c. 22, to establish a disputed boundary line, plaintiff may not, where there is a call for course and distance and a natural object or line of another tract, stop in his proof at the end of the call for course and distance, but must either show the location of the natural object or the line called for, or show that at the time his line was surveyed a line was run and another corner marked, corresponding with the call for course and distance, or that there never was any such object or line as called for.

4. SAME—EVIDENCE—ADMISSIBILITY.

In a proceeding to establish a disputed boundary line, where plaintiff claimed under a grant one of the calls of which was a line of a senior grant, testimony of a surveyor as to whether the call of plaintiff's grant, the beginning point being established as it was, would ever reach any line of the senior grant, was properly excluded.

5. EVIDENCE—DECLARATIONS AS TO BOUNDARY.

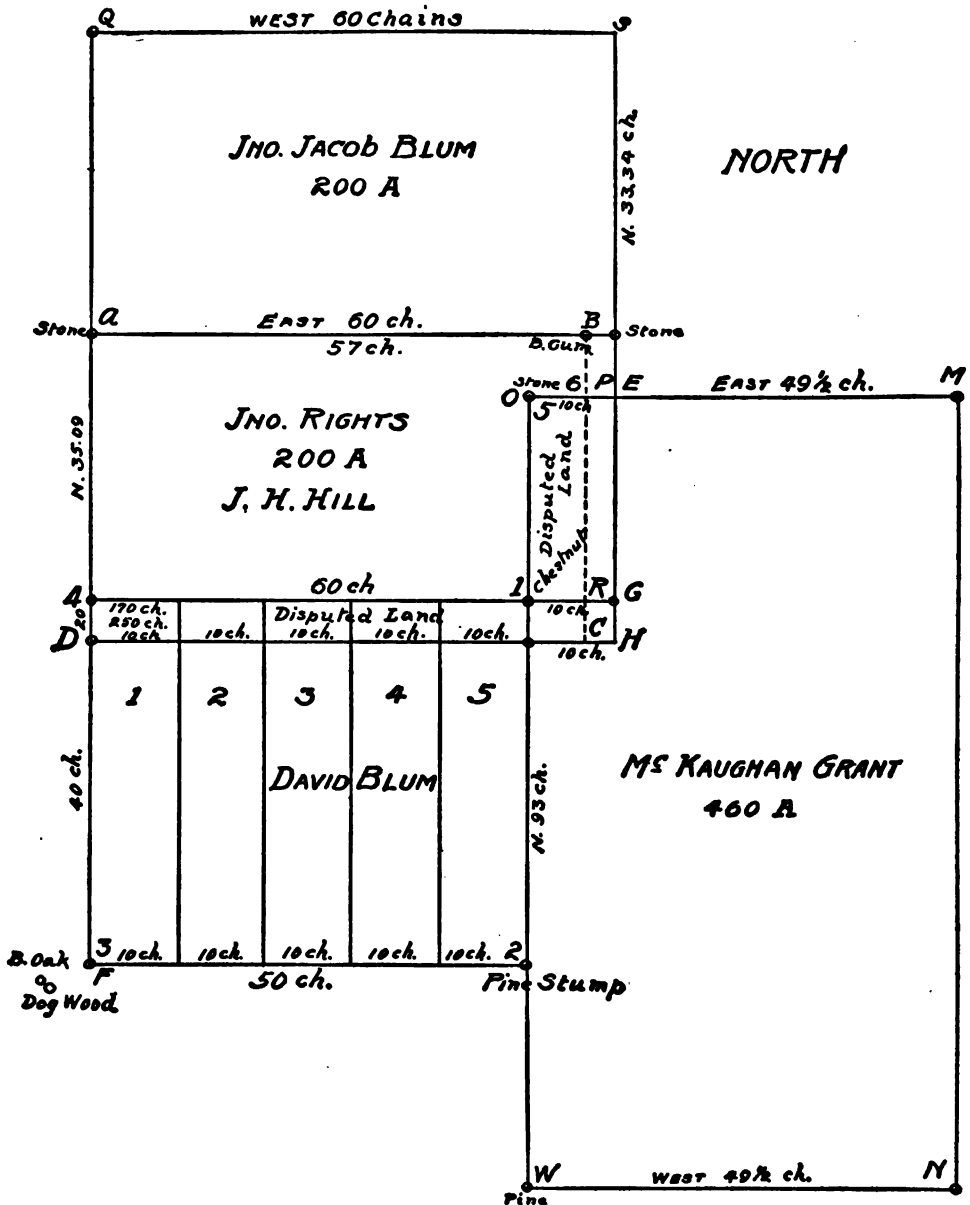
The declarations of a person deceased at the time of trial in regard to a corner or line in controversy are competent; provided the declarant had opportunity of knowing; had no interest in making the declarations at the time, and the declarations were made ante litem motam.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1129-1134.]

Appeal from Superior Court, Forsyth County; Cooke, Judge.

Proceedings by J. H. Hill against Thornton Dalton and others. From the judgment rendered, plaintiff appeals. *Affirmed*.

The following is the map referred to in the opinion:



Manly & Hendren and Watson & Buxton, for appellant. Lindsay Patterson, for appellees.

CONNOR, J. This is a proceeding instituted pursuant to the provisions of chapter 48 of the Code, as amended by chapter 22, p. 44, Laws 1893, commonly known as the "Processive Act." The case was before us on appeal at the fall term, 1904, reported in 136 N. C. 339, 48 S. E. 784. The proceeding was conducted through its several statutory stages until it reached the superior court, and was then tried upon a single issue directed to the inquiry in respect to true line of plaintiff's land. It would be difficult to state the contentions upon which

the exceptions to his honor's rulings are based, without reference to the map which was in evidence. Plaintiff introduced a grant to John Rights, bearing date January 14, 1795, describing a tract of 200 acres: "Beginning at a pine, Jacob Blum's corner; east, with his line, 57 chains, to a white oak in James McKaughan's line; south, 35 chains and 9 links, crossing two branches, to pointiers in said McKaughan's line; west, 57 chains, to a stake; north, 35 chains, 9 links, to the beginning." Plaintiff introduced several deeds, conveying said land by the same description, until the title vested in A. D. McCumbe. He then showed mortgage deed from McCumbe to Belo, containing covenants of seisin, against incum-

branches, and general warranty; deed from Belo to plaintiff—all of said deeds containing same description. There was evidence, in respect to which there was no controversy, that the Rights grant began at the southwest corner of the Jacob Blum grant, located by the surveyor at a stone on the map at A. It was also shown that the 57 chains in the first call gave out at B; that there was a small black gum at that point. Those defendants, claiming under the McKaughan grant, introduced a grant to James McKaughan, bearing date November 9, 1784. This grant covered 460 acres: "Beginning at a pine on the west side of the creek; running north, 93 chains, to a pine; east, 49½ chains, to a black oak; south, 93 chains, to a pine; then west to the beginning." There was evidence tending to show the location of the grant as appears on the map at W, Q, N, M. Plaintiff denied that the McKaughan grant was correctly located. There was evidence tending to sustain plaintiff's contention in this respect. Plaintiff insisted that he was not called upon to locate the McKaughan grant, although called for by the Rights grant; that, as defendants claimed under the grant, the burden was upon them to locate it; that, if they failed to do so, he was entitled to locate his land according to the course and distance, disregarding the objects called for. If plaintiff is correct in his contention, his true lines would be A, B, C, D; thence to the beginning. His honor instructed the jury: "That the burden was on the plaintiff to establish the true boundary in dispute between the parties. That, as the grant under which plaintiff claimed called from its beginning point east 57 chains to McKaughan's line, the burden was on the plaintiff to establish by a preponderance of the evidence the true boundary line of the McKaughan grant." The court stated the same proposition in other forms, and declined to give an instruction asked by plaintiff, putting the burden upon the defendant. Plaintiff's exceptions present the question whether there was error in the instruction given and in refusing that asked.

Upon the former appeal this question was not presented or argued. We did not otherwise decide it than to say: "As the plaintiff is the actor, it would seem that the burden is on him to make good his contention." As the question is now fairly presented and has been argued, we deem it proper to treat it as open, and endeavor to lay down the rule for guidance in like cases in the future. In those cases which have been before this court involving the construction of the statute, we do not find any expression of opinion regarding the rule of practice in this respect. The proposition that the party holding the affirmative of the issue carries the laboring oar, or has the burden of making good his allegation, is elementary. He meets this requirement by

introducing testimony which the court deems sufficient to take the case to the jury. He may, in certain cases, after the introduction of testimony, rely upon any presumption which the law raises and which becomes evidence from which, unless rebutted, he may call for a verdict. These principles are all of common knowledge and illustrated in practice by numerous cases in our Reports. The only question is the extent and manner of their application to this unique proceeding with which we are dealing. In the absence of any authority, courts are compelled to resort to "the reason of the thing." It is impracticable, if not impossible, to try and determine controversies of fact without adopting some principle or rule for determining which of the parties shall first produce testimony, or, in the language of the books "go forward." 1 Greenleaf, § 14; Thayer on Ev. 353. If no evidence had been produced, it is clear that the court would have instructed the jury to find the issue against the plaintiff; that is, that he had not established his line. It behooved him, if he would persuade the jury to find the fact to be as alleged, to introduce evidence. Therefore, in the ordinary acceptance of the term and as generally understood in practice, the burden of proof was upon him. We see no reason why the general rule should not apply in a proceeding instituted to establish a disputed line. The plaintiff says, conceding this to be true, he was only required to locate his land according to the calls in his grant; that he was entitled to have the lines called for, in the absence of any evidence on the part of the defendant, declared to be the true line. Upon this contention the inquiry arises, what is necessary for the plaintiff to show to locate his grant? He says that, having shown the beginning point to be at A, he may locate according to the calls by course and distance. This presents the question, what are the calls in the grant? and thus we reach the real question raised by his honor's charge and the exception thereto. His honor's opinion was that the controlling call in the first and second line is the McKaughan grant.

In *Cherry v. Slade*, 7 N. C. 82, Chief Justice Taylor examined the cases decided prior to 1819 and carefully reviews them in an able and exhaustive opinion. He discusses the history and reasons upon which the court had proceeded in questions of boundary, where there is a variance between the calls for course and distance and natural objects or lines of other tracts of land. Without undertaking to do more than refer to this "mine of learning," we find that the rules there announced have been uniformly followed by this court; "that whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance

specified. The course and distance may be incorrect from any one of the numerous causes likely to generate error on such a subject; but a natural object is fixed and permanent, and its being called for in the deed or patent marks beyond controversy the intention of the party to select that land from the unappropriated mass." There is a second rule which makes an exception to the first. "Whenever it can be proved that there was a line actually run by the surveyor was marked and corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land." The rule is stated in *Gilchrist v. McLaughlin*, 29 N. C. 310: "When another known line is called for, and distance gives out before reaching the line called for, the distance is to be disregarded." *Jefferson v. McGhee*, 34 N. C. 332. In *Corn v. McCrary*, 48 N. C. 496, it is said that the line of another tract controls course and distance, and it makes no difference whether such line be marked or unmarked. *Nash v. R. Co.*, 67 N. C. 413; *Dickson v. Wilson*, 82 N. C. 487. When the plaintiff introduced the John Rights grant, it was incumbent upon him to locate it in accordance with the controlling calls. When it appeared by the evidence of the surveyor that at the end of an east line of 57 chains there was no white oak or line of the McKaughan grant, it behooved him to go further, and show, either where the McKaughan line was or that the line relied on by him was surveyed, marked, and the corner marked at the end of the call. In the absence of any testimony in either respect, he had failed to locate his grant or establish his line; that being the matter in controversy. This may not be true in actions of a strictly adversary nature involving title. In such cases the plaintiff is ordinarily required only to make out a prima facie case; but here the plaintiff, actor, has undertaken to establish the true location of his line.

We are of the opinion, in this proceeding, that he may not, where there is a call for course and distance and a natural object or line of another tract, stop at the end of the call for course and distance, but must either show the location of the natural object or the line called for, or show that at the time his line was surveyed a line was run and a corner marked corresponding with the call for course and distance, or that there was never any such object or line, as called for. The question of title is not in issue in this proceeding. We confine our ruling to a proceeding for processioning or establishing a disputed line. The objective and controlling point in the location of the Rights patent is the white oak in the McKaughan grant, and until that is ascertained the plaintiff cannot ask the jury to find his true line as he contends. The defendants having shown the McKaughan grant and introduced evidence in regard to its location, the inquiry was narrowed to the

single question whether such evidence was to be accepted by the jury as true. In considering the evidence it was necessary for the court to instruct them in respect to the burden of proof. If they believed the defendant's evidence in this respect, the plaintiff could not further proceed, but for the rule that they would disregard the course and distance and carry his first call to the nearest point in the grant. If they did not believe the evidence, the plaintiff had failed to locate his grant, and the jury would have been compelled to find that they could not locate his true line. The same result would follow if the evidence was so balanced that they could not say how the matter was. The law declares the McKaughan grant to be his boundary. The burden was upon him to show where it was. We concur with his honor's instruction. The jury followed the call as far as possible, and then made such deflections as were necessary to carry them to the McKaughan grant. An examination of the plats set out in several of the cases in our Reports show a much more radical departure from the course and distance to reach the natural object or line called for. The jury reached the McKaughan grant at 6 and ran back to 5, in this way answering the second call along the McKaughan line. A line from B to C would not, according to the location of the McKaughan grant, have met this call.

The plaintiff proposed to ask the surveyor: "If the true location of the McKaughan grant is, as appears on the map, W, 5, M, N, would the first call of the Rights grant, the beginning point being established at A, ever reach any line of the McKaughan grant?" Upon objection the question was excluded. The plaintiff stated that his purpose in asking the question was to show that the first line of the Rights grant, if extended, would not strike the line of the McKaughan grant anywhere, and therefore the McKaughan grant was not properly located. This inquiry presents the question, in another aspect, passed upon in this case in the former appeal. The question in controversy was the location of the Rights grant. To do this it was necessary to locate the McKaughan grant. The proposition was to show that the latter was not properly located, because it did not correspond with the former. If permitted, it would be to establish the lines of the senior grant, the controlling object, by the lines of a junior grant, the very object which was controlled by the senior. The fact that the course and distance called for in the junior grant did not reach the line of the senior grant was no evidence of the location of the latter. This would be to reverse the rule by having the junior grant, the location of which is the matter in controversy, to control the location of the senior. For the reasons given and upon the authority cited in the former opinion, we sustain his honor's ruling.

Plaintiff testified that, after he purchased, McCumbe pointed out the corner of the land.

He was then asked, "What corners did he point out to you?" Objection by defendant sustained, and plaintiff excepted. McCumblie was dead at time of the trial. It is abundantly settled in this state that the declarations of a person deceased, at the time of the trial, in regard to a corner or line in controversy, is competent, provided the declarant had opportunity of knowing, had no interest in making the declaration at the time, and that it was ante litem motam. In *Sasser v. Herring*, 14 N. C. 340, the rule is stated, and in *Hamilton v. Yow*, 136 N. C. 357, 48 S. E. 782, Mr. Justice Walker restates it, in the light of all of the decisions of this court, which are cited and the language of several of them quoted and commented upon. It is needless to do more than refer to that well-considered opinion. That the admission of the declaration of a single person under the limitations prescribed is an exception to the general rule is conceded. It is also said that the concession made by the court in this respect was largely due to the peculiar condition existing in the early settlement of our state. It would seem that the reason of the rule suggests that it should not be extended beyond its original scope. The plaintiff did not bring himself within the well-defined limitations upon which such declarations are admissible. There is nothing in the record to show or indicate whether the declaration, if made, was ante litem motam. Before the declaration in any aspect was admissible, the plaintiff should have brought it within the well-defined limitations in respect to time, interest, death and knowledge of the declarant.

It is not clear that the declaration is not incompetent for another reason. There is no difficulty in saying as a matter of law what the boundaries of the Rights grant are. The only difficulty is in saying where they are. There is but one way in which the plaintiff can avoid the rule which carries his first line to the McKaughan grant, by showing that at the time the line was surveyed it was marked and the corner marked. To show the declaration of a deceased owner otherwise competent as to the corners of the Rights land would be but slight, if any, evidence of the McKaughan grant. *Caraway v. Chancy*, 51 N. C. 361; *Roberts v. Preston*, 100 N. C. 243, 6 S. E. 574.

We have examined the record with care, and find no error in his honor's ruling. The judgment must be affirmed.

(140 N. C. 65)

PACE et al. v. CITY OF RALEIGH.

(Supreme Court of North Carolina. Nov. 22, 1905.)

1. INTOXICATING LIQUORS — REGULATION — ELECTION — PETITION — SIGNERS — QUALIFICATIONS.

Const. art. 6, §§ 1, 3, 4, provide the qualifications of voters and declare that every person shall be able to read and write, unless reg-

istered under another clause, before being entitled "to register," as required by section 3, and that before he shall be entitled to "vote" he shall have paid his poll tax for the previous year. Laws 1903, p. 290, c. 233, § 7, requires an order for a municipal election to determine whether saloons shall be licensed in lieu of a city dispensary on petition of one-third of the "registered voters" therein for the preceding municipal election, and section 9 declares that "any person entitled to vote for," etc., "shall have the right to vote at such election." *Held*, that "registered voters" did not include all persons whose names were on the permanent registration roll at the preceding municipal election, but only included those who had paid their poll tax as required and were entitled to vote.

2. ELECTIONS — REGISTRATION LISTS — RIGHT TO PURGE.

The aldermen of a city, being entitled to purge the registration lists in determining the persons entitled to vote at a municipal election by striking off those voters who have died or become disqualified by removal or otherwise, could also strike off such as were not entitled to vote because of the constitutional disqualification of not having paid their poll tax.

3. APPEAL — SCOPE OF REVIEW — EXCEPTIONS.

Under the express provisions of Supreme Court Rule 27 (39 S. E. vii), objections other than that the court did not have jurisdiction, or that a cause of action was not stated, cannot be considered on appeal without exceptions taken at the trial.

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Wake County; Justice, Judge.

Mandamus by the state, on relation of J. M. Pace and others, against the board of aldermen of the city of Raleigh. From an order granting the writ, defendants appeal. Reversed.

Application for mandamus. The plaintiffs and others presented a petition to the board of aldermen asking that an election be called to determine whether saloons should be licensed in said city for the sale of intoxicating liquor in lieu of the existing city dispensary. The committee to whom the petition was referred reported that they found on the registration books 1,826 names, but, that 233 of those registered had moved and 35 had died, leaving 1,568 valid registered names; that after purging in the same manner from the petition the names of those who had removed or died there remained on the petition 543 names. Upon further reference to ascertain how many of those upon the registration books and the petition, respectively, were entitled to vote by having paid the poll tax for 1904 on or before May 1, 1905, as required by the Constitution, it was found that 266 persons on the registration list had not so entitled themselves to vote, of whom the names of 113 were on the petition. The board thereupon authorized any one entitled to vote at the proposed election to come forward and add their names to the petition or to withdraw them, whereupon there were 10 names added to the petition and 22 were withdrawn. The board found, in accordance with the above figures, that there were 1,302 registered voters, of whom 418 had signed the petition, being "16 names less than one-third of

the registered voters who were registered at the last municipal election," and refused to order an election. This proceeding was brought for a mandamus against the board of aldermen to order the election, which being granted, the defendants appealed.

R. H. Battle, W. B. Snow, and W. N. Jones, for appellant. Argo & Shaffer and W. B. Jones, for appellee.

CLARK, C. J. Chapter 233, p. 290, Laws 1903, provides:

"Sec. 7. It shall be the duty of the governing body of any city or town, upon the petition of one-third ($\frac{1}{3}$) of the registered voters therein, who were registered for the preceding municipal election, to order an election to be held," etc.

"Sec. 9. Any person entitled to vote for members of the General Assembly shall have the right to vote at such election, in all boxes provided, and any such voter who is in favor of the manufacture," etc., "and every such voter who is in favor of barrooms or saloons shall vote a ticket on which shall be written or printed," etc.

The sole question presented is, who are the persons entitled to sign a petition for an election under this statute, which requires "one-third ($\frac{1}{3}$) of the registered voters therein, who were registered for the preceding municipal election." The plaintiffs contend that a "registered voter" is any one who is duly and lawfully registered. The defendants contend that a "registered voter" must not only be registered, but he must also be a voter—I. e., "entitled to vote"—which right the Constitution denies to one who is merely registered; that it is further necessary that he shall have paid his poll tax. In short, the plaintiffs contend that any one who is registered is a voter, though he may not be an actual "voter" entitled to vote; while the defendants contend that he must not only be registered, but also a voter.

The plaintiffs are not entitled to their mandamus unless they can maintain their proposition that registration makes any one who is duly and lawfully registered a "voter." Who is a voter? Webster's International Dictionary defines "Voter: One who votes, who is entitled to vote." This is the definition in section 9 of this act (chapter 233, p. 290, Laws 1903) which says, "Any person entitled to vote for," etc., "shall have the right to vote at such election." The language of the Constitution is not ambiguous. The constitutional amendment, now article 6, § 4, provides: "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language; and before he shall be entitled to vote, he shall have paid on or before the first day of May of the year in which he proposes to vote, his poll tax for the previous year, as prescribed by article 5, section 1, of this Constitution." Then, after the au-

thorization of a permanent roll for those registering under the "grandfather clause," it is again added: "Provided, such person shall have paid his poll tax as above required." Before one is lawfully a voter he must be "entitled to vote," and from above it is plain that being registered does not entitle one to vote, for it is added, both as to those whose names are upon the ordinary and the permanent roll, "and before they are entitled to vote" they shall have paid their poll tax (if liable for poll tax under article 5, § 1, of the Constitution). Under the constitutional provisions prior to the amendment, every male person, born in the United States or naturalized, 21 years old, resident in the state 12 months and in the county 90 days (who was not disqualified by conviction of felony), was an "elector" (or "qualified voter," as the decisions styled him for lack of a better word), and, when registered, was entitled to vote. As the Constitution then stood, nothing more was required, and such person was a "registered voter." But the constitutional amendment made a radical change. It is now before us for the first time, and decisions as to "qualified voters" and "registered voters" under the former constitutional requirements as to suffrage throw no light upon the meaning of the new clauses which have taken their places in the Constitution.

Under the constitutional amendment of 1890, now Const. art. 6, § 1, every male person, born in the United States or naturalized, and possessing qualifications set out in this article, shall be entitled to vote, "except as herein otherwise provided." Section 2 requires two years' residence in the state, six months in the county and four months in the precinct (with disqualification by conviction of a penitentiary offense). Section 3 prescribes that a person offering to vote shall be a legally registered voter "as herein prescribed." Section 4 then provides that, in addition to the above qualifications as to age and residence, "every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language" (unless registered under the "grandfather clause" later set out); "and before he shall be entitled to vote he shall have paid" on or before May 1st of that year, "his poll tax for the previous year" (if liable thereto under article 5, § 1); and even as to those registered under the grandfather clause and upon the "permanent record," who "shall forever thereafter have the right in all elections by the people in this state" (unless disqualified for crime) there is added, "Provided, such person shall have paid his poll tax as above required." This shows that under the former provisions one qualified by age and residence (and not disqualified by crime) was an "elector," and became upon registration a "registered voter"; but under the constitutional amendment one qualified by age and residence (and not disqualified by crime) is

entitled to register, provided, further, he can read and write, as required, or can register under the "grandfather clause," but it is carefully added that in neither of those cases shall he become "entitled to vote" unless, further, he shall have paid his poll tax (if liable thereto) at the time prescribed. The constitutional amendment was carefully thought out and fully debated, both in the convention and before the people. There were doubtless good reasons, of public policy, for prescribing that no one, though otherwise qualified and duly and lawfully registered, should be entitled to vote unless he shall have paid his poll tax. Before that is done, he may be registered, but he cannot be a "registered voter," because he cannot vote. The General Assembly could prescribe such terms as it thought proper as a prerequisite to ordering an election. It could have dispensed with any petition, or it need not have required one-third or, indeed, that the petitioners should be "registered voters"; but, having done so, we are only authorized to hold those to be voters who the Constitution says are "entitled to vote"—i. e., those who, besides being lawfully registered, upon possessing the necessary qualification, have further paid the poll tax (if liable). The object in requiring one-third of the "registered voters" to join in the petition was doubtless to avoid the expense, turmoil, and heated controversy incident to an election of this kind, unless at least one-third of those entitled to vote in such an election should indicate their desire that such election should be held.

The order of the board of aldermen was proper upon the facts before them. In the view we take of the case, we have not found it necessary to express any opinion upon the right of the board to purge the registration list, though there are authorities which seem to justify that course. *Duke v. Brown*, 90 N. C. 127, 1 S. E. 873; *Rigsbee v. Durham*, 99 N. C. 348, 6 S. E. 64. Nor have we been inadvertent to the fact that under the former constitutional provision one who was an "elector" (i. e., qualified to register) was eligible to office, though not registered, and that under the "amendment" no one is eligible to office unless he is a "voter"—i. e., registered upon proper qualification and having paid his poll tax (if liable). There is no hardship in this. The same public policy which requires the payment of poll tax and registration, in addition to the qualification as to age and residence, to constitute a "voter," can surely require the same as to one who asks the suffrages of voters. If it be conceded that the board of aldermen had no right to purge the registration lists, then clearly the mandamus could not issue, for the petition with its 543 names did not contain one-third of the names (1,826) upon the registration lists. If the aldermen can purge the registration lists by striking off those vot-

ers who have become disqualified by removal or otherwise, they can surely purge it by striking off those who have never been entitled to vote because of the constitutional disqualification of not having paid their poll tax. It does not appear in the record that the tax list was the sole evidence resorted to, nor that such evidence was not corroborated by notice to the parties (as is probable) or otherwise, nor that any person affected alleged that his poll tax had been paid in fact, as would have been done if there had been any doubt as to any name which had been disallowed. Certainly there is no exception in the record to the method pursued, nor to the truth of the finding of nonpayment of poll tax as to any person, nor was any objection on that ground presented even in the argument here; but the plaintiffs earnestly and correctly contended that an appeal must be considered solely upon the exceptions set out in the record, save only exceptions that the court did not have jurisdiction or a cause of action is not stated, which objections alone can be taken for the first time in this court (rule 27 [39 S. E. vii] and cases cited in *Clark's Code*, pp. 921-924), and these objections are not open to the plaintiffs.

If the plaintiffs had any doubts as to the correctness of the findings of fact as to the nonpayment of poll tax by any one, they should have contested it before the aldermen, and could again have tried that point *de novo* before the judge; for, while the findings of fact by a superior court judge are binding upon us, the findings of fact by the aldermen were open to review before the superior court. In *re Deaton*, 105 N. C. 59, 11 S. E. 244. But, so far from the plaintiffs contesting the truth of the findings of fact as to the nonpayment of poll tax, the judgment recites that in the superior court it was "admitted by the parties, plaintiffs and defendants, that the only question to be considered in the case * * * is one of law, to wit, whether under section 7, c. 233, p. 290, Laws 1903, the payment of poll tax on or before May 1st of the year in which he offers to vote should be applied as a test of competency to sign the petition." This was the sole question that was, or could be, presented to us on the appeal. No one is disfranchised by this opinion, but it is simply held that upon the findings of fact, to which the plaintiffs made no exception, one-third of those entitled to vote at the proposed election have not signed the petition. This would not, of course, be an estoppel, nor preclude a further ascertainment of the fact in any election at which any party affected might offer to vote.

The judgment below is reversed.

BROWN, J. (dissenting). I regret to differ with my Brethren in any case, and especially in this, in which my natural inclinations strongly prompt me to concur. But my con-

victions are strong that the board of aldermen illegally struck from petition the names of a large number of those who had the legal right to sign it. I am of opinion (1) that the board had no power to strike them off for the alleged nonpayment of poll tax; (2) that the board has no authority to pass upon such fact; (3) that, if they have such authority, they exercised it in an illegal manner and based their finding upon utterly incompetent evidence.

1. The right to petition for an election in certain cases is a right of the private citizen given by law. It is as much a legal right to those to whom it is given as the right to vote is to those who possess the necessary qualifications. In my judgment the qualifications necessary to legally petition for an election include only those which are necessary to enable a person to register and thereby become what our Constitution plainly calls a "registered voter." These do not include payment of poll tax. The language of the statute is as follows: "Sec. 7. That it shall be the duty of the governing body of any city or town, upon the petition of one-third ($\frac{1}{3}$) of the registered voters therein, who were registered for the preceding municipal election, to order an election to be held," etc. Chapter 233, p. 290, Acts 1903. The Constitution (article 6, § 3) enacts that "every person offering to vote shall be at the time a legally registered voter as herein prescribed." Section 2 prescribes the only qualifications, but one, necessary to become a registered voter, referred to in section 3. These are residence in the state for two years, in the county six months, and in the election district four months, preceding the election. Section 4 adds the other, an educational qualification. There is, of course, the well-known disqualification for crime. Thus the man who registers becomes, in the language of the Constitution, a "registered voter." He may exercise the right or not as inclination or duty may prompt him. But before he can exercise it he is required by section 4 to pay his poll tax for the previous year, and such payment must be made on or before May 1st of the year in which he purposes to vote. When the Legislature used the words "registered voter" it used them in the sense in which they are employed in the Constitution and as previously defined by the courts. This is an elementary principle of the construction of statutes. This court as long ago as 1875 has made a broad distinction between a registered voter and a qualified voter, and that distinction has been generally recognized both by the General Assembly and the judiciary. Mr. Justice Rodman, speaking for a unanimous court, says: "A qualified voter is one who is entitled to register as a voter, and who is also qualified to vote after such registration." *Railroad Co. v. Caldwell*, 72 N. C. 493. Again he says in the same opinion:

"But in the idea of the Constitution the terms 'qualified voters' and 'registered voters' are not exactly co-extensive." See, also, *Norment v. Charlotte*, 85 N. C. 389. Having shown that the right to become a "registered voter" is a distinctive right given by the Constitution, and so recognized by the courts, the Legislature is presumed to have used the term in the significance so given it. The right to become a registered voter antedates the time fixed for the payment of poll tax, and therefore it follows that a registered voter, within the plain meaning of the Constitution, is one who has registered, but has not paid his poll tax. When he does the latter, he becomes a fully qualified voter. If the General Assembly had intended that only qualified voters should sign the petition, it would have used those words, and not the term "registered voters." It had the same power to require one as the other as a condition precedent to holding the election. With perfect deference for my Brethren, it seems plain to me that they have by judicial construction read into the statute words which the General Assembly never intended to place there. Inasmuch as the disability arising from not having paid poll tax post-dates registration in all cases, it is evidently regarded in the Constitution and statute as a temporary disability to vote, and not as a barrier to becoming a registered voter. The failure to pay this tax does not authorize the erasure of the delinquent's name from the registry of voters. It only disables him to vote at the succeeding election. When he registers he is made a registered voter by force of the Constitution. He may fail to pay poll tax for ten years, and then exercise his right to vote by the payment of poll tax for one year only. But ordinarily and with unchanged conditions he is not required to register but once. The failure to pay the tax does not affect in any way his status as a registered voter. So that, when the law says one-third of the registered voters for the preceding municipal election, it does not mean registered voters who might not be free to vote at a present election from failure to have paid poll tax by the 1st of the preceding May; but it means all whose names are upon the registration books as standing, permanent voters; that is, all who are potential voters. I have not reviewed the authorities cited in defendant's brief, because they are not noticed in the opinion of the court, and have, in my judgment, no application to the point under discussion, for the reason that we are now considering the law which prescribes qualification for petitioners for an election, and not qualifications for voters at an election.

2. We were invited by counsel on both sides to scrutinize this record with care. I have done so, and in the investigation of the case another reason, not mentioned in argument or brief, has occurred to me which

greatly strengthens my conviction that the General Assembly used the words "registered voters" advisedly and in the sense they have always been used; that is, because the statute falls to give to the city authorities any power to determine who has not paid poll tax and fails to declare how the fact shall be proven and what evidence is necessary. It provides no machinery for this purpose. Whether a man is a registered voter can be easily determined by a simple inspection of the registration books. Whether or not he has paid his poll tax cannot be determined by an inspection of the tax-books. If that were allowed, the sheriff or tax collector could temporarily disfranchise any one by failing to enter the payment. The Legislature of 1901 was not willing to place the registered voter in the power of the tax collector, and so under the general election law enacted at that term the tax lists constitute no evidence whatever. They are utterly incompetent to prove anything. The entries of payment are *ex parte*. The voter has no control over them, and they are not evidence against him upon the fact of payment. There is no law that I can find that requires the sheriff to make the entry of payment of taxes upon the lists. Such entry is his own act, for his own convenience, and is not a public record. *Noble v. Douglass*, 56 Kan. 92, 42 Pac. 328. The act of 1901 provides that it shall be the duty of every sheriff and tax collector, between the 1st and 10th days of May, 1902, and biennially thereafter, to certify under oath a true and correct list of all persons who have paid their poll tax for the previous year on or before the 1st day of May, to the clerk of the superior court, who shall, within 10 days, record the same in a book to be provided for that purpose, keeping each township separate, and certify a true copy thereof to the chairman of the board of elections for such county. This is evidently for information for purposes of challenge. If it were permissible to refer to the taxbooks to determine who has paid poll tax, this certified list would be the best evidence of that fact, and not the sheriff's entries on the books. This list is the evidence provided for the board of elections, but it is not made evidence against the voter. The record in this case shows that the committee of the board of aldermen, appointed for the purpose of determining who had paid poll tax, referred only to the sheriff's taxbooks and accepted the entries there as conclusive evidence.

If the construction of the statute adopted by the majority of the court is the true one, and it was the intention of the Legislature that the words "registered voter," plain and unequivocal as they are, should mean "qualified voter," is it not strange that the governing bodies of cities and towns are

given the naked power, necessarily implied under the court's construction, to determine who are qualified voters, and left without a vestige of machinery for such determination? Is it that the qualifications of a voter are to be left for determination to the uncertain judgment of a board of aldermen, to be allowed or denied in the absence of the voter and without the right to be heard? The statute does not suggest any means of determining who are and who are not qualified voters. It is silent as to the tax books. Where, then, is the authority to consult the sheriff's office for guidance? Where is the right to accept the sheriff's entries or lack of entries as conclusive of the payment or nonpayment of poll tax? It cannot be found in the statute. And yet the logical result of the opinion of the court is to construe into the act this authority. Is such a construction reasonable? I answer this by again referring to the general election law, enacted by the Legislature of 1901 and considered and approved by the Legislature of 1903, to show an unwillingness on the part of the Legislature to leave the right of suffrage to any such control, and to show the unusual care in providing machinery for the determination of the qualifications of a voter. Following the requirement that no person shall be entitled to vote unless he shall have paid his poll tax in accordance with the Constitution, the act provides: "Every person liable for such poll tax shall, before being allowed to vote, exhibit to the registrar his poll tax receipt for the previous year, issued under the hand of the sheriff or tax collector of the county or township where he then resided: * * * Provided, that in lieu of such poll tax receipt it shall be competent for the registrar and judges of election to allow such person to vote upon his taking and subscribing the following oath: 'North Carolina, ——— County: I do solemnly swear (or affirm) that on or before the first day of May, of this year, I paid my poll tax for the previous year, as required by article 6, section 4, of the Constitution of North Carolina.'" In enacting this provision the Legislature recognized that the exercise of the right of suffrage should be favored and not discouraged, and that the method of determining the existence of the right should be simple. It is true that the determination of the board of aldermen as to the payment of poll tax by the signers of the petition does not involve the right to vote, but only the right to call an election. But it matters not that the right to vote is not directly involved. The right to petition is a legal right conferred by the act, and this court says depends upon the right to cast a vote. Under the court's construction of the statute a resident of the city of Raleigh, or of any other city, although a registered and qualified voter, may be denied a voice in calling

an election, because the board of aldermen in an ex parte proceeding, when he is not present, with no evidence before it save the tax list of the sheriff, may find that he is not a qualified voter. A supposed state of facts will show the injustice of the court's construction. A. has signed the petition for an election. The sheriff's tax list does not show that he has paid his poll tax. The board of aldermen on such negative and incompetent evidence erase his name from the petition. On the day of election he presents his tax receipt, or makes oath that he has paid his poll tax, and votes at the election, which he was denied the right to call. In this case the voter is refused the right of petitioning for a municipal election in which he has the right to vote.

As a further evidence of the importance of this machinery for determining the qualifications of a voter, it is provided by the general election law that the failure of the sheriff to give a tax receipt is a misdemeanor, and he is required, upon application and affidavit of the applicant that his receipt has been lost, to provide a duplicate receipt. The act, however, provides no penalty for a mistake in the list of persons who have paid their poll tax, and does not even require the entry to be made on the taxbooks, other than the list to be furnished the clerk of the court, which was not referred to by the board of aldermen in this case. That the taxbooks are subject to mistakes cannot be doubted. Is the voter, then, to be given no opportunity to correct such mistake, or make oath to the payment of his poll tax, and be entitled thereby to sign the petition? It seems to me to be a strained construction of the legislative intention to hold that, in the face of the specific machinery of the general election law for determining the qualifications of a voter, they should empower the governing bodies of towns and cities to adopt any method they should see fit to adopt to determine so important a matter. Is the voter, whose right to sign the petition is attacked, given the right by the terms of the statute, either express or implied, to be present when the matter is considered? Is he entitled to any hearing? Is he entitled to notice? Can he present his tax receipt or make oath that he has paid his poll tax? Can he show that he is exempt from poll tax? The statute gives no such rights. Then I must assume that these rights are denied him, and this assumption is supported by the facts in this case. The report of the committee of the board of aldermen of the city of Raleigh, in explaining the method pursued in determining the qualifications of the signers of the petition, says: "We examined the taxbook of the sheriff of Wake county for the year 1904, and found that two hundred and sixty six (266) persons whose names are on the registration books failed

to pay their poll taxes for the year 1904 on or before May 1, 1905. Of these 266 names, we find 113 on the petition of persons whose names are on the registration books who failed to pay their poll taxes for the year 1904 on or before May 1, 1905." Is their conclusion justified? They say they examined the taxbooks only. They made such examination in the absence of the voter, and yet on this sort of incompetent evidence they conclude that the poll tax has not been paid and deny "registered voters" the right to petition for an election. Has the right of suffrage so far lost its sanctity that its exercise can be made dependent upon conclusions drawn from such evidence? Books, possibly incorrect, a committee, possibly mistaken, and from this the conclusion is drawn that 113 petitioners, all of whom are absent, have failed to pay their poll tax. And this unwarranted method is indorsed by this court because Mr. Webster defines a voter to be "one who votes, who is entitled to vote." It appears to me that this is a forced construction, and that it could not have been the intention of the Legislature to empower a board of aldermen to determine in an ex parte proceeding the qualifications of one offering himself as a voter, when the general election law was so solicitous in protecting the registered voter's right to prove his qualifications.

That the construction of a statute should be reasonable is familiar learning. That it should be construed in the light of existing legislation on the same subject is also well settled. What is a reasonable construction of the statute before us? The Legislature intended to provide a simple, convenient, and cheap method of petitioning and calling an election. A petition of a specified number of citizens was open to the objection that women and children, who are citizens in the broadest sense of the word, might sign it. A specific number of qualified voters was inconvenient, because, as I have pointed out, it would involve a cumbersome and tedious method of determining who are qualified voters. The Legislature met these objections by adopting the only alternative, the "registered voter," and provided that an election must be called "upon the petition of one-third ($\frac{1}{3}$) of the registered voters of any city or town." They did not use the word "voters" alone, because it is coextensive with qualified voters, and because it means, as the court defines it, "one who votes; one who is entitled to vote"; and there would be difficulty in determining this question. But they qualified it with the word "registered," thereby intending that the registration books, containing the names of the existing registered voters, should be final in determining the number of citizens having the right to sign a petition.

3. Assuming that the board has the implied power to determine who have not paid

the poll tax, I am convinced that, without any wrongful purpose on their part, they have mistakenly exercised such power in an illegal manner. Although this point was not argued before us, it arises upon the complaint for mandamus. Omitting the voluminous exhibits attached to the complaint, it is short and simple, and alleges that the board wrongfully refused to count 118 names rightfully on the petition. It is the duty of the court to consider any view of the law where in the board may have erred in refusing to count those names. In *Scott v. Life Ass'n*, 137 N. O. 521, 50 S. E. 221, this court based its judgment solely upon a view of the law not mentioned in the record, and upon entirely different grounds than those assigned in argument. In the first place, I incline to the opinion that the board had no right to delegate its authority to a committee of two to pass on the fact of payment of poll tax. It is the exercise of practically a judicial function, and the board should have passed upon the matter themselves by a majority in regular session. In the second place, if the board has this implied power, in its exercise they should pursue the method pointed out in the election law. The voter's right to petition being a statutory right, and in the opinion of the court dependent upon his right to vote, should be passed upon in the same manner as his right to vote. The board should have summoned the 118 petitioners before them and called upon each to produce his tax receipt, or have given him the opportunity to take the oath I have quoted. It is not admitted in the complaint that these 118 citizens and registered voters, or any of them, have not paid their poll tax, and this plaintiff would have no right to make any such admission for them. Each petitioner has the personal right to have notice, be present, and be heard when his individual right to sign the petition is contested upon such ground, as much so as when his right to vote is challenged at the polls on election day upon the same ground. Then he is present and is heard in defense of his legal rights. Such just and reasonable right has been denied by the defendant in this case to each of the 118 petitioners whose names were arbitrarily stricken from the petition.

The court in its opinion says: "If it be conceded that the board of aldermen had no right to purge the registration lists, then clearly the mandamus could not issue, for the petition did not contain one-third of the names upon the registration list." This, of course, could only be true if the names of those who had not paid the poll tax are added to the registration lists, and those names on the petition who had not paid poll tax were not restored to the petition. If we restore the names to one, we must restore them to the other. It was admitted below, conceded here, and is expressly found by Judge Justice and acquiesced in by all, that if nonpayment of poll tax was not a disqualification, then

the necessary one-third of voters had signed the petition. The count stands thus:

Original registration.....	1,828
Dead and removed.....	538
Registered voters.....	1,568
Necessary one-third.....	528
On petition.....	543
Names taken off by request.....	22
	521
Names added by request.....	18
	534

Excess on petition over one-third
of registered voters..... 11

The above is the true estimate of those who are reported not to have paid poll tax and who are registered and on the petition. If they are excluded, then the petition lacks 16 of having one-third of registered voters. In view of the report of the committee as to the examination of the tax lists, I am at a loss to understand the statement in the opinion that it does not appear that the tax list was sole evidence before them. That is the plain statement in the report of the committee. "*Expressio unius est exclusio alterius*." No one disputes the right of the board to purge the registration books of the dead and removed; but, payment of poll tax not being a necessary qualification to register, the board has no right to purge the registration books of registered voters who are alleged not to have paid poll tax. Registrars and poll holders themselves cannot do that. How can it be logically said that a voter's name can be practically stricken from the registration books for the lack of a qualification not required to put it there? In behalf of these 118 private citizens, whose legal rights have been denied them, and who have practically been declared disfranchised without notice, hearing, or competent evidence, I enter my respectful dissent to the opinion and judgment of the majority of the court in this case.

I am authorized to say that Mr. Justice WALKER concurs in this dissent.

(124 Ga. 297)

PORTER v. STATE.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. ARREST—AUTHORITY TO ARREST WITHOUT WARRANT — VIOLATION OF ORDINANCE — FLIGHT.

Pen. Code 1895, § 896, is applicable alike to state and municipal arresting officers. If an offender against a municipal ordinance is endeavoring to escape from justice, the marshal or policeman may lawfully arrest him without a warrant whilst so endeavoring to escape. But where it is not shown that the person attempted to be arrested by the marshal had violated any ordinance of the town, other than by proof of a verbal complaint made to the officer by another that the person sought to be arrested had created a disturbance, and he eluded the officer to prevent an illegal arrest, his avoidance of the officer by flight is not such an endeavor to escape as would justify his arrest without a warrant.

2. ASSAULT AND BATTERY — SHOOTING — RESISTING ILLEGAL ARREST.

The offense which one commits who fires at an arresting officer attempting an illegal arrest with a gun, and misses him, when such resistance is unnecessary to defend himself from the illegal arrest, is that of unlawfully shooting at another not in his own defense.

3. HOMICIDE—ASSAULT WITH INTENT TO MURDER—EVIDENCE—RELEVANCY.

The ordinances of the town, defining disorderly conduct and prescribing the duties of the marshal, were relevant, as showing the authority of the marshal to make arrests for misconduct such as that he was informed the defendant was guilty of.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Oscar Porter was convicted of assault with intent to murder, and brings error. Reversed.

W. B. Hudson, Geo. Y. Harrell, and B. F. Harrell, for plaintiff in error. F. A. Hooper, Sol. Gen., and Graham & Forrester, for the State.

EVANS, J. Oscar Porter was convicted of the offense of assault with intent to murder. It appeared on the trial that the marshal of the town of Lumpkin was approached by a negro, John Anderson, upon the public square of the town, and requested to arrest the defendant upon a charge of disorderly conduct. The defendant was at the time but a short distance from the marshal, and had full opportunity to observe the marshal and Anderson in conversation. After listening to Anderson's complaint the marshal followed the defendant, who was walking down the street. The marshal quickened his pace, and the defendant also walked faster, when the marshal called him by name and told him to stop, whereupon the defendant ran in the direction of his home and disappeared from the marshal's view. The officer, some half or three quarters of an hour afterwards, discovered the defendant on the public square, sitting upon some piping with a gun resting upon his lap. The officer attempted to approach him unobserved, for the purpose of making an arrest upon the complaint which had been made to him. When the marshal got within 10 feet of the defendant, the latter suddenly sprang up, fired at the marshal, and then ran off. He was afterwards captured in another county. The marshal was in uniform and carried a club, but made no attempt to use it before he was fired upon. The marshal had no warrant for the defendant's arrest. No ordinance of the town was violated by the defendant in the officer's presence. At the time of the occurrence the mayor of the town "was at home, sick." An ordinance of the town, defining disorderly conduct and providing for the punishment of one guilty thereof, was introduced in evidence by the state, and also an ordinance defining the duties of the police force. The defendant in his statement contended that the shooting was accidental. In his motion for a new trial the de-

fendant complains that the court erred in admitting in evidence the above-mentioned ordinances of the town, and also in charging the jury, and in refusing a certain request to charge. The motion was overruled, and error is assigned on the judgment denying the defendant a new trial.

1. The third ground of the amended motion assails the instruction of the court, therein excepted to, as contradictory and as not applicable to the facts of the case, and as being objectionable because it assumes that a marshal of a town may legally arrest without a warrant an offender against a municipal ordinance. The charge excepted to was as follows: "A marshal of a town has the right to arrest a person for the violation of the ordinances of the town, without any warrant for the purpose of doing so. It is not required that a city marshal or policeman shall have warrants to make such arrests; or, in other words, if they make the arrest without a warrant, that would not be an illegal arrest. While that is true, an officer of a city, a marshal or a policeman, would not be authorized, or rather it would be illegal, to arrest or attempt to arrest for an offense not committed in the presence of the officer, unless there was some other reason for which the law would authorize an arrest to be made, or an attempt to be made, without a warrant or a process of law for making such arrest. While that is true, if an ordinance of a city or town be violated by a person, and it should be reported to an officer that such ordinance had been violated, or that there had been a violation of a certain ordinance by a person, and such person should be attempting to flee, and make his escape, then such officer would have the right to proceed to make such arrest without a warrant; and if, in doing so, the person so fleeing resists arrest, and with a deadly weapon attempts to take the officer's life, he would be guilty of an assault with intent to commit murder." It is evident from an analysis of this instruction that the court meant that the power of arrest without a warrant could be lawfully exercised by a marshal, where the offender was attempting to escape. The language used in the beginning implied an unqualified power of arrest without a warrant, and might have misled the jury. Construing the whole charge complained of as an instruction that an officer without a warrant may arrest an offender who is endeavoring to escape, we think it was unauthorized by the facts. A reference to the statement of facts will disclose that the defendant, at the time of the shooting, was not attempting to escape, nor was he at the time trying to elude arrest by flight. On the contrary, what the defendant then did was to resist arrest. If the marshal could lawfully arrest without a warrant, the defendant could not legally interfere with the officer in the discharge of his duty.

The trial judge was evidently of the opinion that under the circumstances detailed

by the marshal, upon whose testimony the state relied for a conviction, he was justified in attempting to arrest the defendant without a warrant, inasmuch as the defendant had taken to flight when first approached by the officer. Exception is taken to the following charge upon this subject: "Now, if you believe from the facts of this case that this defendant, Oscar Porter, had violated some of the penal ordinances of the town of Lumpkin, Mr. Bell, and if he was then in the presence of or in sight of the defendant, and the defendant attempted to flee, evade an arrest by escape, the city marshal would have the right to proceed to make that arrest without waiting to get any due process of law for the purpose of doing so; and if, in his endeavor to make that arrest under those circumstances without any warrant, the defendant should resist him and attempt to take his life, as charged in the indictment, he would be without justification in doing so, and the jury would be authorized to so find—a verdict finding the defendant guilty." The complaint made of this charge is that it did not correctly state the law applicable to the case, in that it amounted to an instruction that the "marshal could arrest the defendant upon mere request or demand, without a warrant or process," provided the defendant saw the party report him or demand his arrest for a past offense, and that, if the defendant attempted to prevent such arrest by flight, his mere effort to prevent such arrest would authorize his subsequent arrest; that the charge assumed there had been a violation of a municipal ordinance by the defendant, although there was no evidence that this was true; and that the charge excluded from the consideration of the jury the question whether or not there was any sufficient legal excuse for not obtaining a warrant before undertaking to make the arrest. Other instructions to the jury are excepted to on the ground that they likewise presented to the jury a theory of the case not authorized by the evidence and the law applicable thereto. These exceptions to the charge of the court seem to call for a somewhat extended review of the law relating to the right of a municipal peace officer to arrest, without warrant, a person who may have committed a violation of a municipal ordinance not in the immediate or constructive presence of the officer.

At common law certain officers were authorized to arrest without warrant under peculiar circumstances. Hale says: "There are certain officers and ministers of public justice that virtute officii are empowered by law to arrest felons, or those that are suspected of felony; and that, before conviction, and also before indictment. And these are under a greater protection of the law in execution of this part of their office upon these two accounts: (1) Because they are persons more eminently trusted by the law, as in many other acts incident to their office,

so in this; (2) because they are by law punishable, if they neglect their duty in it. And therefore it is all the reason that can be that they should have the greatest protection and encouragement in the due execution of their office, since their actings herein are not arbitrary, but necessary, duties—not permissions—and under severe punishments in their neglect thereof. And hence it is that these officers that are thus intrusted may, without any warrant, but from themselves, arrest felons and those that are probably suspected of felonies; and, if they be assaulted and killed in the execution of their office, it is murder. And, on the other side, if persons that are pursued by these officers for felony or the just suspicion thereof—nay for breach of the peace or just suspicion thereof—as night walkers or persons unduly armed, shall not yield themselves to these officers, but shall either resist or fly before they are apprehended, or, being apprehended, shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein because they cannot be otherwise taken, it is no felony in these officers or their assistants that upon inevitable necessity they kill them, though possibly the parties killed are innocent, for by their resistance against the authority of the king in his officers they draw their own blood upon themselves. The officers that I herein principally intend are (1) justices of the peace, (2) sheriffs, (3) coroners, (4) constables, (5) watchmen. And when I mention these I also include all that come to their aid and assistance; for every man in such cases is bound to be aiding and assisting these officers, upon their charge and summons, in preserving the peace and apprehending of malefactors, especially felons." 2 Hale's P. C. 85, 86. The term "policeman" has been held to be the legal equivalent of "watchman" at common law, with respect to the power to arrest without warrant. *State v. Evans* (Mo.) 61 S. W. 590, 84 Am. St. Rep. 669. Section 896 of our Penal Code of 1895 is a codification of the common law on the subject of arrest, with, perhaps, a slight enlargement of the power of arrest. That section reads as follows: "An arrest may be made for a crime by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or if the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant." In *Thomas v. State*, 91 Ga. 206, 18 S. E. 305, and in *Brooks v. State*, 114 Ga. 6, 39 S. E. 877, it was held that this section was applicable to municipal peace officers, such as policeman or town marshal.

The law is very jealous of the liberty of the citizen. In proportion as the offense is less serious, the greater the formality prescribed for the exercise of the power to deprive the citizen of his liberty. If the of-

fense be a felony, an arrest may be made by a private person or an officer without a warrant, if the citizen suspected of the felony is endeavoring to escape; but, if the offense be a misdemeanor, then, even before an officer will be authorized to arrest, he must bring himself within the exception provided in Pen. Code 1895, § 896. It has been held that the prosecution of one charged with the violation of a municipal ordinance is not a "criminal case," within the meaning of that clause of our Constitution which preserves the right of trial by jury. *Williams v. City Council*, 4 Ga. 509; *Floyd v. Commissioners*, 14 Ga. 354, 58 Am. Dec. 559. On the other hand, such a prosecution has been held to be a "criminal case," within the meaning of the statute providing within what time a bill of exceptions must be tendered and signed. *Barnett v. Atlanta*, 109 Ga. 166, 34 S. E. 322. But whether the violation of a municipal ordinance be a crime in the usual sense of the term or merely an offense against the public, to be known by some more appropriate name, the citizen cannot be deprived of his liberty because of his infraction of the ordinance, unless at common law he was liable to arrest, or the power to arrest is given by statute. Under the citation from *Hale*, the power to arrest for such a minor offense without a warrant did not exist at common law. Therefore it must depend upon statute, and there is no statute, of which we are aware, authorizing a municipal police officer to make an arrest, save in compliance with the terms of the above-cited section of our Penal Code. As to the right to arrest without a warrant, under the common law or the charter power conferred upon a municipality, see *Voorhees on Arrest*, § 112 et seq., and *McQuillin on Munic. Ord.* § 306.

That the infraction of a municipal ordinance may not amount to either a felony or a misdemeanor, but is merely to be regarded as a violation of a municipal precept touching appropriate and becoming conduct on the part of the citizen, does not dispense with the requirements of the law with regard to issuing a warrant for his apprehension. That he has committed a very slight offense affords no reason for treating him as a criminal who has forfeited his personal right of liberty, and who may therefore be arrested without any formality whatever. The suggestion may be made that it is inconvenient or impracticable to procure a warrant before making the arrest of such an offender, especially in a large city where there would be difficulty in ascertaining his whereabouts and serving a warrant upon him. But the obvious reply to this suggestion is that our General Assembly has not as yet seen fit to authorize police officers to deprive a citizen of his liberty at their own time and pleasure upon bare suspicion or upon mere information that he has been guilty of the violation of an ordinance of the municipality. Again, it may be said that in incorporating certain

towns and cities no provision has been made by the Legislature for the issuing of warrants for the apprehension of offenders against municipal ordinances. If this be true in point of fact, then the effect of such omission would be, not to abrogate the general law on the subject of arrest or to deprive the citizen in any measure of his right of personal liberty, but to afford the municipality no means of bringing the offender to account other than those for which the general law makes provision. The courts cannot undertake to supply the omissions of the legislative department of the state, but are bound to enforce the law as they find it.

So far as the town of Lumpkin is concerned, the somewhat recent act whereby it was granted a new charter unquestionably confers upon the mayor the power to issue warrants for the apprehension of persons charged with a violation of the ordinances of that town. Acts 1902, p. 492, § 9. In *Williams v. Sewell*, 121 Ga. 665, 49 S. E. 732, this court held that "A municipal charter which imposes upon the mayor the duty of seeing that the ordinances of the town are faithfully executed, and confers upon him jurisdiction to try all persons charged with violating such ordinances, authorizes the mayor to issue a warrant for the arrest for trial of one charged with the violation of an ordinance; and this is true, notwithstanding the charter does not in express terms authorize the mayor to issue a warrant for such purpose." So, it would seem, there was not "likely to be a failure of justice for want of an officer to issue a warrant"; the mayor being in town, though "at home, sick." That he was so incapacitated by his illness as not to be able, on the afternoon of the arrest or upon the following day, to attend to official business, does not appear. The name and identity of the accused were known. Haste was not imperative. Certain it is that the arresting officer did not undertake to make the arrest because of the impracticability of getting the mayor to issue a warrant, because he did not pretend that he based his right to apprehend the defendant upon any such ground. The case appears to have been tried upon the theory that the officer had a right, without a warrant, to arrest the defendant as an offender who was seeking to escape from justice, not one who had merely evaded an illegal arrest in the first instance and who had afterwards resisted with unlawful force a renewal of the officer's unauthorized attempt to place him in custody.

The charge of the court was not adjusted to the facts brought to light by the evidence. So far as appears, the defendant never manifested any intention of leaving the community or going beyond the corporate limits of the town. He refused to stop when ordered by the marshal to do so, and evaded the attempted illegal arrest by running off in the direction of his home. Some half or three-

quarters of an hour afterwards he again appeared on the public square, thereby negating any impression the marshal may have had that he intended to become a fugitive from justice. When first approached by the marshal, the defendant could either have resisted the unlawful arrest by the use of all necessary force or have avoided the attempted arrest by running away from the officer. *Thomas v. State*, 91 Ga. 205, 206, 18 S. E. 305. He chose the latter alternative and successfully eluded arrest. After arming himself with a gun he reappeared on the public square. With what intention does not affirmatively appear. He was not an "escape," nor was he making any attempt then to escape, but was quietly sitting down and conversing with some other negroes. When the officer suddenly confronted him, he immediately shot at, but missed, him. He may have intended, when he returned with his gun, to resist any renewed attempt to arrest him; but he indicated no intention to become a fugitive from justice until he committed the grave offense of unlawfully shooting at the officer.

The court was requested to charge the jury that "every man, however guilty, has the right to shun an illegal arrest by flight; and when an attempted arrest is illegal, and the defendant prevents such illegal arrest by flight, the exercise of this right of flight should not and would not subject him to be arrested as a fugitive endeavoring to escape." This request was pertinent to the case, and should have been given, for the jury should have been instructed that the evasion of the illegal arrest which the defendant accomplished by running away from the officer when first approached by him, about sundown, did not render the defendant a fugitive from justice whom the officer might thereafter arrest, without a warrant, as an "escape," whenever and wherever the officer might find him. If one accused of a misdemeanor or a violation of a municipal ordinance may oppose an illegal arrest with commensurate resistance, or by flight, it would be begging the question to say that an evasion of an illegal arrest by flight would authorize his arrest as a fugitive endeavoring to escape.

In granting a new charter to the town of Lumpkin in 1902 the General Assembly provided that the mayor should "have control of the marshal and his duties and of all special officers" appointed for any purpose, and that he might "cause the arrest and detention of all rioters and disorderly persons in said town before issuing his warrant therefor." Acts 1902, p. 492. But the marshal was not clothed with any authority in the matter of arrest, in addition to that he might exercise under the general law, while not acting in concert with or under any specific orders from the mayor. It is not to be presumed the General Assembly was unac-

quainted with the general law on the subject of arrest, or acted unadvisedly in ignorance of the local conditions in that town, when the above-mentioned provision was made with respect to the circumstances under which the formality of issuing a warrant could be dispensed with. We must be content with the scheme for bringing petty offenders to justice which the Legislature has, in its wisdom, seen fit to adopt.

2. To slay an officer who is without authority of law to make an arrest for a misdemeanor, where the motive of the slayer is merely to avoid an illegal arrest, would be manslaughter and not murder. *Croom v. State*, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; *Williford v. State*, 121 Ga. 176, 48 S. E. 962. While one who has committed a misdemeanor may use proportionate force in resistance to an illegal arrest, yet, if the means employed to prevent his detention are disproportionate to the effort made to take him into custody, such disproportionate resistance is unlawful; and, if such unlawful resistance culminates in a homicide, the party seeking to avoid arrest is guilty of voluntary manslaughter. If he fires at the arresting officer with a gun and misses him, and such resistance is unnecessary to defend himself from an illegal arrest, the offense is no more than an unlawful shooting at another, not in his defense, and does not amount to an assault with intent to murder. *Thomas v. State*, supra. From the evidence it appears that the marshal attempted no bodily harm in bringing about the arrest of the defendant, and that the defendant's firing at him with a deadly weapon was without excuse. The defendant claimed in his statement that the discharge of the gun was accidental. The marshal's testimony indicated that it was intentionally discharged at him. Accordingly the case made out by the evidence was one of unlawfully shooting at another, while the defendant's statement presented the defense of accidental shooting. The verdict of the jury, finding the defendant guilty of the offense of assault with intent to murder, was wholly unauthorized.

3. The ordinance of the town, defining disorderly conduct and prescribing the duties of the marshal, were relevant, as showing the authority of the marshal to make arrests for misconduct such as he was informed the defendant was guilty of. But, while the marshal had authority to make arrests for violations of the ordinances, he could not lawfully make an arrest without a warrant, save under the circumstances enumerated in the Code section above cited. The purpose of that section is to guard the citizen against summary apprehension for a petty offense not committed in the presence of the arresting officer, and with the commission of which he is not charged under oath by the person who makes com-

plaint to the officer, when the circumstances are not such as to justify an arrest without first procuring a warrant.

Judgment reversed. All the Justices concurring, except BECK, J., not presiding.

LUMPKIN, J., with whom CANDLER, J., joins (concurring specially). I concur in the judgment granting a new trial in this case, but I am unable to concur in all of the reasoning on which this judgment is based. The charge of the presiding judge clearly contained one or more errors which necessitate the granting of a new trial. A patent error consisted in submitting to the jury for determination whether the defendant had in fact violated some of the penal ordinances of the town of Lumpkin, when there was no evidence whatever that he had done so. The proof on this subject was merely that the marshal had been informed that such a violation had taken place.

Somewhat greater latitude is allowed in regard to arresting for a felony than for a misdemeanor, but I am not prepared to concur in the idea that greater formality is required in arresting violators of municipal ordinances than criminals, under the state law. This is not directly stated to be the rule in the opinion of the majority, but the reasoning seems to lead to that result. The legislative intent appears to be that under some circumstances arrests for disorders may be made without a warrant. Thus, in reference to towns and villages for which incorporation is provided in Pol. Code 1895, § 683, it is declared (section 705) that it shall be the duty of the mayor to see that the peace and good order of the town or village are preserved, and that persons and property therein are protected, and to this end he may cause the arrest or detention of all riotous and disorderly persons in the town or village before issuing his warrant therefor. The charter of the town of Lumpkin contains a similar provision. The charter of Temple contains authority to the clerk to issue certain writs, including warrants, though not mentioned in *Williams v. Sewell*, 121 Ga. 665, 49 S. E. 732. See Acts 1901, p. 658, § 23. By Pen. Code 1895, § 902, conductors of passenger trains are invested with powers of police officers while on duty, and authorized to detain persons guilty of disorderly conduct on the train, and have them delivered to the proper authorities for trial as soon as practicable. In *McRae v. Americus*, 59 Ga. 168, 27 Am. Rep. 390, Bleckley, J., said: "Police ordinances are at once family rules on a large scale and state laws on a small scale. * * * In a city, we think, a man may fight in a way to violate an ordinance, without being guilty of an assault and battery." In *Queen v. Atlanta*, 59 Ga. 323, Jackson, J., said, in a concurring opinion: "To hold a police court to strict pleading would be to destroy, almost, if not alto-

gether, its usefulness." See, also, *Johnson v. Americus*, 46 Ga. 80; *Floyd v. Eatonton*, 14 Ga. 354, 58 Am. Dec. 559; *Williams v. Augusta*, 4 Ga. 509; *Hood v. Von Glahn*, 88 Ga. 414, 14 S. E. 564; *Littlejohn v. Stella*, 123 Ga. 427, 51 S. E. 390. A policeman performs the duty of arresting, both for offenses against the state and those against municipal ordinances. He partakes both of the nature of a constable and a watchman at common law, with such added powers as may result from legislation.

As to the right to arrest without a warrant at common law, and as to night watchmen, see 4 Bl. Com. 292; 2 Hale's P. C. 98. The decisions cited from this state in the majority opinion arose in cases of arrests for offenses against the state, but if section 896 of the Penal Code of 1895 is to be treated as applying to arrests by policemen or marshals for violation of municipal ordinances, and as impliedly requiring a warrant, that section authorizes such an arrest without a warrant "if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant." A policeman under city ordinances is as much under the protection of the law in making an arrest as any public officer. *Johnson v. State*, 30 Ga. 426. The expression "in his presence" does not necessarily mean in his sight. In *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613, it was held that "an officer may arrest without warrant for wife-beating, if he arrives at the scene during the progress of or immediately after the beating; he being attracted thereto by the noise of the disturbance or the outcry of the woman." In *Brooks v. State*, 114 Ga. 6, 39 S. E. 877, it was held that "if a policeman, at a late hour of the night, hear a pistol shot within two blocks of his beat, and immediately thereafter discover a man running from the direction of the shot and towards him, he has a right to arrest him without a warrant." In *Harrell v. State*, 75 Ga. 842, it was held that "policemen ought to assist each other in arrests, and, when one hails another to stop a man running to a bridge which carries him into another jurisdiction, it is the duty of that other to seize and arrest the fugitive." In *Thomas v. State*, 91 Ga. 204, 18 S. E. 305, the evidence of the policeman was that he was called to arrest the accused by an old woman who kept a boarding house on the corner of Oak and Third streets, in the city of Macon, whose name he did not know or had forgotten; that she stated to him that the accused had broken into her trunk and had taken \$29 and a few cents, and a coat; that she described the accused, and said she wished the policeman to look out for him; and that this was about three hours after the property had been stolen. The court charged: "If you believe from

the evidence that the officer had been notified to look out for him as a thief, and that evening he approached to arrest him, and the defendant fled before the officer drew the weapon and without endeavoring to attack the defendant in any way, the defendant, while fleeing and the officer pursuing, drew the pistol and fired upon him, and you believe the pistol was a weapon likely to produce death, you would be authorized to convict him of assault with intent to murder." It was held that "this charge assumes that the facts enumerated would constitute probable cause for making the arrest without a warrant, whereas they might or might not; and whether they would or would not would be for the determination by the jury in the light of all the circumstances attending the case, including the facilities for obtaining a warrant according to the spirit of section 4723 of the Code." Thus, where it was attempted to make an arrest for the violation of a criminal law of the state, it was held that the jury should determine whether there was probable cause for making the arrest without a warrant.

In the present case I am of the opinion that there was sufficient evidence to authorize the judge to submit to the jury whether the offender was endeavoring to escape, or for any cause there was likely to be a failure of justice for the want of an officer to issue the warrant, if indeed the warrant was necessary. There was evidence to show that, when complaint was made to the marshal of the town, the accused saw what was occurring and began to leave; that, when, the marshal approached him, he ran away and could not be overtaken. If it should appear that one is guilty of disorderly conduct in violation of a municipal ordinance, and, upon seeing a policeman or the town marshal approaching leaves the scene, starts in a walk, breaks into a run, and finally escapes from sight in the gathering gloom of the evening by running, so that he cannot be found for the time being, it seems to me that it may well be submitted to a jury whether he was endeavoring to escape. It is true that the defendant obtained his gun, and about a half or three quarters of an hour later in the evening was found on the public square, where he attempted to kill the marshal when the latter appeared coming around the corner. The mere fact that he did not leave town is not conclusive that he was not attempting to escape. Very often the more populous centers afford a better means of hiding and escaping from justice than the sparsely settled country; nor is the fact that he obtained his gun and was seen on the public square such conclusive proof that he did not intend to escape as to authorize this court to assume the functions of a jury and determine that fact. It may be suggested that it was illogical for him to return to the public square, if he intended

to escape altogether, and that so doing indicated that the intention was only to escape from illegal arrest. To borrow the thought of a great jurist, it is illogical to commit crime; and, if one does an illogical thing, it is not surprising that he does it in an illogical way, or acts illogically afterwards. The fact that the man ran and escaped from something is unquestionable. Whether his purpose was to escape altogether from arrest, or whether it was only to evade an illegal method of arrest, may well be left to the jury. This court may take judicial cognizance of many things, but I do not think that we can take cognizance of whether a fleeing violator of law intends to escape from arrest, or only from illegal arrest. Generally violators of law who flee are more interested in escaping arrest than in the question whether the officer is acting with due formality, or whether the arrest is to be classified as legal or illegal. In many instances of the commission of disorder, when the peace officer appears, the guilty parties immediately cease their violation of law and walk or run away. Strictly speaking, the offense is often not committed under the eye, or in the immediate presence of, the officer. But the gathered crowd is there. The disorder is going on until he appears or is sent for. Perhaps there are visible evidences of a breach of the peace or of disorder abandoned at his approach, and surely the perpetrators will not be allowed to escape on the theory (determined by the court, not the jury) that they were running away from the scene of the offense lest they be arrested without a warrant. To lay down such a rule would be to largely destroy the efficiency of peace officers. While illegal arrests are to be discountenanced, and are no more approved by me than by my Brethren, yet I think, under the evidence in this case, it was proper—certainly if the offense had been proved to have been committed by the defendant—to submit to the jury whether he was escaping, and whether the officer rightly undertook to arrest him without a warrant.

(124 Ga. 399)

PROVIDENT SAVINGS LIFE ASSUR.
SOC. v. GEORGIA INDUSTRIAL CO.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. MORTGAGES—COVENANTS—INSURANCE.

A covenant in a security deed that the borrower is "to keep the improvements on said premises insured in company or companies acceptable to [the lender] against loss or damage by fire," in a stated amount, and "also to fully insure all buildings to be erected on the premises [thereby] conveyed, with loss, if any, payable to" the lender, is not a covenant to pay in advance the insurance premiums. If the borrower procures the issuance of insurance policies on his own credit, and delivers them to the lender agreeably to his obligation, the covenant to keep insurance is not broken until

the insurance policies are canceled by the insurance company.

2. INSURANCE—POLICY—CANCELLATION.

Where the policy stipulation was that it could be "canceled at any time by the company by giving five days' notice of such cancellation," and in the "loss payable clause" it was provided that the company reserved the right to "cancel this policy at any time, as provided by its terms, but in such case" the policy should "continue in force for the benefit only of the [lender] for ten days after notice to the [lender] of such cancellation," when it should cease, and that the insurance company should "have the right, on like notice, to cancel this agreement" relatively to the insured, the policy could not be canceled by the insurance company without giving the five days' notice to the insured.

3. MORTGAGE—ACCELERATING DEBT.

A provision in a security deed for accelerating the maturity of the debt should not be so construed as to work hardship on the borrower, where there has been a bona fide effort on his part to comply with his covenant, and the circumstances are such that his efforts at compliance were apparently acceptable to the lender. In such a case, when there has been no waiver of the covenant by the lender, good faith requires that he should, before undertaking to enforce the provisions of the deed accelerating the maturity of the debt for noncompliance with the terms of the covenant, afford to the borrower a reasonable opportunity to fully meet his obligations thereunder.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Georgia Industrial Company against the Provident Savings Life Assurance Society. Judgment for plaintiff, and defendant brings error. Affirmed.

On March 25, 1904, the Georgia Industrial Company borrowed \$40,000 from the Provident Savings Life Assurance Society, giving its promissory note for that sum, payable three years after date, and secured by a loan deed covering a tract of land in Hancock county. This deed contained the following covenants: (1) So long as the indebtedness, or any part thereof, remained unpaid, the borrower was to pay all taxes, etc., and agreed "to keep the improvements on said premises insured in company or companies acceptable to [the lender] against loss or damage by fires or lightning, in the sum of at least thirteen thousand dollars (\$13,000), and also to fully insure all buildings to be erected on the premises hereby conveyed, with loss, if any, payable to" the lender or its assigns, "as their interest may appear, and that any tax assessment or premium of insurance not paid when due" might be paid by the lender or its assigns, and any sum so paid should be added to the amount of the principal debt, and should draw interest from the time of the payment at the rate of 8 per cent. per annum, and be covered by the security of this deed. (2) The borrower further covenanted and agreed that, "in case of any default in the due payment of interest upon said principal debt at and when the same shall become due, or the due performance of any of the covenants herein expressed to be per-

formed by the [borrower], and a continuance of said default for a period of ninety days, the said principal note, together with any and all sums paid for account of the [borrower], in accordance with the provisions above set forth," should, at the option of the lender or its assigns, "then and thereby became due and payable forthwith, with accrued interest and all expenses and costs of collection," etc.; time being of the essence of this contract. (3) In case the debt secured by this deed should not be paid when it became due "by maturity in due course, or by reason of a default, as above provided," then the lender or its assigns might "enter upon said premises, and collect the rents and profits thereof, and [might] sell the said property at auction, at the usual place for conducting sales at the courthouse in the town of Sparta, in Hancock county, in said state, to the highest bidder for cash, first giving four weeks' notice of the time, terms, and place of such sale, by advertisement once a week in the newspaper in which the sheriff's advertisements for Hancock county are published; all other notice being hereby waived" by the borrower. In January, 1905, the Provident Savings Life Assurance Society gave notice to the Georgia Industrial Company of its election to call the loan, claiming that the covenant respecting the keeping up of insurance and the improvements upon the premises covered by the loan deed had been broken, and that the default had continued for a period of more than 90 days. Shortly thereafter the assurance society took steps to exercise the power of sale conferred upon it by the loan deed, and advertised the property for sale on the 7th day of April, 1905. On April 5th the Georgia Industrial Company filed a petition to enjoin this proposed sale of the property, alleging in its petition that there had been no default arising out of a failure on its part to comply with its covenants under the loan deed, and that the assurance society was proceeding without right to exercise the power of sale therein provided for. The court issued a rule nisi, and on the interlocutory hearing passed an order enjoining the sale. To the granting of this temporary injunction the assurance society excepts.

W. H. Burwell and Jas. H. Gilbert, for plaintiff in error. Walter McElreath, for defendant in error.

EVANS, J. (after stating the foregoing facts). 1. It appears that shortly after the loan was negotiated, the Georgia Industrial Company delivered to the assurance society certain insurance policies, amounting in the aggregate to \$13,000, containing a stipulation that any loss sustained thereunder should be payable to the assurance society as its interest might appear. Some of these policies were issued by a firm of insurance agents without requiring the Georgia Indus-

trial Company to first pay the premiums, thereon. Subsequently repeated demands were made upon it to pay these premiums, which the company neglected to do. On July 12, 1904, the insurance agency notified a representative of the assurance society that the efforts made to collect the past-due premiums on these policies had wholly failed, and that the companies issuing the policies had determined to cancel them for this reason. The representative of the assurance society requested the insurance agency to abstain from taking such action, and agreed in behalf of his principal that it "would hold itself responsible for, and would pay," the premiums on these policies, and also the renewal premium on another of the policies, which would expire on August 4, 1904, and which he requested the insurance agency to have "renewed in due course for the benefit of" the assurance society. The insurance agency assented to this proposal, and refrained from canceling the policies for nonpayment of premiums, relying upon the promise made by the representative of the assurance society that it would assume responsibility for the payment of premiums. Neither the insurance agency nor any representative of the assurance society notified the Georgia Industrial Company of this understanding and agreement. On July 29th the insurance agency addressed a letter to the president of that company, giving notice that one of the policies would expire on August 4th and requesting him to fill out and return an inclosed application for its renewal. The president of the company did so, the policy was accordingly renewed, and the insurance agency thereafter called on the company for payment of the renewal premium of \$170 and accepted from it a partial payment of \$100 thereon. Subsequently the insurance agency, despairing of being able to collect from the Georgia Industrial Company the unpaid premiums on policies issued to it, called on the assurance society for payment of the same, and payment thereof was made by it through its representative on January 23, 1905. Between July 12, 1904, and the end of the year, its local representative had been from time to time advised by the insurance agency of its unsuccessful efforts to collect these premiums, and reminded that the policies were being kept in life in reliance upon the promise made in behalf of his principal that payment by it would be made when required by the insurance companies. He regarded the continued failure on the part of the Georgia Industrial Company to pay the insurance premiums as amounting to a breach of its covenant to keep the improvements on the premises covered by the loan deed insured as therein stipulated, and accordingly, on January 16, 1905, gave written notice to that company that, inasmuch as it had failed to comply with this covenant, the assurance society had elected to exercise its option to declare the loan to

be due and payable forthwith, and that the company would "also be held accountable for all premiums of fire insurance paid and to be paid by the society in connection with this matter." So far as appears, this was the first intimation the Georgia Industrial Company had that the assurance society had entered into any agreement with the insurance agency with respect to the payment of premiums. As late as January 3, 1905, the company was advised by a letter written by the secretary of the assurance society, and sent from its office in New York, that one of the policies would expire on the 15th of that month, and that the society would be "pleased to receive a renewal of the same, or other acceptable insurance, on or before that date." The assurance society now insists that the Georgia Industrial Company failed to keep up the required amount of fire insurance in compliance with its covenant, and that its default in this respect dates from the 12th day of July, 1904, since which time the requisite amount of insurance has been kept in life solely by reason of the society's agreement to pay premiums, and not upon the faith of any credit extended to the company by the insurance companies or their agents.

The policies of insurance which were issued to the Georgia Industrial Company were not invalid or ineffectual because of the nonpayment of any premium, and could not become so until the insurance companies canceled them pursuant to the terms therein expressed. When the insurance companies issued these policies without demanding payment in advance of the premiums, they became immediately binding. Their delivery to the insured or its creditor at the instance of the insured was equivalent to an express waiver of prepayment of premiums. The insurance companies could thereafter cancel the policies only upon the terms and conditions of the contract with the insured as expressed in the policies. Each of them contained this stipulation: "This policy shall be canceled at any time by the company by giving five days' notice of such cancellation." In the "loss payable clause" it was provided that: "The company reserves the right to cancel this policy at any time, as provided by its terms; but in such case this policy shall continue in force for the benefit only of the society for ten (10) days after notice to the society of such cancellation, and shall then cease, and this insurance company shall have the right, on like notice, to cancel this agreement." Under the terms of the policy, if there had been no "loss payable clause" attached, the giving to the insured of five days' notice of intention to cancel was a condition precedent to the cancellation of the policy. Where there is a "loss payable clause," and it is sought only to cancel this clause, ten days' notice must be given to the party to

whom the loss is made payable. If the company desires to cancel the policy in its entirety, both as to the insured and as to the party who holds it as security, five days' notice is required to be given to the insured, and ten days' notice to the person named in the "loss payable clause." No notice of an intention to cancel any of the policies was ever given to the Georgia Industrial Company prior to the date on which the assurance society announced its election to call the loan. The evidence warranted the conclusion that, up to that date at least, the insured was under the bona fide belief that the policies were still in force and were being kept in life upon the faith of the credit extended to it by the insurance companies through their agents. The notification given to the assurance society by the insurance agency of an intention to cancel the policies for nonpayment of premiums was not notice to the insured; and the agreement between the assurance society and the insurance agency that, upon the assurance of the payment of premiums by the society, the policies would not be canceled, could in no wise affect the rights of the insured under the policies, the insured not being a party to this agreement and being wholly ignorant of such an arrangement. The policies of insurance evidenced what was in the nature of a tripartite contract, and two of the parties thereto could not, by any such secret understanding between them, deprive the other party to the contract of any benefit assured to him thereunder. Otherwise, it would be within the power of a mortgagee and an insurance company to secretly terminate the insurance and declare a default in a covenant by the insured to keep up insurance on the mortgaged property, when by the very terms of the insurance contract a default had not occurred. The borrower's covenant was to keep the improvements on the premises insured, not to pay the insurance premiums in advance. If the borrower procured the insurance in accordance with the terms of this covenant, the covenant was not broken because the insurance companies, after extending credit to the borrower, instead of exacting cash payment of the premiums, became dissatisfied because payment was unduly deferred and expressed to the lender an intention to cancel the policies for nonpayment of premiums. The insurance companies had the right to cancel the policies upon giving to the insured five days' notice of an intention to do so; but, until this notice was given the insured, the policies were binding on the insurance companies, and afforded to the lender all the protection with which they would have surrounded the lender had payment of the premiums been made in advance. As no notice of an intention to cancel the policies was given to the insured, they remained of force, independently of the secret understanding be-

tween the insurance agency and the lender, up to the time the loan was called on January 16, 1905. The lender could not proceed to sell the property pledged as security for the loan under the power of sale contained in the loan deed until a default in keeping up the insurance had occurred and had continued for a period of 90 days. The borrower was not in default because of nonpayment of insurance premiums when the loan was called, and yet the property was advertised for sale April 7, 1905, less than 90 days after the insured for the first time was informed of the lender's undertaking to guaranty payment of the insurance premiums if the companies, which had extended credit to the borrower therefor, would refrain from canceling any of the policies and keep them in force for the benefit of the lender. The court below, therefore, rightly held that the failure on the part of the insured to pay the insurance premiums did not constitute a continuing breach of the covenant to keep the improvements on the premises insured for the protection of the lender.

2. The borrower's covenant was to keep up insurance, in an amount not less than \$13,000, for the benefit of the lender, on the improvements upon the premises described in the loan deed. These improvements were not of such value as to enable the borrower to secure insurance thereon for that amount, and the lender did not, therefore, insist upon a literal compliance with the covenant. On the contrary, the lender, with knowledge that certain buildings belonging to the borrower were located on the right of way of a railway company, and not upon the premises covered by the loan deed, accepted policies of insurance taken out on these buildings for the lender's protection, and treated the insurance thus effected, in addition to that represented by other policies tendered at the same time, as amounting to a substantial compliance with the terms of the covenant. Strict compliance therewith was therefore waived. One of the policies delivered by the Georgia Industrial Company to the assurance society was taken out on a dwelling house which was neither located on the premises covered by the loan deed nor erected on land to which the company had title. The policy stipulated that it was to be regarded as void if the insured did not have the title in fee to the land on which the building was located. The assurance society contends that, at the time it accepted this policy as security, it believed the house was located on the premises included in the security deed, and that its discovery that the dwelling house was located on other land was made pending the present litigation. It further insists that as this policy was included among those making up the total amount of insurance covenanted to be effected and maintained, and as this policy was void from its inception and afforded the society no protection, the covenant of the Georgia In-

dustrial Company has never been kept, either literally or substantially. It is not denied that the land on which this house was built is not embraced in the tract described in the security deed, nor that the fee-simple title to the land is in one other than the insured. But evidence was submitted in behalf of the company authorizing a finding that it had an insurable interest in the house, and that it acted in good faith in effecting insurance thereon and tendering the policy to the lender in an effort to comply substantially with the covenant to keep the improvements on the premises described in the loan deed insured to an amount not less than \$13,000. The president of the Georgia Industrial Company deposed that, from certain facts narrated by him, he inferred that the assurance society had knowledge concerning the true location of this dwelling house. The evidence offered in this connection was not such as to warrant the conclusion that the assurance society had actual knowledge of the fact that the house was not located on the premises included in the loan deed, but was sufficient to support the finding of the court that the insurance on this house was effected in good faith by the borrower in a bona fide effort to insure the lender against possible loss. The manifest purpose of the covenant to keep the improvements on the premises insured was for the better securing of the loan. If, in a bona fide effort to comply substantially with this obligation, the covenantor, acting under the belief that the lender had signified a willingness to waive a strict compliance with the covenant, which was impossible of literal performance, tendered to the lender a policy taken out on a building in which the covenantor had an insurable interest, but which was not located on the premises described in the loan deed, nor on land to which the covenantor had a fee-simple title, and the policy was accepted and retained by the lender without knowledge of the facts, and with no intention to waive any right under the covenant, good faith on the part of the lender would require that it should, upon discovery that the policy afforded it no protection, return the policy to the covenantor and afford it an opportunity to substitute acceptable insurance, before arbitrarily declaring that the covenantor was in default and demanding an immediate payment of the loan. The contract contemplated that the borrower should effect insurance which was acceptable to the lender. The time for rejecting policies of insurance which were not acceptable was when the policies were tendered to the lender in an effort by the borrower to comply with the terms of the covenant. So long as the assurance society retained the policy taken out on the dwelling house, the Georgia Industrial Company might well assume that the former recognized that there had been a substantial compliance with the terms of the covenant. Of, course, the assurance society, by retaining the policy in ignorance of the true state of facts, did not

waive its right to exact compliance with the covenant; but, when it discovered that the policy of insurance in its possession was upon property not included in the loan deed, it should have promptly offered to return the policy and made demand upon the covenantor to substitute therefor a policy which was acceptable, unless the Georgia Industrial Company had by deception and artifice perpetrated an actual fraud upon it by inducing it to accept the policy in the first instance, and was therefore knowingly and deliberately in default from the beginning of the transaction. The court below expressly ruled that, so far as this branch of the case was concerned, it should be made to turn upon the question of the good faith of the Georgia Industrial Company in effecting this particular insurance, and tendering the policy to the assurance society. While provision for accelerating the maturity of a secured debt was not generally to be regarded as in the nature of forfeitures, yet such provisions should not be so construed as to work hardship where there has been a bona fide effort to comply with the obligations assumed by the borrower. *Rounsavell v. Crofoot*, 4 Ill. App. 671. The presiding judge found that the Georgia Industrial Company had acted in good faith in its efforts to keep its covenant; and he did not abuse his discretion in refusing to treat the partial failure to comply therewith, as such a default as would give the assurance society, an immediate right to exercise the power of sale, without offering to return the policy objected to, and affording the covenantor a reasonable opportunity to substitute insurance which was satisfactory.

Judgment affirmed. All the Justices concurring.

(124 Ga. 69)

TOWSEND v. STATE.

SAME v. BROACH.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. CONSTITUTIONAL LAW—CONTRACT OF EMPLOYMENT—FRAUDULENT BREACH.

The act approved August 15, 1903 (Acts 1903, p. 90), entitled "An act to make it illegal for any person to procure money, or other thing of value on a contract to perform services, with intent to defraud, and to fix the punishment therefor, and for other purposes," is not repugnant to the Constitution of Georgia, nor to the Constitution of the United States, for any of the reasons assigned in the demurrer to the accusation based upon a violation of the terms of said act.

2. SAME—EVIDENCE.

But, the verdict being without evidence to support it, the court erred in not granting a new trial.

3. HABEAS CORPUS—ILLEGAL DETENTION.

Inasmuch as the act above referred to was not void as being unconstitutional, the detention of the defendant under the sentence of the court upon his conviction of the offense of being a common cheat and swindler under the provisions of said act was not illegal.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Jim Towsend was convicted of crime, and brings error. Reversed.

He also brings habeas corpus against T. B. Broach, jailer. Judgment for defendant, and petitioner brings error. Affirmed.

H. F. Sharp, for plaintiff in error. W. H. Ennis, Sol. Gen., for defendants in error.

BECK, J. Towsend was accused of being a common cheat and swindler under the provisions of the act approved August 15, 1903 (Acts 1903, p. 90); the accusation charging that, after having contracted to perform certain services for the prosecutor, he procured money and other things of value from him with intent not to perform the services, "to the loss and damage of" the prosecutor. The accused demurred to the accusation, on the ground that it did not set out with sufficient certainty the articles of merchandise alleged to have been advanced. He also demurred on the ground that the statute under which the defendant was accused was void, being contrary to the principles contained in article 1, § 1, par. 17, of the Constitution of Georgia, as well as contravening the federal Constitution, and violating the law in reference to peonage as contained in section 5528 of the United States Compiled Statutes of 1901. Both demurrers were overruled, to which the defendant excepted *pendente lite*, and the case preceeded to a trial. Upon the hearing the prosecutor testified that under the contract referred to in the accusation he was to furnish the accused with 25 acres of land and a mule, the accused was to furnish the labor and supplies, and they were to divide the proceeds of the crop. It was further agreed that the prosecutor was to procure the supplies for the defendant, and that the defendant was to pay him for them out of the defendant's share of the crop. The prosecutor also testified: "He rented the land from me, and agreed to cultivate the land on the halves." The defendant in his statement contended that he had rented the land from the prosecutor, and that, as to the money he had gotten from the prosecutor, he intended to work for one Hight in order to get money with which to pay it; that he was thus at work for Hight when he was arrested. The jury returned a verdict of guilty. The defendant made a motion for a new trial, upon the general grounds, and because the court refused written requests to give in charge the following: "A cropper is not a hirer in the sense of the statute." "Confinement in jail is good and sufficient excuse for not complying with his contract." "Before you can convict, the state must show that, before the defendant was confined in the jail of Floyd county, the time had come when the money was to be paid or the labor

performed." The court overruled the motion, and the defendant excepted.

1. The contention of the plaintiff in error that the court erred in overruling his demurrer upon all the grounds thereof, which are substantially set forth above, is settled adversely to him by the ruling of this court in the case of *Lamar v. State*, 120 Ga. 312, 47 S. E. 958. The ruling in that case is clearly adverse, also, to his contention that the act approved August 15, 1903 (Acts 1903, p. 90), is repugnant to peonage statutes, "for that its ultimate object is imprisonment for debt." "It is reasonably clear that, in enacting the statute now under consideration, the Legislative purpose was not to punish one simply for a failure to pay a debt, but was to punish the act of securing the money or property of another with a fraudulent intent not to perform the service, the promise to do which was the consideration of such money or property. * * * Our statute is not subject to such a construction." *Lamar v. State*, *supra*; *Banks v. State*, 52 S. E. 74.

2. But, while the court properly overruled the demurrer to the accusation, the contention of plaintiff in error, in his motion for a new trial, that the verdict in the case was contrary to the evidence and to the law, contains, as it seems to us, an assignment of error that is meritorious. Under the prosecutor's own testimony the relation between him and the plaintiff in error was not one of hirer and employé, or of landlord and cropper, but was that of landlord and tenant. There is nothing in the record to show that the relation of landlord and cropper existed between the prosecutor and the accused. It is true that the prosecutor did testify that he was "to furnish supplies," but in immediate connection with this it is disclosed that he meant, by the expression "furnish supplies," that he was to let the defendant have them on credit; the latter being expected to pay for them out of his half of the crop. That the contract between them was one of rental is shown, also, very clearly by the defendant's statement, which is substantially in accord with the testimony of the prosecutor; and the court should have granted a new trial on the ground that the verdict was contrary to law and the evidence. Except as indicated in the above, no errors of law were committed.

3. Subsequently to the conviction of the defendant, he filed his petition for habeas corpus against Broach, deputy sheriff and jailer of Floyd county, alleging that his conviction and the ensuing sentence against him were void upon the same grounds as those set forth in the demurrer. The court denied the petition and refused the writ, to which ruling the plaintiff in error excepted, and by writ of error brought said ruling to this court for review. It follows, from what we have said in the first division of this opinion, that there was no error in the court's

action and judgment upon the petition for habeas corpus.

Judgment in the one case reversed; in the other affirmed. All the Justices concurring.

(124 Ga. 72)

JAMES v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. STATUTES—TITLE OF ACT.

The act of February 26, 1877 (Acts 1877, p. 335), prohibiting the sale of intoxicating liquors upon the Island of St. Simons, is not unconstitutional as containing matter different from that expressed in its title, nor as referring to two subject-matters.

2. INTOXICATING LIQUORS—REPEAL OF STATUTE.

If there is an irreconcilability between the domestic wine act of February 27, 1877 (Acts 1877, p. 33), and the act referred to in the preceding note, the conflict extends only to the sale of that class of wine, the sale of which is the subject of the general law, and the local act would be unrepealed, so far as it related to intoxicating liquors other than wine of the character referred to in the general law.

(Syllabus by the Court.)

Error from City Court of Brunswick; A. D. Gale, Judge.

Mimie James was convicted of illegal sale of intoxicating liquors, and brings error. Affirmed.

The accused was arraigned upon an indictment in which it was charged that she "unlawfully did sell and barter intoxicating liquors on the Island of St. Simons, in the county of Glynn." The indictment was preferred under an act (Acts 1877, p. 335) of which the following is a copy:

"An act to prohibit the sale of intoxicating liquors of any and every kind upon the Island of St. Simons, in the county of Glynn.

"Section 1. Be it enacted by the General Assembly of the state of Georgia, that from and after the passage of this act, it shall not be lawful for any person to sell, or barter, in any quantity whatever, intoxicating liquors of any kind upon the Island of St. Simons, in the county of Glynn, or upon any river, creek, inlet, within the boundary line of said island.

"Sec. 2. Be it further enacted, that any person violating the first section of this act shall be guilty of a misdemeanor, and, on conviction in any court having jurisdiction of misdemeanors, shall be fined a sum not less than one hundred or more than five hundred dollars, in the discretion of the court, or imprisoned at the discretion of the court, not less than two or more than twelve months."

A demurrer was filed, which set up that "the act is unconstitutional: First. Because it contains matter different from that expressed in the title. (a) The title refers to a prohibition of the sale of intoxicating liquors, and the body of the act prohibits not only the sale, but the barter, of such liquors. (b) The title prohibits the sale upon the Island of St. Simons, in the county of Glynn,

and the body of the act prohibits the sale not only upon the island, but upon any river, creek, or inlet, within the boundary line of said island. (c) The title of the act contains no language indicating a purpose to make the sale or barter penal, while the body of the act makes such sale or barter a misdemeanor. Second. The act was repealed by the domestic wine act of 1877 (Acts 1877, p. 33). Third. The act contains two subject-matters, the sale and barter of intoxicating liquors upon the Island of St. Simons, and relates to the sale and barter, not only upon the island, but upon streams within the boundary lines of said island, and provides a penalty for both the barter and the sale of intoxicating liquors." The demurrer was overruled, and the accused excepted.

J. D. Sparks, for plaintiff in error. Jno. W. Bennett, Sol. Gen., and J. T. Colson, for the State.

COBB, P. J. A sale in its broadest sense comprehends any contract for the transfer of property from one person to another for a valuable consideration. Century Dictionary; *Cain v. Ligon*, 71 Ga. 694, 51 Am. Rep. 281. It is often used in a more limited sense as embracing only those contracts which are founded upon a money consideration. In an act prohibiting the sale of intoxicating liquors the word "sale" is to be construed in its broad and comprehensive sense, and therefore includes what is commonly known as barter and exchange. *McGruder v. State*, 83 Ga. 616, 10 S. E. 281 (5); *Griffin v. State*, 115 Ga. 577, 41 S. E. 997 (4); *Paschal v. State*, 10 S. E. 821, 84 Ga. 326. The word "sale" in the title authorized legislation upon the subject of barter. The title of the bill indicates a purpose to provide legislation prohibiting the sale of intoxicating liquors upon the Island of St. Simons. This is sufficiently broad to authorize legislation reaching every part of that island. That provision in the body of the act which in terms makes the provisions of the act applicable to rivers, creeks, and inlets within the boundary line of the island is therefore within the terms of the title. The title does not in terms refer to a penalty to be imposed for a violation of the provisions of the act. But the word "prohibit," which appears in the title, is sufficiently broad to authorize legislation making penal the sale which is prohibited by the act. The law cannot effectually prohibit an act unless some penalty is imposed for its violation. Without penalty there would be no effectual prohibition. Even though the title omits the usual words "and for other purposes," a penalty for its violation is germane to the scheme of the act as indicated by its title, which is to prohibit the sale of liquors. In *Sasser v. State*, 99 Ga. 54, 25 S. E. 619, the title referred simply to prescribing the method of granting licenses for the sale of liquor, and increasing the fee for such

licenses, and language of this character was not broad enough to embrace the subject of a penalty for the sale without a license. The act did not contain two subject-matters. The subject-matter of the act was the prohibition of the sales of every nature and kind of intoxicating liquors upon all of the territory embraced within the limits of the island. The subject-matter of the act was thus single; and while it dealt with both sale and barter, and sales upon land and sales upon water, it was at last merely an act to prohibit the sale in all parts of the island.

The act under which the indictment was preferred was approved February 26, 1877, and the domestic wine act was approved February 27, 1877. The domestic wine act related merely to sales in quantities not less than one quart by manufacturers of wine made from grapes the product of vineyards in this state. If the passage of this general law had the effect to repeal any part of this local law for St. Simons Island, it certainly did not repeal it in its entirety. If any part of the prior local act was repealed by the subsequent general law, only such part was repealed as is in irreconcilable conflict with the general law. The indictment was in the language of the local act, and was therefore a good indictment under that act. If upon the trial it should appear that the accused was a manufacturer of wine from grapes, within the terms of the domestic wine act, and sold only the wine referred to in that act and in the manner therein referred to, then the question as to whether the local act was repealed, so as to authorize the sale of such wine, might become material. But if it appeared that the accused sold intoxicating liquors of a character not referred to in the domestic wine act, or if she sold domestic wine in quantities not authorized by that act, she could be properly convicted of a violation of the local act. The indictment was not subject to any of the objections set up in the demurrer.

Judgment affirmed. All the Justices concurring.

(124 Ga. 75)

BASS v. LAWRENCE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. STATUTES—SUBJECT-MATTER—TITLE.

The title of the act approved December 15, 1900 (Acts 1900, p. 345), to wit, "An act to cause and establish a new charter for the city of Milledgeville; to establish the office of recorder; to enlarge the jurisdiction of the police court; to more accurately regulate the power of the mayor and aldermen of said city relative to the public streets; to provide methods of contesting elections; to confer power upon the mayor and aldermen to assess and collect taxes and licenses; to authorize condemnation of private property for public purposes; to authorize the establishment of a city chain-gang; to confer jurisdiction upon the mayor and aldermen over the city cemetery and other public property; to regulate the establishment of nuisances; to authorize the collection of gross-sales tax; to provide for support of schools

within the limits of said city, and for other purposes"—contains only one subject-matter, and that is the grant of a new charter to the city of Milledgeville, with such incidental powers as are germane to that object.

2. SAME — PROVISIONS NOT INCLUDED IN TITLE.

The sixty-fifth section of the act (Acts 1900, p. 364) which provides that "all ordinances or ordinance, or any part, clause, or section of any act or acts now in force in said city, which is not in conflict with this act, are hereby continued to be a part of the charter of said city, and are hereby declared of full force and effect," is broader than the title of the act, and such provision is void because it is variant from what is expressed in the title.

3. SAME—EFFECT.

But the entire act is not void. The remainder of the act is complete in itself, and capable of being enforced independently of the provisions of the sixty-fifth section (Acts 1900, p. 364), and is therefore valid.

4. MUNICIPAL CORPORATIONS—POLICE COURT—AUTHORITY—HABEAS CORPUS.

The police court had full jurisdiction to enforce the ordinances of the city and to impose sentences for their infraction and where a person pleads guilty to the violation of an ordinance the validity of which is not questioned, and is in the custody of the proper officer by virtue of the sentence lawfully imposed by the court, his detention is not illegal.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Habeas corpus proceedings by E. E. Bass against J. H. Lawrence. From a judgment remanding petitioner, he brings error. Affirmed.

Hines & Vinson, for plaintiff in error. J. E. Pottle, Sol. Gen., and Allen & Pottle, for defendant in error.

EVANS, J. The contention of the plaintiff in error is that he is illegally restrained of his liberty, for the reason that the judgment and sentence of the recorder's court of the city of Milledgeville is void, because the act of the General Assembly granting a new charter to that city, approved December 15, 1900 (Acts 1900, p. 345), is violative of paragraph 8, § 7, art. 3, of the Constitution of this state (Civ. Code 1895, § 5771), in that the act contains matter which is not expressed in its caption, and also embraces two separate and distinct subject-matters. The title of the act is as follows: "An act to cause and establish a new charter for the city of Milledgeville; to establish the office of recorder; to enlarge the jurisdiction of the police court; to more accurately regulate the power of the mayor and aldermen of said city relative to the public streets; to provide methods of contesting elections; to confer power upon the mayor and aldermen to assess and collect taxes and licenses; to authorize condemnation of private property for public purposes; to authorize the establishment of a city chain-gang; to confer jurisdiction upon the mayor and aldermen over the city cemetery and other public property; to regulate the establishment of nuisances; to authorize the collection of gross-sales tax; to provide for support of schools

within the limits of said city, and for other purposes." The 65th section (page 364) of the act provides: "That all laws contained in the several acts granting charter powers and privileges to said city, or the mayor and aldermen thereof, and the several acts amendatory thereof, and all ordinances or ordinance, or any part, clause, or section of any such act or acts now in force in said city which is not in conflict with this act, are hereby continued to be a part of the charter of said city, and are hereby declared of full force and effect." It is insisted that the matter embraced in this section is entirely distinct from the objects of the legislation as expressed in the title of the act.

In *Mayor of Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247, after an elaborate collation and examination of the previous adjudications of this court, it was held that, where the title of an act specifies some of the objects for which the statute was passed, and contains the general expression "and for other purposes," any legislation could constitutionally be embodied in the body of the act which was germane to the general subject expressed in its title. If the words "and for other purposes" had been omitted, the matter in the body of the act would be limited by the caption. The whole of the act would not be void, but that portion of the body of the act to which no reference was made in the title would fail, as being opposed to par. 8, § 7, art. 3, of the Constitution. *Sasser v. State*, 99 Ga. 54, 25 S. E. 619. So, under the constitutional provision that "no law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof" (Civ. Code 1895, § 5771), an act may be good in part and void in part, or the act may be absolutely invalid. If both the title and the body of the act contain separate and distinct subject-matters, the act will be void in its entirety, since it would be impossible to tell what particular object rather than another of those referred to the legislation was intended to accomplish. But if only one subject-matter is covered by the title of the act, the fact that matter not therein referred to is embraced in the body of the act will not necessarily render it wholly inoperative. To the extent that certain provisions found in the body of the act are not referred to in its title, it will be unconstitutional. It will be operative, however, as to those provisions which are covered by its title, if the legislative scheme will not be defeated by the rejection of so much of the matter embraced in the body of the act as is not referred to in its caption. If the legislative intent, as expressed in the title, can be given effect by enforcing such of the provisions of the act as are referred to in its caption, then the enactment may be deemed complete, and capable of enforcement save as to such additional provisions as render it in part unconstitutional.

It was urged by counsel for the plaintiff in error that this view is antagonistic to that announced by this court in *Brieswick v. Brunswick*, 51 Ga. 639, 21 Am. Rep. 240. Even a cursory examination of that case will suffice to show that Chief Justice Warner, who wrote the opinion of the court, did not intend to be understood as saying the whole of the act then under consideration was void, but only one of its provisions, which was not referred to in its title. All that was decided was that this provision, which was similar to that embraced in section 65 of the act creating a new charter for the city of Milledgeville, related to a subject-matter different from that referred to in the title, and that to this extent the act was invalid, because violative of the constitutional inhibition above mentioned. It is manifest that the court did not undertake to hold that, because the body of the act embraced provisions relating to more than one subject-matter, the act was void in its entirety. If such was the view entertained by the court, there was no occasion for the Chief Justice to take pains to point out that the provision of the act which was declared to be unconstitutional was not covered by the caption of the act, because not germane to the purpose therein expressed.

The decision rendered in the *Brieswick Case* may be regarded as controlling in the present case in so far as the constitutionality of section 65 of the act now under consideration is concerned. But eliminating that section, the act is complete in itself, and capable of being enforced independently of the provisions therein contained. The title of the act fully covers what is embraced in its body regarding the establishment of a police court, to be presided over by an official known as the "recorder," the maintenance of a chain gang, and the carrying into effect of the various other purposes referred to in the caption. As to all of these matters, the act is constitutional, and it follows that the police court was not without jurisdiction to enforce the ordinance of the city, or to impose sentence upon the plaintiff in error upon his plea of guilty to the charge of having violated one of them which he recognized as being valid, and the validity of which he does now undertake to call into question. His detention was not, so far as appears, illegal, and the court below did not err in refusing to discharge him from custody.

Judgment affirmed. All the Justices concurring.

(124 Ga. 78)

EDWARDS v. CITY OF ATLANTA.

(Supreme Court of Georgia. Nov. 9, 1905.)

MUNICIPAL CORPORATIONS — VIOLATION OF ORDINANCE—PROOF OF VENUE.

In a proceeding before a recorder's court of a city against a defendant charged with violating a municipal ordinance, it is necessary to show the venue of the offense, and this is not

sufficiently done by showing that the matter under investigation took place at "Ponce de Leon Park"; it not appearing from the evidence whether or not the place so designated is within the tract of land described in the act of 1877, by which certain land was included within the corporate limits of the city of Atlanta for police purposes. See Acts 1877, pp. 141, 142; Code of Atlanta 1899, § 18.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

George Edwards was convicted of violating an ordinance of the city of Atlanta, and brings error. Reversed.

Jos. W. Humphries and Jno. D. Humphries, for plaintiff in error. J. L. Mayson and W. P. Hill, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concurring.

(124 Ga. 78)

STARR v. CITY OF ATLANTA.

(Supreme Court of Georgia. Nov. 9, 1905.)

MUNICIPAL CORPORATIONS — VIOLATION OF ORDINANCE.

This case is controlled by the decision of this court in *Edwards v. City of Atlanta* (this day decided) 52 S. E. 297.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

John Starr was convicted of violating an ordinance of the city of Atlanta, and brings error. Reversed.

J. W. Humphries and Jno. W. Humphries, for plaintiff in error. J. L. Mayson and W. P. Hill, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concurring.

(124 Ga. 79)

BRYAN v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. JURY—CHALLENGE TO ARRAY.

A challenge to the array is an objection to all the jurors collectively because of some defect in the panel as a whole.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 541, 543.]

2. SAME—CHALLENGE TO POLL.

Where it was contended that certain members of the jury whose names appeared on the panel had just before been members of a jury who had found a verdict of guilty against another person charged with gaming while playing in the same game involved in the charge against the defendant, the point should have been raised by a challenge to the polls, and not to the array.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

G. D. Bryan, Jr., was convicted of gaming, and brings error. Affirmed.

Bryan was charged with gaming, and found guilty. There was direct evidence to

show his guilt. He moved for a new trial, on the ground that the verdict was contrary to law and evidence, and also because the court overruled a challenge to the array of jurors put upon him, on the ground that it did not contain an impartial jury, because of the panel of 24 jurors put upon him 10 had the same day been members of a jury who found against another person a verdict of guilty of the offense of gaming while playing in the same game involved in the charge against this defendant. The motion was overruled, and the defendant excepted.

Twigg & Oliver, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

LUMPKIN, J. (after stating the facts). A challenge to the array is an objection to all the jurors collectively because of some defect in the panel as a whole. If some of the jurors included in the panel are not impartial, this cannot be properly reached by a challenge to the array, but by a challenge to the polls. Upon proper challenge of a juror on the ground that he was a member of the jury on a previous trial involving the same transaction, the court will investigate the question, and if the juror be found incompetent, he will be set aside for cause. The motion for a new trial states that "for this reason this defendant challenged the array thus put upon him, upon the ground that the said panel did not contain an impartial jury, and asked the court to discharge said ten jurors, and fill the panel with ten impartial jurors." But in the order overruling the motion for a new trial the presiding judge made the following statement: "In connection with the additional grounds of the motion, it is proper to state that the challenge to the array was oral. There was no challenge to the poll, nor request to examine any juror upon his voir dire; no particular juror was challenged." It thus appears that the challenge was made to the array, instead of to the polls. See Pen. Code, § 972; *Eberhart v. State*, 47 Ga. 598; *Blackman v. State*, 80 Ga. 785, 7 S. E. 626; *Schnell v. State*, 92 Ga. 459, 17 S. E. 966; *Thompson v. State*, 109 Ga. 272, 34 S. E. 579; *Teal v. State*, 119 Ga. 102, 45 S. E. 964; *Crew v. State*, 118 Ga. 645, 38 S. E. 941; *Wells v. State*, 102 Ga. 658, 29 S. E. 442; *Brown v. State*, 104 Ga. 736, 30 S. E. 951; *Lewis v. State*, 118 Ga. 803, 45 S. E. 602; *Rawlins v. State* (Ga.) 52 S. E. 1.

Judgment affirmed. All the Justices concurring.

(124 Ga. 81)

RALPH v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. CRIMINAL LAW—CONSTITUTIONAL RIGHTS—CONFRONTING WITNESSES.

The constitutional right of one accused of an offense against the laws of this state to be confronted with the witnesses contemplates that

they shall be examined in his presence, and be subject to cross-examination by him.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1538-1548.]

2. SAME—DEAF AND DUMB DEFENDANT.

Where a defendant is deaf and cannot hear the evidence of the witnesses for the state, the presiding judge should permit some reasonable mode of having their evidence communicated to him.

3. SAME—PROCEDURE.

Under the recitals of the bill of exceptions and the note of the presiding judge, there was no abuse of discretion in the manner in which this was done, nor does it appear that any injury resulted to the accused therefrom.

(Syllabus by the Court.)

Error from City Court of Dawson; A. M. Raines, Judge.

Horace Ralph was convicted for, pointing a pistol at another, and brings error. Affirmed.

Ralph was tried in the city court of Dawson upon an accusation charging him with pointing a pistol at another. The bill of exceptions sets out the contention of the plaintiff in error in the following language: "When the case was called for trial, defendant's counsel stated in his place that his client could not hear anything that the witnesses might state in their testimony in said case; that the defendant could read and write; and if the testimony should be written out, the same could then be read and understood by said defendant. Counsel for defendant, in behalf of his client, then asked the court, in view of the situation and in order to give the defendant his constitutional right to be confronted by the witnesses testifying against him, to have the evidence taken down and furnished to the defendant in writing, so that he might read it, and thus be informed of what the witnesses might testify against him. The court declined to grant this request, stating that there was no official stenographer, and that there was no way to have the evidence reported. Counsel then informed the court that he could get an expert typewriter to take the evidence and typewrite it as the witness testified on the stand, and let it be read by the defendant, and thus acquaint him with the testimony. His honor then stated that he could not allow this to be done, as it would take too much time, and that the only thing which he could allow would be to let the counsel write down the testimony as the trial progressed as usual, and give it to his client on paper to be read by him. The trial of the case then proceeded in the ordinary way, and defendant was represented by only one attorney." The presiding judge added the following note: "The court allowed defendant's attorney to write out the evidence of the witnesses and show to his client. The court saw counsel writing and turn it over to defendant, but does not know what he had written for his client to see." The defendant was convicted, and excepted.

Jas. G. Parks, for plaintiff in error. M. J. Yeomans, for the State.

LUMPKIN, J. (after stating the facts). Under the Constitution every person charged with an offense against the laws of this state should be confronted with the witnesses testifying against him. Const. art. 1, par. 5 (Civ. Code 1895, § 5702). This provision guaranties that witnesses for the state shall be examined in the presence of the accused, and be subject to cross-examination by him. Confrontation in criminal law has been defined to be the act of setting a witness face to face with the prisoner, in order that the latter may make any objection he has to the witness, or that the witness may identify the accused." Black's Law Dict. "Confrontation"; Anderson's Law Dict. "Confront." In *Mattox v. United States*, 158 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409, Mr. Justice Brown, referring to a similar provision in the Constitution of the United States, says: "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." See, also, *State v. Mannion*, 19 Utah, 505, 57 Pac. 542, 45 L. R. A. 638, 75 Am. St. Rep. 753; *Summons v. State*, 5 Ohio St. 325. If the accused be deaf or blind, this will not prevent his being subject to trial because upon being confronted by the witnesses his physical infirmity will lessen his capacity to utilize that right. The accused says that he is deaf but can read. Had he been both deaf and illiterate, certainly he could not claim that he could not be lawfully tried for a criminal offense. In the proper administration of justice, however, the court shall give a person accused of crime a reasonable opportunity to obtain the benefit of this constitutional right. If he is deaf, such opportunity should be allowed for communication to him of the testimony of the witnesses by the sign language employed by deaf mutes, or by writing, or in some other manner which would be reasonable and proper, under the circumstances, to insure him a full and fair exercise of his legal rights. The exact manner in which this result should be arrived at must depend upon the circumstances of the case, and to a considerable extent be left to the sound discretion of the court. If there is no official stenographer, the court cannot be required to stop the trial, and incur the expense of

employing one. To have the testimony of each witness taken down stenographically, and then arrest the progress of the trial until the stenographer can transcribe his notes, and the defendant can read what had thus been written, would be cumbersome. Nor will the court be compelled to employ a typewriter for that purpose. The defendant, knowing of his infirmity, should make provision for his own assistance, and not require the court to practically destroy an orderly trial. Whether an expert operator upon a typewriter and a machine were accessible, or whether the use of such a machine in the courthouse during the trial would interfere with the proper conduct of the business, were matters addressed to the sound discretion of the presiding judge. He allowed the counsel for the accused to write out and exhibit to him the testimony. It does not appear how many witnesses testified, or whether this was a matter of slight or grave inconvenience, nor does it appear that the accused was not fully apprised of the evidence introduced against him. It may be inferred from the judge's note that he allowed time and opportunity for the taking down and exhibition to the accused of the testimony, and it is not shown that any harm resulted from the method adopted by the court.

Judgment affirmed. All the Justices concurring.

(124 Ga. 116)

**CARR v. CITY COUNCIL OF AUGUSTA.
DELANEY v. CITY COUNCIL OF
AUGUSTA.**

(Supreme Court of Georgia. Nov. 9, 1905.)

1. CERTIORARI—WHEN LIES—ACTS OF MUNICIPAL COUNCIL.

When a municipal council acts in a legislative, executive, or ministerial capacity, its action is not subject to review on certiorari.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 33-39.]

2. SAME.

When a municipal council acts in a judicial capacity, its action is subject to review on certiorari.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 33-39.]

3. INTOXICATING LIQUORS — REVOCATION OF LICENSE—REVIEW.

The authorities of a municipality may revoke a license to sell liquor granted by them at any time without trial or notice, and when a revocation of such license is thus accomplished, it is in the exercise of the executive powers of the municipality, and the action is not subject to review on certiorari.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 113, 116, 117.]

4. SAME.

When a charter of a municipal corporation contains the usual general welfare clause, and confers the power to control and regulate the sale of liquor, the authorities of the city may pass an ordinance providing that the conviction of a holder of a license to sell liquor in a court of competent jurisdiction of any violation of the

law regulating the sale of liquor shall work a revocation of the license.

5. SAME—EVIDENCE OF CONVICTION.

When the ordinance of the charter indicated in the preceding note provides that the clerk of council shall submit to council "each and every conviction," the ordinance contemplates that evidence of the conviction shall be submitted by the clerk before action is taken revoking the license.

6. SAME—REVIEW.

In determining whether the evidence submitted is sufficient to authorize a revocation of the license under the ordinance, the municipal council acts in a judicial capacity, and its judgment is subject to review on certiorari.

7. SAME.

A municipal council cannot justify a revocation of a license to sell liquor under its general power to revoke such license at pleasure, when it appears from the resolution revoking the license that the same was not passed in pursuance of its general power, but apparently under the authority of an ordinance declaring a given act to be a sufficient cause for revocation.

8. CERTIORARI—ANSWER—PROCEDURE.

The judge should have required the municipal council to file an answer to the allegation in the petition for certiorari that there was no evidence before it as to the conviction of the parties whose licenses were revoked. Upon the coming of such answer, he should have determined whether the evidence before it, if there was such, was sufficient to authorize the passage of the resolution; the resolution being in the nature of a judgment declaring the license forfeited.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Application of James Delaney for writ of certiorari to the city council of Augusta and by one Carr for the same. Writs denied, and petitioners bring error. Reversed.

Saml. H. Myers, N. M. Reynolds, and Salem Dutcher, for plaintiffs in error. C. Henry Cohen, for defendant in error.

COBB, P. J. The city council of Augusta granted a license to sell liquor to the firm of Delaney & Co., of which James Delaney was a member, and also granted a similar license to Carr. After the licenses were granted, and before they had expired, the city council passed an ordinance making it the duty of the council to declare the forfeiture of any license if the dealer should be convicted, in any court of competent jurisdiction, of a violation of any federal, state, or municipal regulation governing the sale of liquor, and imposing it as a duty upon the clerk of the council to submit to the council each and every conviction, as above indicated, of every person holding a license from the city. The clerk reported that Delaney and Carr had each been convicted in the city court of Richmond county for violation of the state law governing the sale of liquor, and the council passed a resolution declaring the licenses held by Delaney and Carr forfeited, the forfeitures to take effect 10 days after the passage of the resolution. While the ordinance did not provide that notice

of the intention to revoke should be given to the party holding the license, the council permitted Delaney and Carr to be heard through their attorneys before the resolution was passed. Delaney and Carr each applied for the writ of certiorari to review the action of the council in passing the resolution revoking the licenses. The petition was sanctioned, and at the hearing the judge dismissed each petition, and each of the defendants excepted.

In each petition it is alleged that, at the time the resolution forfeiting the license was passed, the council had before it no evidence of the fact recited therein. This allegation was denied in the answer to the certiorari as originally filed. Upon exception to this the denial was stricken, and then an exception was filed to the answer because the allegation was not answered at all. The council demurred to this exception, upon the ground that it was not necessary for an answer to be made to such an allegation, and this demurrer was sustained. Each bill of exceptions contains an assignment of error upon the striking of the exceptions just referred to and upon the dismissal of the petition.

It is said that the petition was properly dismissed for the reason that a proceeding of a municipal council could not be reviewed by certiorari. But the Code declares that the writ of certiorari will lie for the correction of errors committed by justices of the peace, corporation courts, and councils, and any inferior judicatory, or any person exercising judicial powers. Civ. Code 1895, § 4634. It is therefore to be determined whether a municipal council, when proceeding to declare forfeited a license which had been issued by it, is exercising judicial power. If such action is in the exercise of judicial power, an error committed may be corrected on certiorari. The duties of a municipal council are varied; some are merely ministerial, some are legislative, some are executive, but there are still others which are judicial in their nature, and the determination of where the legislative or ministerial duty ends and where the judicial duty begins is often attended with extreme difficulty. Harris on Certiorari, § 48. Where the duty is purely ministerial or purely legislative, the error cannot be corrected by certiorari. But where the duty imposed upon the municipal council clearly requires the exercise of judicial powers, or even the exercise of quasi judicial powers, the general rule is that an error committed may be reviewed on certiorari. 1 Smith, Mun. Corp. § 561. When a municipal council passes an ordinance, it acts in its legislative capacity, and certiorari will not lie. But when after having passed an ordinance, it proceeds to enforce the same, according to its terms, against one who has become liable to a penalty provided by the ordinance, in

the determination of whether such person has violated, and has thereby become subject to be proceeded against under its provisions, a municipal council is exercising a judicial power of the same nature that any court would exercise in investigating whether a given person has violated a given law. The action of the council, no matter by what name it might be called—order, resolution, or otherwise—which declares that a person has laid himself liable to penalties prescribed in the ordinance, is a judgment of the council, which can only be reached by the exercise of judicial functions; that is, an application of the law as laid down in the ordinance to the facts that appear before the council at the time the resolution is passed. The ordinance, in effect, imposed a penalty upon one holding a license to sell liquor when he did any one or more of the acts referred to in the ordinance. The ordinance devolved upon the council the determination of the question of fact as to whether he had been guilty of the acts declared illegal. Without reference to whether the ordinance was invalid for not providing notice to the party proceeded against for a forfeiture of his license, the act of the council declaring the person proceeded against guilty of a violation of the ordinance was in its very nature a judicial act. See Black on Intoxicating Liquors, § 195.

In the case of *Sprayberry v. Atlanta*, 87 Ga. 120, 18 S. E. 197, it was held that a municipal corporation which had authority under its charter to regulate the retail of ardent spirits within its limits, and at its pleasure license such retailers, etc., and also the power to pass such ordinances as seemed to be proper for the peace, good order, and health, etc., and good government of the city, had full authority to provide by ordinance that the conviction in the state courts of one licensed to retail liquors of a violation of the state statutes in reference to the sale of spirits should work an immediate revocation of the license of such person. The authority of the city council of Augusta under the charter of the city being substantially as broad as the authority of the council of Atlanta, the Case of *Sprayberry* is controlling on the question as to whether the council of Augusta had authority to pass the ordinance in question, so far as charter authority is concerned. It is said, though, that the state has legislated fully in reference to the forfeiture of liquor licenses, and that by the act of 1891, now contained in Pen. Code, § 452, the authority to revoke a license for the sale of liquor on the ground set forth in the ordinance is vested exclusively in the judge of the state court trying the defendant for violation of some law regulating the sale of liquor. The section provides that, if any vender of intoxicating liquors shall be convicted of a violation of any law controlling the liquor traffic, it shall be a part of the sentence that the license shall be forfeited.

It was held in *Newman v. State*, 101 Ga. 539, 28 S. E. 1005, before sentence forfeiting the license could be legally imposed, the indictment should set forth that the accused was a regularly licensed vender of intoxicating liquors. It may be that a licensed vender of intoxicating liquors is indicted without this fact being averred in the indictment, which was the fact in *Newman's Case*; and, if so, his license cannot then be revoked by sentence, under the ruling in that case. But without reference to this, we see no reason why this statute should be construed as giving exclusive authority to the judge of the state court to provide for the revocation of the license for the causes named in the statute. There is no such conflict of the implied powers of the corporation, resulting from the provisions of the charter above referred to and the terms of the act of 1891, as would require a holding that the power of the municipality was necessarily taken away by implication when the act of 1891 was passed. Under the terms of the ordinance, before a forfeiture could be declared, it must appear that the party proceeded against had violated some lawful regulation in reference to the sale of liquor. Even conceding that the ex parte proceeding was legal (and upon this we now express no opinion), it was necessary that at the time of the proceeding there should be sufficient evidence before the council to authorize a finding by them that the person whose license was sought to be forfeited had done one or more of the acts prohibited by the ordinance. The proceeding to forfeit the license was in its nature a judicial proceeding, which would culminate in a judgment depriving the party of the right which he had under a license granted him by the city. The judge of the superior court on the application of the party affected by the judgment thus rendered could review the action of the council on certiorari. When the petition for certiorari in terms alleged that the council acted without any evidence, an answer should have been filed to this allegation, and, upon the coming in of the answer, the judge should have determined whether the evidence before the council was sufficient to authorize the resolution or judgment rendered by them. It was therefore erroneous to strike the exception to the answer that it did not reply to the allegations of the petition that there was no evidence before the council at the time the resolution forfeiting the license was passed.

But it is said that the city council had authority to revoke the license at pleasure, and this is true. *Melton v. Moultrie*, 114 Ga. 462, 40 S. E. 302; *Ison v. Griffin*, 98 Ga. 623, 25 S. E. 611. If in the exercise of its right the city had passed an ordinance or resolution simply revoking the license, this would have been done in the exercise of its executive powers, and the courts would not have reviewed the same on certiorari. But when they attempt to revoke the license for cause, under the provisions of the ordinance pro-

viding that a certain act shall be sufficient cause for the revocation of the license, and do not proceed under their general discretionary power, then the determination by the council of the question as to whether the person holding the license has made himself amenable to the provisions of the ordinance declaring a certain act to be sufficient cause for revoking the license requires the exercise of judicial powers, and renders the action subject to review on certiorari. In *Asbell v. Brunswick*, 80 Ga. 503, 5 S. E. 500, it was held, where a municipal council had the right to remove a policeman without a trial, as well as to remove him after trial, that if the council proceeded under the latter method, their judgment of removal was subject to review on certiorari, while if they proceeded under the former method, their action would have been in the exercise of their executive powers, and not subject to review on certiorari. See, also, *Gill v. Brunswick*, 118 Ga. 85, 44 S. E. 830; *Mayor of Macon v. Shaw*, 16 Ga. 172.

Judgment reversed. All the Justices concurring.

(124 Ga. 86)

MILNER v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. CRIMINAL LAW—CONFESSIONS — ADMISSIBILITY.

"Whether subsequent confessions, of themselves wholly unexceptionable, were made under previous influences still operating on the mind, is a question not of law for the court, but of fact for the jury." *Pines v. State*, 21 Ga. 227.

2. SAME—NEW TRIAL.

In order for the admission of illegal evidence to constitute a sufficient ground for a new trial, the motion should show that the illegal evidence was objected to when offered, and the specific objection thus made must also be set forth.

3. SAME—VERDICT CONTRARY TO LAW.

A ground of a motion alleging that the verdict is contrary to a specified part of the charge of the court will be construed to mean that the verdict is contrary to law.

4. HOMICIDE—EVIDENCE.

There was sufficient evidence to authorize the verdict.

(Syllabus by the Court.)

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

Ralph Milner was convicted of murder, and brings error. Affirmed.

L. P. Goodrich, D. J. Bailey, and Robt. T. Daniel, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., Jos. D. Boyd, and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. Ralph Milner was tried on an indictment for murder, and convicted. The state proved the corpus delicti by several witnesses, and proved a confession of the defendant by one witness, the sheriff of the county, and also by another witness, one Terrell, that the defendant in his statement on a preliminary trial circumstantially and positively admitted and confessed the crime

with which he was charged. In the incriminating statement upon the preliminary trial the defendant averred that when he killed the deceased, one Rufe Farley, who at the time was armed with a gun, commanded him to do the act, saying, "Damn ybu, you have got to kill him, and if you don't I will kill you;" that when the deceased approached the place near which the killing occurred, he said to the defendant, "Hello, Ralph; have you found anything to kill?" to which the defendant replied, "No sir; I haven't found anything;" that he then joined the deceased, and walked along with him; that Farley came over to where they were, and walked "in behind" defendant with his gun cocked; that they walked along, talking to the deceased, and just before the shooting Farley said to the defendant, "Are you going to do what you said?" whereupon the defendant raised his gun, and shot the deceased "without taking any sight," the gun being within about two feet of the deceased's head when he shot; and that, after the deceased fell, Rufe Farley beat him with a stick and robbed him. The defendant's confession was corroborated by proof of the corpus delicti and numerous circumstances attending the commission of the crime. There was nothing to show that more than one other person besides the deceased was present at the killing. The defendant made a statement in substance as follows: "When I shot, I shot at a fishhawk. * * * I told Mr. Terrell and Mr. Head that [referring to his confession] because I thought that they were trying to get me out. How I come to believe in Mr. Terrell, he wanted to hire me again in the spring, and I thought he was trying to get me out. He told me he would get me out, and wanted me to work for him, and said he would get me a lawyer." After being convicted, the defendant made a motion for a new trial upon several grounds; the first three being the general grounds and the others being as follows: "(4) Because the court erred in permitting the witness Terrell to testify what the boy stated on the next day after this confession was obtained, and in the presence of this witness on the preliminary trial, said witness sitting in the courtroom inside the bar railing. The testimony of the witness which should not have been allowed to go to the jury is as follows: 'He went on to tell about his killing Sam Jones. He said on Thursday afternoon he went down in the woods, close to where Sam was killed, and he had his gun, and was hunting squirrels. He stayed awhile there, sitting on a stump near where he killed old man Sam. Rufe Farley came to him about sundown, and he said that old Sam Jones was coming down through a piece of corn from the pasture, driving a cow. He said Rufe stepped up to him, and

took a cut shell of his own gun and put it in Ralph's gun, and taken a shell out of his pocket and put it in his own gun, and picked up a big red-oak stick, seven or eight feet long and about eight inches round, and said, "Yonder comes a man that owes me money and won't pay. Damn you, you got to kill him, and if you don't, I will kill you." He said that old man Sam Jones came along the woods and said: "Hello, Ralph, have you found anything to kill?" He said, "No sir; I haven't found anything," and got up and walked along with him. Rufe Farley came over the upper side of the road, out of the edge of the woods, and walked in behind him with his gun cocked. He went along talking to old man Sam, and got close to where old man Sam was killed, and Rufe said to him, "Are you going to do what you said?" and Rufe had his gun cocked on him; that he raised his gun and shot him. They asked him if he took any sight, and he said he didn't, he just raised his gun. He had the gun about two feet of the old man Sam's head when he shot. As soon as he shot, old man Sam fell, and he broke and run towards his home. He said that Rufe done the beating of him with the stick, and the robbing of him, and such as that.' Defendant claims that the admission of the above testimony was error, because it was made next day after the confession was obtained from the defendant by promise of reward, and that this testimony was made in the presence of the same man who obtained the previous confession, and was made under the influence of the same promise, and in the presence of Terrell, who obtained the first confession. (5) Because the court erred in admitting the pocketbook containing some money. There was no evidence that this pocketbook or money were ever in the possession of the deceased, and the admission of it by the court was error, because it injured the defendant, as evidence had been introduced that the old man had been robbed, and the jury would infer, from the court admitting this pocketbook and contents of same, that it had been the property of the deceased, and had been taken from him by the defendant." Defendant further alleges error in the sixth and seventh grounds of his motion, because the verdict was contrary to the charge of the court. Upon the overruling of his motion for a new trial, he excepted.

1. After the questions raised in the first three grounds of the motion, which were the usual and general grounds, the first assignment of error is upon the admission of the alleged illegal testimony of the witness Terrell, who was permitted to testify to a statement made by the defendant upon a preliminary trial (whether of the defendant or another is not clear from the record) to the effect that he had shot and killed the deceased, but that he did so because one Rufe

Farley commanded him to do so, threatening him with death if he refused. There is nothing in the record to suggest that this statement was not made freely and voluntarily and after proper caution, save that the witness Terrell was present at the trial and sitting within the rail inclosing the bar, and because of this presence and proximity of Terrell there was a continuance of the inducement under which it was insisted that the first confession had been obtained. The court refused to exclude the evidence of the witness, and permitted its introduction. The course pursued by the trial judge in permitting the testimony to go to the jury was in accordance with the repeated rulings of this court. We will presume, in the absence of any complaint to the contrary, that in its general instructions the court charged the jury to determine, from all the evidence in the record, the circumstances under which the statement containing the confession was made, whether or not the same was freely and voluntarily made, as well as to determine whether the influence under which the previous confession was improperly obtained was still operating on the mind of the accused; and that if they should find that the statement was not freely and voluntarily made, or that the mind of the accused was still affected by previously exerted influences of an improper character, they should not consider or give any weight whatever to the alleged confession. We are not unaware that there are many and very respectable authorities to the contrary. "When once a confession under improper influence is obtained, the presumption arises that a subsequent confession of the same nature flows from the like influence; and this though the subsequent confession was made to a different person from the one holding out the inducement." 6 Am. & Eng. Enc. L. (2d Ed.) 542, and numerous citations supporting the text. But in the case at bar we apply the rule of our own court, and without reluctance, especially as it is evident from the record that the first confession obtained (which was excluded by the trial court in its evident but commendable determination to protect the rights of the accused) was itself made under such circumstances that if they aroused hope in the breast of the defendant it must have been hope springing from "seed of his own planting," and this is not the hope that excludes a confession, though made under its influence. "The hope that excludes is that, and that only, which some other person kindles or excites. Some inducement must be held out by another person, tending, according to human nature and the law of human motives, either to overpower

the will or seduce it, either to coerce through fear, or persuade through hope." *Bohanan v. State*, 92 Ga. 32, 18 S. E. 302. Under no circumstances would we relax the just and salutary rule that excludes confessions made or obtained under the influence of hope or fear, but, on the other hand, confessions freely and voluntarily made are evidence that should be submitted to the jury, who, under proper instruction and admonition from the court, can be trusted to give them their proper weight; and in this case they were duly admonished to reject the confessions if they were not freely and voluntarily made. The trial judge upon this point instructed the jury in the following appropriate language: "If you believe that Terrell held out any inducement to the defendant, or did or said anything that caused him to entertain a hope of benefit, no matter how slight, then if he afterwards made a confession to other parties, if you believe that hope aroused in his mind by Terrell, if there was any such hope aroused by any action of Mr. Terrell, if you believe that that hope was still bearing in his mind at the time he made any other confessions, if he made any other confessions, on the idea and acting upon any hope that may have been held out to this defendant by the witness Mr. Terrell, although the confession has gone in the evidence, it is not to be considered in this case." There was ample evidence in corroboration of the direct confession made by the defendant, including such significant circumstances as blood upon the defendant's gun and on his knife, as well as tracks, indicating that they were made by his shoes, which led from the place of the murder to his home. A careful consideration of all the evidence and the defendant's brief and incoherent statement would convince any mind that he is guilty of the wicked and shocking crime ascribed to him.

2. The next ground of the motion (the fifth) raises the question of the admissibility in evidence of a certain pocketbook and its contents, but this question is raised here for the first time, and, as it is not alleged what objection was urged when it was offered in evidence in the court below, or that any objection was there made, it is presumed that none was made, and "reasons why certain evidence should not have been admitted cannot be considered in this court, unless they appear to have been urged before the trial judge and at the proper time." *Grace v. McKinney*, 112 Ga. 425, 37 S. E. 737.

3. No other errors of law are complained of. The evidence authorized the verdict.

Affirmed. All the Justices concurring.

(140 N. C. 138)

GWYN-HARPER MFG. CO. v. CLOER
et al.

(Supreme Court of North Carolina. Nov. 28, 1905.)

1. REFORMATION OF INSTRUMENTS—PLEADING—RELIEF.

Where defendants in their answer set up a mistake in a deed under which they claim, the court may award a reformation of the deed, although there is no prayer therefor, if the allegations of the answer and the findings of the jury upon appropriate issues justify such relief.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 147.]

2. PLEADING—ISSUES—ADMISSIBILITY OF EVIDENCE.

In an action to recover lands and for damages for trespass, defendants in their answer set up a mistake in a deed, but tendered no issues as to such mistake, and took no exception to the issues submitted, which were whether plaintiff was the owner of the lands, and whether defendants had trespassed thereon, and the amount of damage sustained. *Held*, that evidence in support of the allegations of mistake in the answer was inadmissible under the issues.

Appeal from Superior Court, Caldwell County; Webb, Judge.

Action by the Gwyn-Harper Manufacturing Company against W. R. Cloer and others. From the judgment rendered, plaintiff appeals. Reversed.

Action to recover certain lands and for damages for a trespass thereon. These issues were submitted: "(1) Is the plaintiff the owner of the lands described in the complaint or any part thereof? A. Yes; south of dotted line from four to seven. (2) Have the defendants or either of them, trespassed upon the land described in the complaint? A. No. (3) What damage, if any, has plaintiff sustained? A. (No) Nothing." From the judgment rendered plaintiff appealed.

Edmund Jones, for appellant.

BROWN, J. The plaintiff alleges in the complaint that it is the owner and entitled to the possession of the land described therein, and that the defendants unlawfully entered and trespassed thereon. The defendants deny those allegations and in their answer also make the following allegation as a foundation for correcting and reforming the deed, viz.: "(4) The defendants admit that in the year ——— the defendant E. F. Cloer executed a deed to one Monroe Minish for the land described in the first paragraph of the complaint, but they aver that the last call in the description was erroneous; that said call, instead of being thence 'north to Cloer's back line,' should have been 'west to Cloer's back line'; that the error was due to the mistake and oversight of the draftsman, J. C. Harper, now deceased, and was made by mutual mistake and oversight of the grantor, the said E. F. Cloer, and the grantee, Monroe Minish, or by the mistake of E. F. Cloer and the fraud of Monroe Minish. Having answered the complaint fully the defendants ask that they go hence without day and recover their costs."

52 S.E.—20

The defendants do not pray for a reformation of the deed, as they should have done, but the court would award it if the allegations of the answer and the findings of a jury upon appropriate issues justified it. Upon the trial, the defendants introduced E. F. Cloer, who claims to be the owner of the land in dispute, and proposed to prove by him that at the time of the sale of the land by him to Minish in March, 1881, a mistake was made in the calls of the deed; that instead of north to Cloer's back line as shown in the deed, the call should have been west to Cloer's back line, and running west as contended for by defendants the land in dispute would have been left out of the boundary conveyed to Minish. The plaintiff excepted to the introduction of this evidence. We think the exception well taken. The form of the issues did not justify the reception of such evidence. There was no exception to the issues by either party, and no other issues were tendered by the defendants. If the defendants relied upon the equitable matter set out in the answer, it was their duty to tender appropriate issues upon which the facts set out in their fourth allegation could be found. If the plaintiff desires to meet such new matter by denying it, and also by averring that he is an innocent purchaser for value without notice, and that the defendants are guilty of laches in correcting his deed, he should file a proper replication to the answer, and upon the trial should tender appropriate issues. Upon the form of the issues, we hold his honor erred in admitting the evidence.

New trial.

(140 N. C. 140)

ELLER et ux. v. CAROLINA & W. RY. CO.
(Supreme Court of North Carolina. Nov. 28, 1905.)**1. JUDGMENT—MERGER—SPLITTING CAUSE OF ACTION.**

Where plaintiff brought an action against a railroad for damage to her baggage, which contained a bridal trousseau, and recovered judgment therefor, she could not thereafter maintain a separate action for mental anguish caused by the injury to her trousseau, but she should have collected all the damage to which she was entitled in her original suit.

2. ACTION—JOINDER OF CAUSES OF ACTION—PARTIES AND INTEREST INVOLVED.

Under Code, § 267, authorizing the joinder of certain causes of action, but requiring the causes of action so joined to all belong to one of the classes specified and to affect all the parties to the action, a husband and wife cannot join their separate actions for damages for mental anguish caused by defendant's negligence and recover one sum in satisfaction of their several claims.

3. DAMAGES—REMOTENESS—MENTAL ANGUISH. Mental anguish, experienced by a prospective groom on the damaging by a railroad of the wedding trousseau of his bride to be, was too remote a form of damage to entitle the groom to recover therefor against the railroad, which did not know of the intended marriage.

Appeal from Superior Court, Catawba County; Councill, Judge.

Action by Albert Eller and wife against the Carolina & Western Railway Company. From a judgment of dismissal, plaintiffs appeal. Affirmed.

On September 5, 1904, the feme plaintiff, then Dora Anderson, was a passenger on defendant's train from Granite Falls to Hickory. She had, as baggage, a valise of the kind usually known as a "telescope," containing clothing, letters, photographs, and other articles, which was checked to Hickory and should have arrived at its destination on the 5th of said month, but did not arrive until the evening of the 7th. The feme plaintiff was going to Hickory for the purpose of being married to her coplaintiff, Albert Eller, to whom she was at the time engaged. The wedding had been set for the morning of the 6th, but in consequence of the delay in receiving her baggage it had to be postponed until the 7th, as her wedding trousseau was in the valise. When her baggage was tendered to her she refused to take it, as the valise was torn and her clothes were wet and muddy and so badly damaged that they could not be used. She alleges that by reason of the premises she suffered great mortification and mental anguish, and seeks to recover damages on that account. It appears that she had already sued the defendant in an action for the nondelivery of her valise and the damage to the property. That suit was settled, and she received from defendant \$30, and the clothes were returned to her. At the close of the testimony, the court, on motion of defendant, dismissed the action. Plaintiffs excepted and appealed.

Self & Whitener, for appellants. J. H. Marion, T. M. Hufham, and Witherspoon & Witherspoon, for appellee.

WALKER, J. (after stating the case). The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit. The demand cannot be split and several actions maintained for the separate items of damage. Plaintiff recovers one compensation for all loss and damage, past and prospective, which were the certain and proximate results of the single wrong or breach of duty. *Pierce on Railroads* (1881) 300, 301, and note 1. The rule is different where there is a continuing wrong, or the wrong is repeated, as in the case of a nuisance or trespass, or where there is a new trespass distinct from the original one. *Hale on Damages*, 77, 78. Generally speaking, the redress the law affords for the commission of a wrong is pecuniary compensation. Plaintiff may recover what we call nominal damages, which are really no pecuniary compensation, but which merely ascertain or fix his right or cause of action. Lord Holt has well said: "Surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the con-

trary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing—no, not so much as a little diachylon—yet he shall have his action; for it is a personal injury." *Ashby v. White*, 2 *Ld. Raymond*, 938 (Smith's *L. C.* 425). The idea here is, as we see, that there is damage in the contemplation of law, though the injury involves neither loss nor pain, because the man's right to be protected in his person and reputation has been violated. *Cooley on Torts* (2d Ed.) 69. "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against the party for some amount." *Denman, C. J.*, in *Clifton v. Hooper*, 6 *Q. B.* 468. It was held in *Fray v. Goules*, 1 *El. & El.* (102 *E. C. L.*) 839, that an attorney is liable for compromising his client's suit, contrary to instructions, even though it turned out that he acted with reasonable prudence and bona fide and for the actual benefit of his client, there being no loss whatever, much less an appreciable one. It is only when the gist of the action is damage that the maxim "*de minimis non curat lex*" applies, and that the law no longer distinguishes between no appreciable damage and no damage at all. *Hale, Damages*, 27, 28. In *Bond v. Hilton*, 47 *N. C.* 149, the court, in a full discussion of this question, says: "Wherever there is a breach of an agreement, or the invasion of a right, the law infers some damage, and, if no evidence is given of any particular amount of loss, it gives nominal damages by way of declaring the right, upon the maxim, '*Ubi jus, ibi remedium*.'" And again: "In every contract implying a duty to be performed, the neglect of that duty gives, in law, a cause of action to the opposite party, under the above maxim, and when the law gives an action it gives damages for the violated right, and, if no actual damages be shown, the plaintiff is entitled to nominal damages." Where there is an invasion of another's right, the cause of action is the wrong, or what we technically call "the injury," which entitles him at least to nominal recompense to vindicate his right, and the consequences which immediately flow from that injury, in the way of loss or damage, are but matters of aggravation. *Hale, Damages*, 77. In *Fetter v. Beal*, 1 *Salk.* 11, plaintiff recovered damage for an assault and battery by which his skull was broken, and afterwards, upon the falling out of a piece of his skull, he brought an action for additional damage. The former recovery was held to be a bar to the latter action. *Holt, C. J.*, said: "As to the case of a nuisance by water dropping from the eaves of

the house, every new dropping is a nuisance; but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but is only the measure of damages which the jury must be supposed to have considered at the former trial." In the same case, as reported in 1 Lord Raym. 692 (and it appears to have been considered as a very important one and controlling as an authority), Lord Holt further says: "This is a new case, to which there is no parallel in the books. Every one shall recover damages in proportion to his prejudice which he hath sustained; and if this matter had been given in evidence, as that which in probability might have been the consequence of the battery, plaintiff would have recovered damages for it. The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in aggravation of damages. In some cases the damage is the foundation of the action, as in the action by the master for battery of his servant, 'per quod servitium amisit'; but here the battery only is the foundation of the action, and this damage, which might probably ensue, might and ought to have been given in evidence, and must be intended to have been given in evidence in the former action, and that the jury gave damages for all the hurt that he suffered; for if the nature of the battery was such as probably to produce this effect, the jury might give damages for it before it happened." Sedgwick thus states the rule: "It thus appears that fresh damages merely will not always give a fresh action, and a judgment in a suit founded on a single act of tort will be a conclusive bar to a second suit for the same injury, although harmful consequences have made themselves apparent subsequent to the first suit, as it will be held that in the first verdict the plaintiff recovered all he was entitled to claim. Hence the statute of limitations runs from the time of the breach." 1 Sedg. on Damages (8th Ed.) § 84. He also states well the distinction between mere items of damage for a single tort and the repetition of the trespass or tort itself. "In the case of a personal injury," says he, "the act complained of is complete and ended before the date of the writ. It is the damage only which continues and is recoverable, because it is traced back to the act; while in the case of a nuisance, it is the act which continues, or, rather, is renewed day by day. The duty which rests upon the wrongdoer to remove a nuisance causes a new trespass for each day's neglect." 1 Sedg. Damages, § 88. The question is fully discussed and the distinctions clearly drawn, by Battle, J., in the leading case of *Moore v. Love*, 48 N. C. 215. See, also, *Hatchell v. Kimbrough*, 49 N. C. 163.

We do not decide that mental anguish is an element of damage in a case of this kind; but if, for the sake of argument, we concede that it is, the same plaintiff could have had

such damages as she was entitled to recover on that account included in her former judgment or settlement. Having elected not to do so, she is precluded now from claiming any such damages. Her right to them, if right she ever had, is merged in the former recovery. She could carve out as large a slice as the law allowed, but she could not cut but once. "No one should be twice vexed for the same cause" is a maxim of the law we are not disposed to disregard, and which it is well strictly to enforce.

Plaintiff Albert Eller also asked for damages for mental anguish caused by defendant's negligence, and it is alleged in the complaint that the two plaintiffs "seek to recover one sum in satisfaction of their several claims for the causes herein set out." If plaintiffs had any valid causes of action against defendant, they could not thus join them. Code, § 267. There was no formal objection taken to the misjoinder; but we notice it, so that attention may be called to this important provision of the law, which is mandatory, and intended to protect a substantial right of defendant, and not merely directory. Plaintiff Albert Eller has not stated any cause of action entitling him to recover damages. Those that he claims are, in any view of the case, entirely too remote. Defendant did not know of the intended marriage, and therefore could not have contemplated any damage to him, even if he would otherwise be entitled to recover. *Cranford v. Tel.*, 138 N. C. 162, 50 S. E. 585. The case cited settles the law against his contention.

No error.

(140 N. C. 146)

REID v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of North Carolina. Nov. 28, 1906.)

1. RAILROADS—COLLISIONS AT STREET CROSSING—NEGLIGENCE.

A railroad company is negligent in backing an engine over a street crossing at night without any warning and without a man with a light on it to keep a lookout along the track.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 999.]

2. SAME—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

In an action against a railroad company for negligent death resulting from a collision on a crossing, the defense of contributory negligence was not available, where there was a negligent failure of its employees to avail themselves of the last chance of avoiding the injury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1096-1098.]

Appeal from Superior Court, Mecklenburg County; Cooke, Judge.

Action by James Reid, as administrator, against the Atlanta & Charlotte Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action for wrongfully and negligently causing the death of plaintiff's intestate. The usual issues in such cases were submit-

ted. There was evidence to the effect that on or about February 24, 1905, about 8 o'clock at night, the plaintiff's intestate was run over and killed by an engine of the defendant; and there was evidence tending to show that at the time of the killing the intestate was endeavoring to cross the railroad at Second street crossing in the city of Charlotte, that there were several tracks there used by the defendant in shifting and otherwise, that the street ran down these tracks for some distance, and it was usual and customary for persons who were passing over the crossing at this point to walk part of the way down the main line of the track, and the intestate was at such point at the time she was run over and killed. The evidence of the plaintiff tended further to show that, at the time intestate was killed, the engine was backed on the crossing and ran over the intestate without warning of any kind, without any light on the front end as the train moved, and without any one stationed so as to give warning if danger or collision was imminent. There was evidence of the defendant that at the time of the injury the bell was rung, a light was properly placed, and a lookout kept. Under the charge of the court there was a verdict and judgment for plaintiff, and defendant excepted and appealed.

W. B. Rodman, for appellant. Pharr & Bell, for appellee.

HOKE, J. The charge of the judge below was full and clear. The jury have accepted the plaintiff's version of the occurrence, and there is no error presented which gives the defendant any just ground of complaint. The court in substance told the jury that, where an engine was backing on a crossing in the nighttime, it was the duty of the engineer to sound adequate warning and to keep a man with a light at the front of the engine as it was moving, so as to keep a lookout adequate for safety; and, if there was failure in this respect and an injury resulted, there would be a negligent breach of duty; and, if these duties were performed, there was no negligence on the part of the defendant, and the first issue would be answered "No." This is the rule laid down in Purnell's Case, 122 N. C. 832, 29 S. E. 953. There Furches, J., delivering the opinion said: "As we understand the matter, there must be both a man and a light at night, and a man and a flag in the day. It may be one person, but he must have a light." The fact that the crossing may also be used as a part of the railroad yard, or that this term was used by the court under the circumstances of the present case, does not at all change the principle.

On the first issue as to contributory negligence the court charged the jury, among other things: "(3) It is the duty of persons, before going upon the track of a rail-

road company, to stop and look and listen for any train that may be moving, or, being upon the tracks of such company in its yards where there are several tracks used for shifting cars, to be continually alert and on the lookout for a moving train; and if a person fails in this duty, and in consequence of such failure is injured by a moving train, the person would be guilty of contributory negligence. (4) The burden of the first issue is upon the plaintiff; the burden of the second issue is upon the defendant." The court further charged the jury as follows: "(5) If the jury shall find that the plaintiff was walking on the railroad track, and that the defendant was backing its engine along the track in the nighttime in the direction of the plaintiff, and that there was no light at the time on the back part of the engine and no agent there to keep a lookout along the track, or, being there, failed to exercise reasonable care in looking ahead along the track for any person on or near the track, or that no bell was ringing, and if the jury shall find that the engine so moving ran against or upon the intestate and killed her, and if the jury should further find that, if the bell had been ringing and there had been a proper light on the engine, the intestate would have had notice of the approaching train in time and would have escaped the danger, or that if there had been a person stationed on the engine and was exercising reasonable care in keeping a lookout along the track, he would have discovered the intestate in time to have avoided striking her, then the jury should answer the first issue 'Yes' and the second issue 'No.' (6) If the jury are not satisfied by the greater weight of the evidence that the intestate was killed by a moving train or engine of the defendant, they will answer the first issue 'No.'"

Objection is made to section 5 of the charge, for that it practically declared that the defense of contributory negligence would not avail the defendant under the conditions stated. This part of the charge does have the effect complained of, and there is no error in the ruling. The intestate had gone to the crossing at Third street in the effort to cross the road, and was told by an employé of the defendant that a freight train then obstructed the crossing at that point, and she had better try the Second street crossing. Following these instructions she essayed the latter crossing and was endeavoring to cross, when the engine backed upon her, and her death resulted.

The intestate here was no trespasser, and there was no contributory negligence in the mere fact that she was then upon the road. She was where she had a right to be; and, if she was run over and killed by the engine, under the circumstances stated in this portion of the charge, there was no contributory negligence. Upon either postulate of the specified portion of the charge, there

was a negligent failure on the part of the defendant's agents or employees to avail themselves of the last clear chance of avoiding the injury, which would render the misconduct of the defendant the sole proximate cause of the intestate's death. The case is controlled by the decisions in *Lloyd v. Railroad*, 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764; *Stanley v. Railroad*, 120 N. C. 514, 27 S. E. 27; *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953; *McIlhane v. Railroad*, 122 N. C. 995, 30 S. E. 127.

There is no error, and the judgment must be affirmed.

(140 N. C. 110)

FITZGERALD v. CITY OF CONCORD.

(Supreme Court of North Carolina. Nov. 28, 1905.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE CULVERTS—REPAIR—DUTY IMPOSED.

Under Code, § 3803, requiring that cities and towns shall provide for keeping in proper repair the streets and bridges thereof, in the manner and to the extent that they may deem best, and may cause such improvements as may be necessary, etc., a town is not only bound to originally construct its sidewalks, drains, culverts, etc., in a sound condition, but is required to use reasonable care and continued supervision to keep them so.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1591, 1612.]

2. SAME—DEFECTS—NOTICE.

In an action for injuries to a pedestrian, caused by a defective culvert in a street, plaintiff is bound to show, not only that the defect existed and that an injury was caused thereby, but that the officers of the town knew, or by ordinary diligence might have discovered, the defect, and that its character was such that injuries to travelers therefrom might reasonably be anticipated.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1641-1652.]

3. SAME—EVIDENCE—QUESTION FOR JURY.

Where plaintiff was injured by falling into a hole in a culvert in a street at night, of the existence of which she had no knowledge, and could not see by reason of the darkness, and there was evidence that the culvert had been in a defective condition for several weeks, the town's negligence in failing to repair the same, etc., was for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1747.]

Appeal from Superior Court, Cabarrus County; Justice, Judge.

Action by Rachel Fitzgerald against the city of Concord. From a judgment of nonsuit, plaintiff appeals. Reversed.

Action for negligence. There was evidence of the plaintiff tending to show that she was injured while walking along the streets of Concord, by reason of falling through a defective culvert. The plaintiff herself, on the principal question, testified, as follows: "I live on South Crowell street. On July 28, 1905, as I was going on my direct way home, down West Depot street and crossing the same, I entered South Crowell street on the bridge or culvert at the entrance of said

street, and fell into a hole in the culvert. The plank seemed to be partly broken. As I went down, the planks held me fast, and I could not get out. I fell with all my weight on my left foot, very badly spraining it, and injuring my hip. I pushed down the plank with my hand and crawled out, and crawled over to a storehouse at the intersection of the streets. By holding to the house and getting the support of a stick, I was able to get to a near neighbor's house, and remained there during the night. The night was a very dark one, and there was no lights on the street, as the storm had put them out. I had not noticed this place before in the street." J. D. Gordon, a witness for the plaintiff, on his examination in chief testified: "I do business at the intersection of West Depot and South Crowell streets. I knew the culvert in question. The hole was 16 or 18 inches in diameter. The culvert was as long as the width of Crowell street, and was over the ditch on the south side of West Depot street. It was about 20 feet long, and was crossed by all who enter South Crowell street from West Depot street. It was used by those who enter the street walking and in vehicles. The culvert was considerably worn and covered with dirt. The top planks were worn, sagged, and broken, and could be seen through, and had been in this condition for several weeks before the plaintiff says she was hurt. South Crowell street is one of the principal streets in Concord. I saw the plaintiff afterwards, and she was limping, and is still limping." On the close of the testimony for the plaintiff, on motion of defendant, there was judgment of nonsuit, and the plaintiff excepted and appealed.

W. G. Means and M. B. Stickley, for appellant. Montgomery & Crowell and L. T. Hartsell, for appellee.

HOKE, J. (after stating the case). There was error in directing a nonsuit in this case, and the plaintiff is entitled to have her cause submitted to a jury. The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. Code, § 3803; *Bunch v. Edenton*, 90 N. C. 481; *Russell v. Monroe*, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823. In *Bunch's Case*, *Merrimon, J.*, for the court, says: "It was the positive duty of the corporate authorities of the town of Edenton to keep the streets, including the sidewalks, in 'proper repair,' that is in such condition as that the people passing and repassing over them might, at all times, do so with reasonable ease, speed, and safety. And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls, and the like perilous things very near and adjoining

the streets, shall be guarded against by proper railings and barriers. Positive nuisances on or near the streets should be forbidden under proper penalties, and, when they exist, should be abated." The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town "knew or by ordinary diligence might have discovered the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated."

It will be observed that actual notice of a dangerous condition or defective structure is not required, but notice may be implied from circumstances, and will be imputed to the town if its officers could have discovered the defect by the exercise of proper diligence. As pertinent to the present inquiry, it is stated in 1 Shearman & Red. Neg. § 369: "Unless some statute requires it, actual notice is not a necessary condition of corporate liability for the defect which caused the injury. Under its duty of active vigilance, a municipal corporation is bound to know the condition of its highways, and, for practical purposes, the opportunity of knowing must stand for actual knowledge. Hence, when observable defects in a highway have existed for a time, so long that they ought to have been observed, notice of them is implied, and is imputed to those whose duty it is to repair them; in other words, they are presumed to have notice of such defects as they might have discovered by the exercise of reasonable diligence." And again, in the same section: "It is only reasonable that notice of latent defects should not be so readily presumed from their continuance as open and obvious defects. If these were so dangerous as to challenge immediate attention, the jury is justified in finding a very short continuance of such condition to constitute sufficient notice. Active vigilance is required to detect defects from natural decay in wooden structures, like bridges, plank sidewalks, and the like, which will necessarily become unsafe from age; but the most that ought to be required is the use of ordinary diligence by making tests and examinations, with reasonable frequency, to ascertain whether they are safe or not. It has been held that notice will not be implied, unless the defect was so open and noticeable as to attract the attention of passers-by. But travelers are not charged with any duty to search for defects in a highway as road officers are, and the better rule in our judgment is that knowledge of a defect may be inferred, notwithstanding it may have escaped the attention of all travelers, or even of an officer frequently passing by. It is not a question whether all passers-by actually no-

ticed a defect, but whether it was noticeable." And the decided cases support the doctrine as stated. *Jones v. Greensboro*, 124 N. C. 310, 313, 32 S. E. 675; *Kibele v. Philadelphia*, 105 Pa. 41; *Kunz v. Troy*, 104 N. Y. 346, 10 N. E. 442, 58 Am. Rep. 508; *Pomfrey v. Saratoga*, 104 N. Y. 459, 11 N. E. 43.

On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required, and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, its placing, etc. We have adverted only to the evidence most favorable to the plaintiff's demand, as this is required where a nonsuit is directed on the defendant's motion.

Applying the above principles to the testimony so considered, we are of opinion, as stated, that the plaintiff is entitled to have the question of the defendant's responsibility submitted to the jury under proper instructions from the court, and to that end a new trial is awarded.

New trial.

(104 Va. 657)

NORFOLK & W. RY. CO. v. SPENCER'S ADM'X.

(Supreme Court of Appeals of Virginia. Dec. 7, 1905.)

1. EVIDENCE—MORTALITY TABLES.

In an action for death, standard mortality tables are admissible to show the probable expectancy of the life of deceased.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Death, § 84; vol. 20, Cent. Dig. Evidence, § 1520.]

2. NEGLIGENCE—ACTION—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

The court instructed that, although plaintiff's intestate might have been guilty of negligence, and although that negligence might in fact have contributed to the accident, yet, if defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the accident, plaintiff's negligence would not excuse defendant. *Held*, that the instruction was proper in form.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 115, 392.]

3. MASTER AND SERVANT—INJURIES—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action for the death of a locomotive engineer in a collision between his train and another, evidence *held* sufficient to warrant a finding that the engineer of the other train could have moved his train after knowledge of the danger, so as to have avoided the accident.

4. SAME—QUESTION FOR JURY.

In an action for the death of a locomotive engineer in a collision between his train and another, *held*, that it was a question for the jury whether the conductor of the other train was guilty of negligence in having his train standing beyond the limits prescribed by an order.

5. NEW TRIAL—GROUNDS—DISCREDITING OPPOSITE WITNESS.

As a general rule, a new trial will not be

granted to enable the moving party to discredit an opposite witness.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 221-223.]

6. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action for the death of a locomotive engineer in a collision between his train and another, evidence held sufficient to warrant a finding that there was negligence in failing to put down torpedoes as a warning to deceased.

7. APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where the evidence on the question of negligence is conflicting, the verdict will not be disturbed unless palpably erroneous.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3935-3937.]

8. SAME—WEIGHT OF EVIDENCE.

The Supreme Court will not undertake to pass upon the weight of the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3928-3943.]

9. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of a locomotive engineer in a collision between his train and another, held, that the question of contributory negligence was one for the jury.

10. APPEAL—REVIEW—QUESTION OF FACT.

Where it is impossible to say that reasonable men might not differ in their judgment on the question of contributory negligence, the Supreme Court will not disturb a verdict for plaintiff.

Error to Corporation Court of Roanoke.

Action by Essie Spencer, as administratrix of Arthur T. Spencer, against the Norfolk & Western Railway Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

Wm. Gordon Robertson, for plaintiff in error. Smith & King, for defendant in error.

HARRISON, J. This writ of error brings before us for review the record of an action at law, brought by the defendant in error to recover damages of the plaintiff in error for the alleged negligent killing of the plaintiff's intestate in a collision between two trains of the defendant company.

The collision occurred at a point on the Roanoke & Southern branch of the Norfolk & Western Railway, about three miles south of Starkey station, and near to bridge 1,813, between a freight train, with 2 engines, 52 cars, and a caboose, which was traveling north, and a work train, which was standing still, headed south. Arthur T. Spencer, the plaintiff's intestate, was the engineer on the front engine of the double-header, which was derailed at a point near the south end of the bridge, and went down the bank, inflicting injuries from which Spencer died three days later.

The trial, which was in the corporation court for the city of Roanoke, resulted in a verdict and judgment in favor of Spencer's administratrix for \$10,000.

The first bill of exception is to the action of the corporation court in admitting the evidence of W. S. McClanahan, who was introduced to show, by standard tables of mortality, what was the probable expectancy

of life of a man 26 years of age. In the argument here this exception was properly abandoned. Virginia & S. W. Ry. Co. v. Bailey, 104 Va. —, 49 S. E. 23-37.

The second bill of exceptions is to the court's action in giving the four instructions asked for by the plaintiff. The learned counsel for the defendant company has at this bar withdrawn his objection to instructions Nos. 1 and 3. It will be therefore only necessary to refer to Nos. 2 and 4.

Instruction No. 2 is as follows: "The court instructs the jury that, although the plaintiff's intestate may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant or engineman of the work train could, in the result, by the exercise of ordinary care and diligence, have avoided the accident which happened, then plaintiff's intestate's negligence will not excuse the defendant, and the plaintiff is entitled to recover."

This instruction follows substantially the form that has been employed since the doctrine contained therein was first announced by this court. Richmond & D. R. Co. v. Anderson's Adm'r, 31 Grat. 812, 31 Am. Rep. 750; Johnson's Adm'r v. C. & C. Ry. Co., 91 Va. 176, 21 S. E. 238; Seaboard & Roanoke R. Co. v. Joyner's Adm'r, 92 Va. 354, 23 S. E. 773; Washington, etc., R. Co. v. Lacey, 94 Va. 460-476, 26 S. E. 834.

This instruction is further objected to upon the ground that there was no evidence upon which to base it. This position is not tenable. The work train was standing in a cut, about 225 feet south of bridge 1,813, when the engineer in charge called in his flagman. The evidence tends to show that when the flagman, in response to the call, reached the engine of the work train, he "hollered" to the engineer and said, "For God's sake, get out of here; there is a train coming down the mountain;" that the engineer did not move his engine, and the flagman made no effort to stop the coming train; that the engineer had time, after the warning given by the flagman, to have run his train back as far as the middle of the bridge, thus putting a distance of 332 feet between the two trains, with the view unobstructed, and both trains going in the same direction; and that, if the engineer of the work train had moved back promptly upon receiving notice of the coming freight train, no collision could have occurred.

This evidence was sufficient to justify instruction No. 2, and the plaintiff was entitled to have that view of the case submitted to the jury.

Instruction No. 4 tells the jury, in substance, that if they believe from the evidence that the plaintiff's intestate received the injury complained of in consequence of the negligence of the conductor, the engineer, or the flagman of the work train in not carrying out the rules and regulations of the de-

fendant company, they must find for the plaintiff, unless the jury shall also believe from the evidence that the plaintiff's intestate was guilty of contributory negligence, and that the burden of proving such contributory negligence was upon the defendant.

It is contended that this instruction is erroneous, because there is no evidence tending to connect either the conductor or the engineer of the work train with the accident.

The evidence already adverted to in commenting upon instruction No. 2 is equally pertinent in connection with the objection urged to this instruction. In addition, there was other evidence which contributed to the basis for the instruction under consideration. The order which the conductor of the work train received the morning of the day the accident occurred gave him the right to work between Roanoke and bridge 1,813. At the time of the accident his train was 225 feet south of bridge 1,813. He was therefore outside of his working limits. Conceding that, if necessary, the conductor could have his work train standing beyond the limits prescribed by the order, it was for the jury to say, under the evidence, whether it was negligence to be beyond those limits on this occasion, and whether or not such negligence, if any, contributed to the accident. A careful examination of the record shows that there was sufficient evidence tending to show negligence on the part of each of the persons mentioned in instruction No. 4 to justify its being given.

The third and last bill of exceptions is to the action of the court in overruling the motion of the defendant company to set aside the verdict of the jury. Three grounds are alleged in support of this motion: (1) Misdirection of the jury; (2) after-discovered evidence; and (3) that the verdict was contrary to the law and the evidence.

The first ground has been disposed of by what has been said in considering the objections to the instructions.

The second ground rests upon an affidavit of W. J. Knighton, the conductor of the work train, as to a statement made to him by E. G. Halslip two or three days after the accident. E. G. Halslip was examined at the trial on behalf of the plaintiff, and was followed immediately by W. J. Knighton on behalf of the defendant company, who was called a second time to the stand after being fully examined, cross-examined, re-examined, and recross-examined, thus affording him ample opportunity to tell all that he knew about the case. His affidavit shows that the object of a new trial was that he might state that E. G. Halslip, a witness for the plaintiff, had on one point made to him a different statement from that made by this witness on the stand.

Without considering whether or not the additional evidence of Knighton, relied on as a ground for a new trial, is material, and likely to produce a different result, or wheth-

er or not reasonable diligence would have secured such evidence at the trial now under review, it is sufficient to say that the general rule is, subject to rare exceptions, to refuse a new trial when the sole object is to discredit a witness on the opposite side. *Brugh v. Shanks*, 5 Leigh, 649; *Thompson v. Commonwealth*, 8 Grat. 637; *Brown v. Speyers*, 20 Grat. 296; *Read's Case*, 22 Grat. 924-946.

As already seen, the sole object of the motion for a new trial on the ground of after-discovered evidence was to discredit the testimony of the witness E. G. Halslip, who had testified on the opposite side. In the light of the authorities cited, the after-discovered evidence relied on was insufficient to warrant a new trial.

The third ground upon which the motion to set aside the verdict rests is that the verdict was contrary to the law and the evidence.

At the time of the accident, the work train was standing on a sharp curve in a deep cut a short distance south of a long trestle, called "bridge 1,813," so that it was out of view of the engineer of the freight train until he was within 30 feet of it. Two work trains were engaged between Roanoke and bridge 1,813, under an order issued the day of the accident, which required them to protect themselves against each other and against all trains. For their protection, each was furnished with two flagmen, one of whom was required to protect his train from trains approaching from the north, and the other against trains approaching from the south. Rule 399a of the defendant company required the flagman to go three-fourths of a mile, or 23 telegraph poles, from the work train, and place one torpedo on the rail, on the engineer's side, and then to go back at least 7 telegraph poles farther, or one mile from his train, and place two torpedoes on the same side, 10 yards apart, and then return to the twenty-third telegraph pole, and remain there until called in by the whistle of his engine. The evidence tends to show that the flagman violated this rule, and failed to put down the torpedoes necessary as a warning to the plaintiff's intestate. It also tends to show that the defendant was guilty of negligence in other particulars, already adverted to in considering the instructions.

Whether or not the defendant company was guilty of negligence was a question of fact for the jury. Where the evidence is conflicting, as in this case, the verdict will not be disturbed unless palpably erroneous. *H. & W. Ry. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614; *Morlen v. N. & A. T. Co.*, 102 Va. 622, 46 S. E. 907.

Nor will this court undertake to pass upon the weight of the evidence or the credibility of the witnesses. This is the province of the jury, which the court will not usurp. The jury should be left free in each case to determine, in view of all the circumstances, what witnesses, or what part of the evidence of any witness, they will credit.

N. & W. Ry. Co. v. Poole's Adm'r, 100 Va. 148, 40 S. E. 627. If the evidence introduced on behalf of the plaintiff was believed by the jury, and that of the defendant disbelieved, we could not say that their verdict was palpably erroneous, or that it was not justified.

It is contended that the plaintiff's intestate was guilty of contributory negligence. This was also a question of fact for the jury, and was submitted to them under full instructions as to the law, given without objection, on behalf of the defendant company. The deceased was discharging his duties as a locomotive engineer under the following order, which is known in the record as the "slow order": "To all concerned: Until further notice, all trains will reduce speed to six miles per hour while passing over bridge 1,813, Winston district." The deceased is charged with a violation of this order, which is the foundation for the charge of contributory negligence. It is to be observed that the collision took place before the freight train reached the bridge mentioned in the order, but it is contended that the deceased was approaching the bridge at a rate of speed that would have prevented him from reducing it to six miles per hour while crossing the bridge. The evidence of the speed of the train is conflicting. One witness puts it at 6 miles an hour, another at 8, and still another at 20 miles per hour, and the evidence on that point tends to show that the speed could have been reduced to 6 miles an hour by the time the bridge was reached.

Under the evidence, it is impossible to say that reasonable men might not differ in their judgment upon the question whether or not the plaintiff's intestate was guilty of negligence, and therefore this court would not be warranted in disturbing the verdict of the jury. *Southern Ry. Co. v. Aldridge's Adm'r*, 101 Va. 142-149, 48 S. E. 333.

For these reasons, the judgment must be affirmed.

(38 W. Va. 333)

VALE v. SUITER & DUNBAR.

(Supreme Court of Appeals of West Virginia.
Nov. 21, 1905.)

1. CONTRACTS—ACTION ON EVIDENCE.

A written contract, between other parties than the parties to a suit, which is referred to in the written contract sued upon and to any extent supplements the same, is admissible in evidence upon the trial.

2. EVIDENCE—DECLARATIONS—RES GESTÆ.

Communications between a party to a suit and his employes, not in the presence of the adverse party and of which he has no notice, are not admissible in evidence in his behalf, unless they are a part of the *res gestæ*.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1073.]

3. TRIAL—EXCLUSION OF EVIDENCE—MOTION.

When a motion is made to strike out a portion of the testimony of a witness, the part

of the testimony desired to be stricken out must be particularly and definitely pointed out.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 246.]

4. CONTRACT—FAILURE TO PERFORM.

Where a party by his own contract creates a duty or charge upon himself, his undertaking must be substantially complied with under any and all circumstances. To excuse a performance, his contract must provide for it.

(Syllabus by the Court.)

Error to Circuit Court, Mason County.

Action by A. W. Vale against Suiter & Dunbar. Judgment for plaintiff. Defendants bring error. Reversed.

C. E. Hogg, Somerville & Somerville, and Hollis C. Johnson, for plaintiffs in error.
W. R. Gunn and J. S. Spencer, for defendant in error.

McWHORTER, J. This is an action of assumpsit, brought by A. W. Vale against Suiter & Dunbar in the circuit court of Mason county, to recover from defendants a balance claimed by him to be due for sawing into lumber and ties timber furnished him at his portable sawmill by defendants on what was known as the "William Miller Two-Mile Creek Farm," in Mason county, filing with his declaration a bill of particulars showing a balance due plaintiff of \$860.42. The defendants entered their plea of non assumpsit and filed a special plea in writing, setting up a contract in writing made on the 5th day of May, 1900, between the plaintiff and the defendants, whereby the plaintiff, in consideration that the defendants would pay him 5 cents for each tie manufactured from said timber, and \$3 per thousand for all other lumber or mill stuff, except ties gotten out, covenanted and agreed with said defendants that he would set up and put in good running order, with a capacity of 10,000 to 12,000 feet per day, a portable sawmill, with proper attachments for cut-off saw and edger, on said farm, and that he would make three sets for sawing on said premises, and use good judgment in getting out all the lumber possible that would be marketable from the logs of said timber, and agreed to saw standard ties, 6x8 inch, 8 feet long, and 6x9 inch, 8½ feet long; that he would furnish a grader for the inspection of the lumber and superintend the stacking of the same on the yard; that he would have the said mill set within six weeks after the signing of said agreement; that he would run the same steadily, save when prevented from so doing by unavoidable accidents, and saw all timber as ordered by defendants, including oak, poplar, ash, hickory, linn, elm, buckeye, walnut, sycamore, and beech, quartered oak excepted, and that afterwards the parties extended said contract on same terms as the original so as to include two additional sets of said mill on said farm; that said plaintiff, not regarding his said several covenants, promises,

and agreements, did not set up and put in good running order, with a capacity of from 10,000 to 12,000 feet per day, a portable saw-mill, with proper attachments for cut-off saw and edger, on the farm, and did not use good judgment in getting out all of the lumber possible that would be marketable from the logs gotten out of said timber, and did not furnish a grader for the inspection of said lumber, and did not superintend the stacking of the lumber as per agreement, and did not run the mill steadily, save when prevented from so doing by unavoidable accidents, and did not saw all timber as ordered by the defendants, including the various kinds of timber mentioned, and that by reason of plaintiff's failure it became necessary for defendants to employ a man to do the grading plaintiff agreed to have done, and were compelled to take down lumber and regrade and restack the same, whereby the defendants were damaged to the amount of \$138.27; and that by reason of plaintiff's failure to run said mill steadily as agreed said defendants were delayed three months in getting out said lumber and having the same marketed and getting returns therefrom, by reason of which they were damaged on account of such delay—for interest on money they were compelled to borrow, the sum of \$120; for insurance on said lumber for three months by reason of plaintiff's failure to comply with the said clause of the agreement, \$31.89; for three extra men they were compelled to keep for three months by reason of plaintiff's failure to comply with said clause of said agreement, \$330; and for loss of time suffered by G. W. Sulter and S. A. Dunbar for three months each by reason of such failure of plaintiff, \$600; and for damages occasioned by flood to stock on yards which defendants were prevented from removing in time to avoid flood by reason of plaintiff's failure to run said mill steadily, except when prevented from so doing by unavoidable accidents, \$175; and by reason of such delay for three months defendants forfeited a contract which they had with Ellis & Ellis, of Baltimore, which expired on December 31, 1900, and which contract defendants could and would have fulfilled but for such failure of plaintiff, whereby they suffered damage to the amount of \$250; also forfeited another contract for the same reason with Clark & Clark for the sale of ties, whereby they suffered damages to the amount of \$171.99; and that said defendants by reason of the said premises had sustained damages amounting in the whole to a large sum of money, to wit, the sum of \$1,817.10, which was still due and unpaid and owing from the plaintiff to defendants, and which was there pleaded as an offset against the plaintiff. Such plea was verified by S. A. Dunbar, one of the defendants, to which special plea in writing plaintiff filed his general replication in writing, and denied the truth of said plea, and prayed that the same might be

inquired of by the country. A jury was impaneled and sworn to try the issue. In the course of the trial of the case the defendants took bills of exceptions numbered, respectively, from 1 to 21, which were signed, sealed, and saved to the defendants, the first 19 of which were exceptions to the rulings of the court in relation to the admission of testimony claimed to be improperly admitted.

Exception No. 1. V. C. Bobo, a witness introduced by plaintiff, was asked: "Please state whether you allowed any assistance that you rendered at the breakdowns or anything of the kind to interfere with your duties as measurer, tallier, and grader of lumber sawed by Mr. Vale's mill on the William Miller Two-Mile Creek farm?" which he was permitted to answer over the objection of the defendants. He answered, "I did not." The witness had been employed by plaintiff in the capacity indicated by the question, and had at times, as it appears from the evidence, assisted about the mill in some other matters, and the object of the question was to show that his duties as measurer and grader were not interfered with by such assistance rendered by him in other matters. The defendants do not rely upon this exception in their brief, and I see no valid objection to the testimony. Plaintiff had a right to have the question answered. If there was not sufficient work in the line to employ witness' whole time, he could properly be engaged otherwise when not so employed.

Bill of exceptions No. 2 relates to questions asked on cross-examination by plaintiff of the witness G. W. Sulter, and which questions were permitted to be asked and answered over the objection of the defendants, relating to the timber that was cut to be sawed and shipped. This exception, likewise, is not relied upon by defendants, as it is not mentioned in their brief.

Bills of exceptions Nos. 3 and 4 relate to testimony referring to a contract in writing between Graham & Blessing on the one side and Sulter & Dunbar on the other, dated March 2, 1900, in relation to the hauling of the timber by Graham & Blessing for Sulter & Dunbar on the William Miller Two-Mile Creek farm to the mill of plaintiff. One of the objections to the introduction of this testimony set out in said bills of exceptions was that it was thereby attempted to prove the contents and provisions of a contract in writing by oral testimony, using secondary evidence without laying the grounds therefor, the plaintiff being in possession of the primary evidence. 1 Greenl. on Ev. § 82; 7 A. & E. E. L. (1st Ed.) 85; 2 A. & E. E. L. (2d Ed.) 535. The contract itself was the best evidence of its contents, and it was improper to hear the testimony of witnesses as to what its contents were, and especially giving a construction of it. When improper testimony has been admitted over the

objection of the opposite party, the presumption is that he was prejudiced by the admission of such testimony, unless it affirmatively appears that in fact he was not prejudiced by it. *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. 582; *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. 29; *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921 (Syl., part 4). "Where illegal evidence is admitted against the objection of a party, it will be cause for setting aside the verdict, unless it clearly appear that the objecting party was not prejudiced thereby." The testimony referred to in said bills of exceptions Nos. 3 and 4 should not have been introduced.

It is proper at this point to consider bill of exceptions No. 19, which goes to the introduction in evidence by the plaintiff of the contract of March 2, 1900, between Suiter & Dunbar, of the one part, and Blessing & Graham, of the other. It is claimed by the plaintiff that it was properly introduced because of its provisions under which the plaintiff's mill was to be supplied with logs, and the supervisory right reserved by defendants to forfeit the contract and personally furnish the logs at the mill themselves; that as between Vale and Suiter & Dunbar the loggers were the agents and employes of the defendants, and that the failure of the loggers to supply the mill, which to any extent caused the delay of the plaintiff in his sawing, was contributory negligence chargeable to defendants, and that to such extent plaintiff was not liable for injury resulting from such delay, and that it was proper evidence as showing that the loggers' measurement was to be "mill measurement," and "which is to be taken and made by the said first and second parties and mill operators jointly and shall be the basis of all settlements under this contract." While this contract of March 2, 1900, was between the defendants and Graham & Blessing alone, and they were the only parties to it, yet there is a reference to this contract in the contract of May 5, 1900, between the plaintiff and the defendants, as being the contract under which the logs were to be supplied to the mill to be sawed by the plaintiff. This contract of March 2d was fully identified as the contract under which the mill was to be supplied with logs, and under it, upon the failure on the part of the loggers, Graham & Blessing, the defendants were entitled to forfeit this contract and themselves furnish the logs; and the same contract provided that plaintiff, Vale, should look to Graham & Blessing for damages for any delay in furnishing logs. The contract was relevant as showing that Graham & Blessing were the agents and employes of defendants, and that their delay or failure was that of defendants; and it also contained provisions for measurements, which were to be "mill measurements," and under it the measurements were to be taken by

the three parties, Suiter & Dunbar, Graham & Blessing, "and the mill operators jointly." Thus it was a necessary supplement to the contract of May 5th between plaintiff and defendants, as that contract in itself made no provision for measurements and no provision whatever for supplying logs to the mill. Without the contract of March 2d, that of May 5th would be manifestly incomplete, and, being so, the former necessarily became a part of the latter by the reference to it, in so far as it supplements it and is not inconsistent with it. 9 Cyc. 770; 1 Whar. Law of Ev. §§ 618, 619. The court did not err in admitting the contract of March 2, 1900, in evidence.

Bill of exceptions No. 5 relates to the cross-examination of Lee Arrington, witness called on behalf of the defendants. The questions objected to as propounded by counsel for plaintiff on cross-examination were: "Q. What were those dead culls worth at the time they were left there in the hollow? A. I don't hardly know. Q. Would you have bought them? A. Yes, sir; I would have bought them at some price." This was a legitimate cross-examination, the defendants having examined the witness concerning the culls in question, and there was evidence tending to prove that plaintiff was to be paid for sawing culls.

Bill of exceptions No. 6 concerns the examination of the plaintiff as a witness on behalf of himself, giving his opinion of V. C. Bobo as to his competency and capacity as a grader of lumber, and the court was asked to instruct the jury to disregard the answer of the witness, which motion was overruled. This, under *Purkey v. Transportation Co.* (W. Va.) 50 S. E. 755, and cases there cited, is inadmissible as evidence, and the court should have instructed the jury to disregard it.

Bill of exceptions No. 7 relates to the examination of the plaintiff as a witness, by his counsel, in relation to other mills which he had in operation, where he speaks of two other mills—one in Gallia county, Ohio; the other in Meigs county, Ohio. What other mills plaintiff was running or had in operation elsewhere was wholly immaterial and irrelevant. Counsel for plaintiff contend that this evidence may not have been pertinent, but it was absolutely harmless, and applies the same remarks to the evidence set out in bill of exceptions No. 8. While this error alone would not be sufficient, perhaps, to reverse the case, it is irrelevant and should not have been admitted, and, as there must be another trial, it is proper to here say so.

Bill of exceptions No. 8 refers to the questions asked the plaintiff, A. W. Vale, on re-examination, in relation to what he did on receiving a telegram from his men, dated January 7, 1901, which seems to have been in relation to the demoralizing effect the report about the prevalence of smallpox

had upon his men, when he was permitted to show that he had sent to his employé, J. D. Farley, a telegram to "Keep in close and go ahead. A. W. Vale." "Q. In pursuance of that, you may state whether the men did keep in close and go ahead. A. Part of them refused to obey that and left. A few of them stayed and went ahead and finished the job; but they went away, so that they were a broken crew, and they could not go ahead and move to another job and set up the mill. Q. Please state whether or not you abandoned your operations at that time, or whether you went ahead and did the best you could. A. We went ahead and did the best we could under the circumstances." This evidence was concerning communications between the plaintiff and his employés, not in the presence of the defendants or either of them, and of which they had no notice. The purpose of it was evidently to impress upon the minds of the jury that plaintiff had been at the time diligently striving to comply with the terms of his contract by running the mill steadily. The communications were self-serving and improper to be introduced as evidence. *Scott v. Shelor*, 28 Grat. 891; 20 Cent. Dig. § 1068.

The evidence objected to by the defendants, as set out in bill of exceptions No. 9, is touching the evidence of Vale tending to show that he had no trouble with regard to paying his men, and no complaint by them because they were not promptly paid, which he had a right to show.

Bill of exceptions No. 10 is of the same character as the evidence set forth in bill of exceptions No. 7, and the questions therein complained of were improper, except the last question, which was: "Please state whether or not, in your opinion, you had the necessary men at this mill to operate it in accordance with the terms of your contract." I see no objection to this question, and the answer thereto was proper, in so far as it was responsive to the question; but it was improper for the witness to show the sufficiency of the force at the mill in question by a comparison with the forces he had at the other mills he was running in Ohio, as witness attempted to show in his answer.

Bill of exceptions No. 11 relates to the evidence of the witness Bobo, called for plaintiff, and his attempt to prove the instructions given by plaintiff to Bobo in regard to the grading of the lumber. This evidence should have been rejected, for the same reasons given for the rejection of the evidence set out in bill of exceptions No. 8.

Bill of exceptions No. 12 relates to evidence of the sawing of ties of a larger size than any provided for in the written contract. The court's action in overruling the objection to this evidence should be sustained, and counsel for the defendants seems to be of the same opinion, as they failed to notice it in their brief.

As to bill of exceptions No. 13, the first part of the evidence objected to, relative to the instructions from plaintiff to his employé, Mr. Bobo, should have been sustained, for the reasons given in relation to bills of exceptions Nos. 8 and 11. The other questions objected to, relative to the payment by the plaintiff to his hands, were not improper.

Bills of exceptions Nos. 14, 15, and 16 relate to testimony concerning the contract of March 2, 1900, between Suiter & Dunbar and Blessing & Graham, for the cutting and hauling of the timber, and what was to be done thereunder. The said contract being properly admitted in evidence, the evidence complained of under these bills of exceptions was properly admitted; the same not being given as construing said written contract, and not inconsistent therewith.

The evidence complained of being admitted, as set out in bill of exceptions No. 17, is of the same character as that in bill of exceptions No. 6, and was improper for the reasons there given.

Bill of exceptions No. 18 complains that the court overruled the defendants' motion for the exclusion of all that part of the testimony of the witness Blessing in regard to the contract of March 2, 1900, but points out no particular part thereof. The motion was too indefinite and uncertain, and the court did not err in overruling the motion.

In the course of the trial the defendants asked the court to give to the jury certain instructions in writing, which are set out in full in bill of exceptions No. 20, and are numbered therein, respectively, from 1 to 16, inclusive, of which Nos. 1, 5, 9, 10, 11, 15, and 16 were given by the court. And the court refused to give those numbered 2, 3, 4, 6, 7, 8, 12, 13, and 14. The defendants excepted to the ruling of the court in refusing said last-named instructions. No. 2 is as follows: "The jury are hereby instructed that the phrase 'unavoidable accident' means that which is not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise. And the jury are further instructed that an abandonment of the operation or working of the mill by the men or hands in the employ of the plaintiff, hired by him to saw the lumber and the ties, occasioned by any cause whatsoever, is not 'unavoidable accident' within the meaning and contemplation of the law and the true construction of the contract between the plaintiff and the defendants bearing date May 5, 1900, if the jury believe from the evidence that the plaintiff made no effort to get other men or hands in their place to continue to saw lumber and ties under said contract after the abandonment of the operation of the mill by the men already theretofore employed." This instruction fails to present the true issue in the case. It was not a question of the effort made by the plaintiff to get other men

or hands in the place of those who had abandoned his work, or of his failure to make any effort, but whether he could, by due diligence, have procured them and continued thereby to prosecute the work according to the terms of his contract. The agreement on the part of plaintiff was that "the party of the second part shall place a mill on said premises and have the same set within six weeks from the signing hereof, and shall run said mill steadily, save when prevented from so doing by unavoidable accident." This was binding upon the plaintiff, and it was his duty, after the mill was set, to run it and keep it in constant operation, and was only excusable when prevented by unavoidable accident. "Things improbable in contracts must be performed. A thing impossible may be excused." *Trustees of Schools v. Bennett*, 27 N. J. Law, 513, 72 Am. Dec. 373. "The rule is well established that, where a party by his own contract creates a duty or charge upon himself, his undertaking must be substantially complied with under any and all circumstances. To excuse a performance his contract must provide for it." *Bacon v. Cobb*, 45 Ill. 47; *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Stees v. Leonard*, 20 Minn. 494 (Gil. 448); *Booth v. Mill Co.*, 60 N. Y. 487; *Brewer v. Tysor*, 48 N. C. 180; *James River & Kanawha Co. v. Adams*, 17 Grat. 427. Instruction No. 3 is similar to No. 2, and liable to the same criticism.

Instruction No. 4 tells the jury that if they believe from the evidence that plaintiff began the work of sawing lumber and ties under the contract of May 5, 1900, some time in the latter part of July, and that his mill had a capacity to saw from 10,000 to 12,000 feet per day, and that by steadily running said mill plaintiff could have sawed all the lumber and ties charged by him against the defendants, specified by him in his bill of particulars, on or before November 28, 1900, except any unavoidable accident occurring during that period, and if they further believe from the evidence that a failure to saw the lumber and ties for defendants charged in said account during said period occasioned the defendants any loss or damage as specified in defendants' special plea, then they must ascertain from the evidence what such loss or damage amounted to, and allow and assess the same in favor of the defendants. This is the issue raised by the special plea, and to which the plaintiff filed a general replication; and there being evidence tending to prove his ability to have done such sawing as specified in the instruction, and further evidence tending to prove the damages resulting from such failure to do the sawing, the jury are properly told that the bare fact—that is, the fact alone—that the men quit was not sufficient to excuse plaintiff for his failure to run the mill steadily. The instruction was clearly right and should have been given.

Instruction No. 6 tells the jury that if they believe from the evidence plaintiff made no active and diligent effort to secure men to take the places of those who quit him in November, 1900, and by making such effort he could have procured other men in the place of those who quit his employment on account of smallpox, then the bare fact that the men who were at work in his employment sawing the ties and timber under the contract of May 5, 1900, quit his employment because of the alleged prevalence of smallpox in the city of Gallipolis will not excuse the plaintiff for his failure to run the mill steadily after the latter part of November, 1900, until he resumed work in January, 1901. Under the authorities hereinbefore cited this instruction should have been given, as it tells the jury that, if they believe from the evidence that by due diligence he could have procured help and continued the work, he was not justified in letting the mill remain idle, as he was under contract to keep it in constant operation.

The seventh instruction is as follows: "The jury are hereby instructed that if they believe from the evidence that the men in the employ of the plaintiff, Vale, quit the work of sawing lumber and ties for the defendants on or about November 28, 1900, because of the prevalence of smallpox, or the reputed prevalence of smallpox, in the city of Gallipolis, in the state of Ohio, the fact that such men did so quit his plaintiff's employment will not excuse the plaintiff from running his mill steadily thereafter, unless the jury further believe from the evidence that the plaintiff actually did make a reasonable and diligent effort to secure other men to run his said mill after the former men quit his employment." For the reasons stated in relation to instructions Nos. 2 and 3, the closing part of this instruction, to make it good, should have been, "unless the jury further believe from the evidence that the plaintiff could by due diligence have procured sufficient competent force to enable him to carry on his work according to the contract of May 5, 1900, after his men had so quit his employment."

Instruction No. 8 reads as follows: "If the jury believe from the evidence that the men in his (plaintiff's) employ were on the West Virginia side of the Ohio river, and that the reputed prevalence of smallpox was confined to the city of Gallipolis, distant some two miles or more, and if the jury further believe from the evidence that the reputed cases of smallpox in Gallipolis were under quarantine, that steamboats were still running on the Ohio river, that trains were still running on the railroads passing through and by Gallipolis, and that this state of facts prevailed at the time the men in the employ of the plaintiff, working on the saw-mill of the plaintiff located on the Miller Two-Mile Creek farm, at the time the said men actually left the said sawmill and quit work-

ing thereon, then the jury should take all these matters into consideration; and if they further believe that there was no imminent danger to the said men in the employ of the plaintiff of the spread of smallpox among them from the city of Gallipolis, then the jury are instructed that the fact that said men did quit the employment of the plaintiff and refused to operate said mill will not excuse the plaintiff for a failure to run the mill steadily after the latter part of November, 1900, the time when the said men did quit his employment, until January 2, 1901." This instruction, to make it good, should have added to it, "unless they further believe that by exercise of due diligence he could not have procured men," or words of like import.

Instruction No. 12 relates to the sawing of ties of a larger size than those specified in the contract of May 5, 1900, and tells the jury "that if the plaintiff sawed such ties without any notice to the defendants that he would charge a greater rate than five cents per tie (the price specified for the ties to be sawed under the said contract), then the jury were instructed that they could not allow to the plaintiff any greater sum than the five cents per tie provided for in the said contract." This instruction was properly refused, because the ties differed from those specified in the contract, were larger, and were not sawed under said contract.

Instruction No. 13 is bad because it instructs the jury "that if the mill commenced work and running at its full capacity the plaintiff could have sawed the lumber and ties charged for in his account filed with his declaration in this cause by the time the men in his employment actually quit work in the latter part of November, 1900, and if the jury further believe from the evidence that the plaintiff's failure to finish the sawing of such lumber and ties by that time caused the defendant's damages to any amount on the specification of damages, or any of them, set forth in the defendants' special plea filed in this cause, then the jury should assess and allow the defendants damages by reason thereof in such sum as the evidence in this cause shows that the defendants did thereby sustain." This instruction, in my opinion, is bad because it contemplates the running of the mill "to its full capacity," when the contract provides that he should "run said mill steadily." The requirement that the mill should be run "to its full capacity" places upon the plaintiff a burden which his contract does not authorize; but, the majority of the court being of opinion that the instruction is good, it should have been given, and the court erred in refusing it.

Instruction No. 14 reads: "The jury are hereby further instructed that if they believe from the evidence that Graham & Blessing had a contract with Sulter & Dunbar for the hauling of all the timber on the Miller Two-Mile Creek farm and that under their said

contract said Graham & Blessing had 15 months from the time their said contract was made with said Sulter & Dunbar in which to haul said timber to the mill or mills, the jury are hereby instructed that, because said Graham & Blessing did have such length of time in which to haul all of the said timber on said land to the mill or mills to be sawed, this length of time permitted by Sulter & Dunbar to Graham & Blessing will not excuse any delay on the part of the plaintiff to finish sawing under his contract of May 5, 1900, which plaintiff could have reasonably avoided; and if the plaintiff could have finished his sawing in the exercise of reasonable diligence sooner than the plaintiff actually did conclude the sawing of lumber and ties under said contract of May 5, 1900, and that such delay caused the defendants damages, then the jury are instructed to allow to defendants any such damages as the evidence shows them to have sustained by reason of such delay." This instruction was improper to be given to the jury without a qualification to the effect that "unless it further appears that plaintiff was delayed by the failure of defendants, or their employes, Graham & Blessing, to keep the mill supplied with timber," and to the extent of such delay caused by the failure to furnish timber defendants would not be entitled to damages sustained by such delay.

For the reasons herein stated the verdict of the jury is set aside, the judgment reversed, and the case remanded to the circuit court of Mason county for a new trial to be had therein.

(53 W. Va. 325)

KELLER v. KELLER.

(Supreme Court of Appeals of West Virginia. Nov. 14, 1905.)

DIVORCE—TEMPORARY ALIMONY—NOTICE.

An order for temporary alimony, made in vacation in a divorce suit, without notice, is void.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Suit by Lafayette Keller against Cordella A. Keller for divorce. From an order granting alimony and dismissing the cause, plaintiff appeals. Reversed.

Chas. M. Murphy, for appellant. Wamsley & Coberley, for appellee.

BRANNON, P. Lafayette Keller brought suit in Barbour county against Cordella A. Keller for divorce, and filed his bill and took some depositions. The defendant appeared before the judge in vacation, and filed an answer resisting her husband's suit, and asking temporary alimony. Without notice to the plaintiff or appearance, the judge made an order requiring the man to pay his wife \$200 for temporary alimony and maintenance of her defense, and ordered the answer to be filed. Afterwards in term the husband

moved the court to set aside said order for alimony, but the court refused to do so, and ordered that the suit be stayed until the money be paid. The court suppressed certain depositions taken by the plaintiff as taken in defendant's absence. At a subsequent term an order appears saying: "The court doth on its own motion dismiss the cause for want of prosecution."

The order requiring the payment of alimony without notice is void. The answer could not be received as a pleading legally in the cause in vacation, and thus justify the order. A court cannot admit pleadings or take any steps in vacation except by statute. *Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. 85; 4 Ency. Pl. & Prac. 337. If the answer had been filed in term, upon it an order could have been made in term, without notice, because a party must always be in court to observe what orders are made in the suit. But as to proceedings in vacation it is different. A judge can in vacation make an order for temporary alimony, under Code 1899, c. 64, § 9, but the adverse party has right to defend a motion for temporary alimony. 14 Cyc. 754. As he has right to defend the motion, it follows that he must have notice of a motion to be heard in vacation. *Coger v. Coger*, 48 W. Va. 135, 35 S. E. 823; *Handlan v. Handlan*, 37 W. Va. 486, 16 S. E. 597.

It was error to suppress the depositions taken April 29, 1902, on the theory that the defendant was not present. The taking had been duly adjourned to that date.

It was error to dismiss the suit. How could there be prosecution of it when the court had stayed it, and thus prohibited the plaintiff from prosecuting it? We suppose that the plaintiff was considered as not prosecuting the suit because he had not paid the alimony; but that order, being void, was no warrant for the order to stay or the order dismissing the suit.

We reverse the order allowing the alimony, that suppressing the depositions, that staying and that dismissing the suit, and remand the cause for further proceedings.

(124 Ga. 97)

WALKER v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. CRIMINAL LAW—SECOND APPEAL.

The facts appearing in the present record are substantially as in the record of the case brought to this court at the last term, when the law applicable thereto was decided. *Walker v. State*, 50 S. E. 994, 122 Ga. 747.

2. SAME—INSTRUCTIONS.

Where the allegations of an indictment are legally sufficient to describe and define the criminal act charged, it is not error for the court to instruct the jury that, upon proof of these allegations beyond a reasonable doubt, the jury is under a duty to convict.

3. SAME.

A charge that, if one took orders for the sale of whisky at the time and place and in the

manner alleged in the indictment, he would be guilty of the offense defined in Pen. Code 1895, § 428, is not rendered erroneous because the court did not charge, in immediate connection therewith, that if the defendant acted as agent of the buyer in the transaction, he would not be guilty; it appearing that the court did elsewhere in the charge state this proposition in the language of a written request preferred by the defendant's counsel.

4. CRIMINAL LAW—INSTRUCTIONS.

While it is the duty of the court, whether requested or not, to charge the jury the appropriate law on the substantial issues of a case, yet a defendant who submits a written request for a charge on a material issue, which charge, as requested, is given in charge to the jury, cannot complain that the proposition therein embraced should have been elaborated by the court.

5. SAME—OBJECTIONS TO EVIDENCE.

When evidence is offered and its admissibility is challenged, counsel may state the reason why such testimony should be allowed; and if what he says is in good faith, and not calculated to prejudice the jury, it affords no ground for declaring a mistrial, and the objecting party cannot justly complain thereof, especially when the court instructs the jury that they should not be influenced thereby.

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Freeman Walker was convicted of crime, and brings error. Affirmed.

See 50 S. E. 994.

Malcolm D. Jones, J. S. Adams, and Jos. L. Anderson, for plaintiff in error. G. H. Williams and W. C. Davis, for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 100)

EDWARDS v. STATE.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

Under Pen. Code, § 431, if a person sells, without the license and taking the oath prescribed by law, any of the liquors therein named, he is guilty of a misdemeanor; and it is not necessary for the state to allege or prove that such named liquors are intoxicating.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 233, 265.]

2. SAME—INTOXICATING CHARACTER OF LIQUOR—EVIDENCE.

Where, if the defendant was guilty of selling liquor without a license, under the evidence it was either whisky or brandy. It was not necessary to prove that whisky or brandy was intoxicating. Evidence of the taste and effect of drinking the liquor purchased could be considered in determining what it was; but, if in fact it was whisky or brandy, the defendant would not be acquitted because the state failed to prove beyond a reasonable doubt that it was intoxicating. *Snider v. State*, 7 S. E. 631, 81 Ga. 573, 12 Am. St. Rep. 350.

(Syllabus by the Court.)

Error from City Court of Jonesboro; E. M. Blablock, Judge.

Will Edwards was convicted of selling liquor without a license, and brings error. Affirmed.

J. W. Wise, for plaintiff in error. Jno. B. Hutcheson, for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 126)

ATLANTA & W. P. R. CO. v. ATLANTA, B. & A. R. CO.

(Supreme Court of Georgia. Nov. 9, 1905.)

1. EVIDENCE—JUDICIAL NOTICE.

The courts will take judicial notice of a charter granted to a railroad company by the Secretary of State, under the general law providing for the incorporation of such companies.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 26.]

2. EMINENT DOMAIN—PROPERTY SUBJECT—LANDS OF RAILROAD COMPANY — PRESENT USE.

A railroad company incorporated under the general railroad law may institute condemnation proceedings to acquire the property of another railroad company, if the property sought to be condemned is not in actual use for railroad purposes by the company owning the property, and is not necessary to the present needs of such company. Property acquired and held by a railroad company in anticipation of future needs, and not used and not shown to be needed for present use by such railroad company, stands upon the same footing as ordinary private property, so far as the right of another railroad company to condemn it for railroad purposes is concerned.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 111, 117, 118.]

3. SAME—FUTURE NEEDS.

When, in a proceeding by one railroad company to condemn the property of another railroad company, it appears that the property sought to be condemned is not actually used by the railroad company which owns it for railroad purposes, and is not presently needed for such purposes, the right of condemnation will not be defeated merely because it appears that at some time in the future such property will be needed by such railroad company for railroad purposes. In such a case the future needs of the first company must yield to the present lawful needs of the second company.

4. INJUNCTION—CONDEMNATION PROCEEDINGS.

No sufficient reason appears for reversing the judgment refusing to grant the injunction.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Bill by the Atlanta & West Point Railroad Company against the Atlanta, Birmingham & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This was an application for an injunction by the Atlanta & West Point Railroad Company, hereinafter referred to as the "West Point Company," against the Atlanta, Birmingham & Atlantic Railroad Company, hereinafter referred to as the "Birmingham Company," to prevent the latter company from condemning, for use as a part of its main

line, property in the city of Lagrange, Troup county, owned by the former company. The judge refused to grant the injunction, and the West Point Company excepted. It is averred in the petition that the West Point Company is one of the oldest railroads in the state, and for a period of more than half a century has operated a line of railroad from Atlanta to West Point; that it is operated in connection with the Western Railway of Alabama, which operates a line of railway from West Point to Opelika, Ala.; that the business of the company has increased from year to year, and it now does a large volume of business; that it has heretofore operated the line from Atlanta to Opelika as one division, but the local business between these points has so largely increased that it has become necessary to divide this division into two divisions, one from Atlanta to Lagrange, and the other from Lagrange to Opelika; that the creation of these two divisions will necessitate the extension of its yard and the enlargement of its terminal facilities at Lagrange, which will bring about a change of its depots, both passenger and freight, at that point; that, in anticipation of this, the company secured lands adjacent to its present property in the city of Lagrange, to be used in the enlargement of its terminals, and it has now a complete plan, as indicated by a map which is attached to the petition, which requires the use of this additional property so acquired; that while this additional property is not now actually in use, the plan contemplating its use has been perfected, and arrangements have been made to carry into effect this plan, which is absolutely essential to the proper conduct of its business as a common carrier; that the Birmingham Company is a corporation under the laws of this state, "recently incorporated," authorized to construct a railroad from Montezuma, Ga., to Birmingham, Ala., and from Atlanta, Ga., to Wedowee, Ala., and this company has served a notice of its intention and purpose to condemn a portion of the property which the West Point Company acquired for its terminal facilities in the city of Lagrange; that the acquisition of this property is not necessary for the carrying out of the purpose for which the Birmingham Company was incorporated, and the taking of the property would seriously impair the ability of the West Point Company to discharge those duties imposed upon it under its charter as a common carrier; and that the Birmingham Company has no authority under the law to take the property of the West Point Company. The answer of the Birmingham Company sets up that the property which it seeks to condemn has never been devoted by the West Point Company to any public use, and it will not be necessary to the proper exercise of the duties imposed upon the West Point Company to use the property sought to be condemned; and it is distinctly alleged that this property can be taken without in any way im-

pairing, embarrassing, or materially affecting the West Point Company in the transaction of any of the business which it has, or which it may reasonably expect to have in the near future. At the hearing numerous affidavits were introduced by both parties on the various questions raised by the pleadings. The bill of exceptions assigns error on the refusal to grant the injunction, and also upon a number of rulings made by the judge on the admissibility of evidence.

Dorsey, Brewster & Howell, for plaintiff in error. J. L. Sweat, Hatton Lovejoy, and Rosser & Brandon, for defendant in error.

COBB, P. J. The charter of the Birmingham Company does not appear in the pleadings. The petition alleges that it is a corporation of this state "recently incorporated." It is well settled in this state that the courts will take judicial cognizance of the powers of a railroad company incorporated under an act of the General Assembly. The law requires the acts to be deposited in the office of the Secretary of State, and the court notices without proof the contents of all acts that are so deposited. Since the power to incorporate a railroad company has been taken away from the General Assembly and conferred upon the Secretary of State, the law requires that the application for a charter and the charter itself shall be recorded in the office of the Secretary of State. If the court can judicially notice a charter granted in an act of the General Assembly, which is merely required to be deposited in the office of the Secretary of State, we see no reason why like notice should not be taken of a charter granted under a general law, which requires the application, as well as the charter itself, to be recorded in the office of that officer. It has been held that where an act of the General Assembly requires the Governor to issue a proclamation, the court will take judicial notice of the contents of that proclamation as it appeared upon the minutes of the executive department. *Ragland v. Barringer*, 41 Ga. 114.

2. Under the general law for the incorporation of railroads, a railroad so incorporated is authorized "to acquire, purchase, hold, and use all such real estate and other property as may be necessary for the construction and maintenance of said road, and the stations, wharves, docks, terminal facilities, and all other accommodations necessary to accomplish the object of said corporation, and to condemn, lease, or buy any land necessary for its use. * * * To cross, intersect, or join or unite its railroads with any railroad heretofore or hereafter to be constructed, at any point in its route, or upon the ground of any other railroad company, with the necessary turnouts, sidings, and switches, and other conveniences necessary in the construction of said road, and may run over any part of any railroad's right of way necessary or

proper to reach its freight-depot, in any city, town or village through or near which said railroad may run, under the limitations hereinafter named; but in crossing another railroad, either over, under, at grade, level or otherwise, it shall be at the expense of the company making the crossing, and in such way and manner, at the time of construction, as not to interfere with said railroad in its regular travel or business." Civ. Code 1895, § 2167, pars. 3, 6. "In the event any company does not procure from the owner or owners thereof by contract, lease or purchase, the title to the lands or right of way or other property necessary or proper for the construction or connection of said railroad and its branches or extensions, or its depots, wharves, docks, or other necessary terminal facilities, necessary or proper for it to reach its freight or passenger depot, in any city, town or village, in the state, as hereinafter provided, said corporation may construct its railroad over any lands belonging to other persons, or over such rights of way or tracks of other railroads as aforesaid, upon paying or tendering to the owner thereof, or to his or her or its legally authorized representative, just and reasonable compensation for said lands or said right of way. When the compensation is not otherwise agreed upon, it shall be assessed and determined in the manner provided in this Code. Civ. Code 1895, § 2170. The power of condemnation conferred by the foregoing provisions of law may be exercised by a railroad company to appropriate to its use not only the property of an individual, but also the property of a corporation. The property of another railroad company may be condemned if the property thus sought to be acquired is not actually used by the other company for railroad purposes, and it will not be needed by that company for such purposes in the immediate future. Property owned by a railroad company, which it does not use for railroad purposes, and which will probably not be needed in the near future for such purposes, so far as the right of another railroad company seeking to condemn it is concerned, stands upon the same footing as other property not dedicated to a public use. Property so held by a railroad corporation is private property, owned for private purposes. It is not at all impressed with a public use, and is subject to be taken, under the exercise of the right of eminent domain, under the same circumstances that the property of a private individual may be so taken. Where the property is already in use for railroad purposes, or where it is manifest that it will be presently needed by the corporation to carry fully into effect the purposes of its creation, then the right of another railroad company to acquire it by condemnation is subject to restrictions which are not applicable where the property is not actually in use or need-

ed for present use. Where property is already dedicated to a public use, it may, under the exercise of the power of eminent domain, be subjected to another use, but with the restriction that it cannot generally be so subjected if the second use either destroys or seriously impairs the first use. A condemnation having such an effect can only be had when there is expressed, unequivocal legislative authority permitting it. A general legislative authority to condemn will not be construed to give power to take, when such taking will be inconsistent with a prior public use to which the property has been dedicated. Under a general power to condemn property, a railroad company cannot condemn the property of another company, already used by it for railroad purposes, when the effect of such condemnation would be to destroy the use of the property by the former company, or to seriously impair the rights of the former company therein. *City Council v. Georgia R. Co.*, 98 Ga. 161, 26 S. E. 499. Under a general power to condemn, one railroad company cannot acquire property of another railroad company, already set apart for use as a depot or as a yard for the drilling of cars, when it is manifest that the appropriation by the second company would be either to destroy the rights of the first company, or seriously impair the first company in the use of its property for the purpose of which it was set apart. Where a company has acquired property for the purpose of enlarging its depot, or its yard, or its terminal facilities, and is presently proceeding to adapt such newly-acquired property to the use for which it was acquired, such newly-acquired property would, under such circumstances, as to the rights of another company to condemn, be fully safeguarded by the same restrictions as if the plans which were actually in progress had become completed when the condemnation proceedings were instituted. But where a railroad company, in anticipation of its future needs, acquires property, and it is not in use, and not presently needed, and it is merely held to be used in the future at such times as the needs of the company may require it, the right of condemnation exists in favor of another company, which can only be defeated by showing that the condemnation would interfere with a present necessity of the company which owned the property.

3. The evidence authorized a finding by the judge, not only that the property sought to be condemned was not actually used by the West Point Company for railroad purposes, but that it would not be needed by it for such purposes at any time in the near future. Upon the latter point the evidence was conflicting, but the judge could find, and no doubt did find, from the evidence that the property was purchased for future

use, and that the present needs of the West Point Company were not such as to require it to be used for railroad purposes. Under such circumstances, the future needs of the company must yield to the present lawful needs of the new company seeking a right of way through the city of Lagrange.

4. The bill of exceptions contains numerous assignments of error upon rulings made by the judge upon the admission and rejection of evidence, but none of these are of such material nature as to require discussion in the light of what has been said in the preceding portion of this opinion. There was no evidence to authorize a finding that the Birmingham Company had located its line otherwise than in good faith, for the purpose of carrying out the object of its incorporation, which was to serve the public in the most satisfactory way that a railroad corporation could render that service, and incidentally reap such benefit from that service as is always contemplated shall flow as a compensation for the services rendered. We see no reason for reversing the judgment refusing to grant the injunction prayed.

Judgment affirmed. All the Justices concurring.

(124 Ga. 141)

HILL v. STATE.

(Supreme Court of Georgia. Nov. 10, 1905.)

CRIMINAL LAW—NEW TRIAL—APPEAL.

The evidence was sufficient to authorize the verdict of guilty, and, the presiding judge having refused a new trial, this court will not interfere. The question of whether or not section 122 of the Penal Code was applicable to the class of employees involved in this case was abandoned in the argument.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

R. P. Hill was convicted of crime, and brings error. Affirmed.

Bunn & Trawick and Dean & Dean, for plaintiff in error. W. H. Ennis, Sol. Gen. for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 144)

MATHEWS et al. v. PARKER, Constable.

(Supreme Court of Georgia. Nov. 10, 1905.)

1. JUSTICE OF THE PEACE—CERTIORARI—PETITION—SUFFICIENCY.

A petition for certiorari must allege error so specifically and distinctly that a reviewing court may understand the ground of error relied on. *Clements v. McCormick Machine Co.*, 42 S. E. 222, 115 Ga. 851. Such a petition, which sets forth all the evidence submitted on the trial before a jury in a justice's court, and alleges that the verdict complained of is against the weight of the evidence and without evidence to support it, sufficiently complies with this rule.

2. ERROR—REVIEW—GRANT OF NEW TRIAL.

The Supreme Court will not disturb the first grant of a new trial upon certiorari, when the verdict was not demanded by the evidence. *Brantley v. Taylor*, 49 S. E. 262, 121 Ga. 475. (Syllabus by the Court.)

Error from Superior Court, Tattnall County; T. A. Parker, Judge.

Action between A. J. Mathews and others against Evans Parker, constable. From an order of the superior court granting a new trial on certiorari from a justice, Mathews and others bring error. Affirmed.

W. M. Lewis, for plaintiffs in error. W. L. Wilson and A. B. Hutcheson, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 145)

WALDEN et al. v. WALDEN.

(Supreme Court of Georgia. Nov. 10, 1905.)

1. JUDGMENT—RES JUDICATA.

A verdict or other finding not followed by a judgment, will not serve as an estoppel by res judicata.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1020.]

2. PLEADING—OBJECTION TO PLEA.

Objection to a plea insufficient in law may be made by motion to strike the plea, and this practice is to be commended; but the same result may be accomplished by objection to evidence which is offered in support of the plea.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1093, 1433-1436.]

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; H. M. Holden, Judge.

Action by W. M. Walden and others against William Walden. Judgment for defendant, and plaintiffs bring error. Reversed.

Roger & Stephens, for plaintiffs in error. Cain & Hardeman, for defendant in error.

EVANS, J. This was a suit for land. The defendant filed a plea in abatement, to the effect that he was the purchaser of the land under an execution sale, and that prior to the sale the plaintiffs had filed statutory claims to the levy of the fl. fa., and on the trial of the issue thus joined verdicts were rendered against the claimants, declaring the land subject to the lien of the fl. fa. By agreement of counsel the sole issue submitted was that raised by this plea. Upon the conclusion of the evidence the court directed a verdict for the defendant. Plaintiffs sued out a dire t bill of exceptions, complaining of rulings of the court on the admission of evidence, and that the evidence did not demand the verdict.

The plea in abatement was defective in substance as an estoppel by res adjudicata, in that it failed to allege that judgments were entered upon the verdicts returned

in the claim cases; but the plea was not attacked by demurrer on this or upon any other ground. In all other particulars the plea was sufficiently specific. The identity of the parties, the subject-matter, and pleadings in the claim cases were averred with ample elaboration. It appeared that the verdicts returned in the claim cases had been rendered at preceding terms of the court in which the present case was pending, and that the time for filing motions for new trial had expired. But, even though it was too late to move for a new trial, the verdicts could not, of themselves alone, be urged as an estoppel by res adjudicata. It has been ruled by this court as settled law that a verdict, not followed by a judgment, will not serve as an estoppel, and that it is essential that a judgment be entered on the verdict before the parties will be concluded as to the matters in controversy. *Carstarphen v. Holt*, 96 Ga. 703, 23 S. E. 904; *Mitchell v. Mitchell*, 97 Ga. 795, 25 S. E. 385; *Webster v. Mortgage Co.*, 93 Ga. 278, 20 S. E. 310; *Harris v. Gano*, 117 Ga. 934, 44 S. E. 11.

Good practice would require that the plaintiffs should take advantage of the fatal defect in the defendant's plea either by demurrer or by a motion to strike made before verdict. However, when the verdicts returned in the claim cases were tendered in evidence, objection was made to their reception, on the ground that they were unaccompanied by any judgment. The court overruled this objection. The defendant closed his case on the plea in abatement, without introducing any judgment, whereupon the plaintiffs made a motion to dismiss the plea on this and other grounds. The court properly declined to dismiss the plea because of the failure to prove a fact which was not therein alleged; but the motion to exclude the verdicts, unless they were accompanied by a judgment raised the point that the verdicts, of themselves, were insufficient to create an estoppel by res adjudicata, and the court should have ruled out the verdicts when the defendant failed to show that judgment had been duly entered upon them. See, in this connection, *Crew v. Hutcheson*, 115 Ga. 511, 42 S. E. 16, *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280. The plaintiffs accomplished the same result by objecting to the evidence offered in support of the plea, which could more properly have been reached by presenting a motion to strike the plea. Doubtless it was the intention of counsel, by moving to dismiss the plea on the ground that it was not sustained by sufficient evidence, to urge the point that, in the absence of any judgment entered upon the verdicts in the claim cases, they could not have the effect of creating an estoppel by res adjudicata. But the motion to dismiss for the reasons actually assigned was without merit, since a plea should not be stricken merely because it has not been sufficiently supported by evidence offered to sustain it. However, as we have

pointed out, the motion to exclude the verdicts because they were unaccompanied by any judgment sufficiently raised the objection that the plea was bad for failure to allege that judgments had been duly entered upon the verdicts. Taking this view of the matter, we hold that the court should have excluded the verdicts; and as, in the absence of this evidence, the plea in abatement could not be sustained, the defendant was not entitled to a verdict in his favor.

It is unnecessary to review the various other assignments of error upon the admission of evidence offered in support of the plea in abatement.

Judgment reversed. All the Justices concurring.

(124 Ga. 147)

PENNINGTON v. AVERA.

(Supreme Court of Georgia. Nov. 10, 1905.)

1. LOGS AND LOGGING—SALE OF GROWING TIMBER—CONSTRUCTION OF CONTRACT.

An owner of land entered into a contract with the proprietor of a sawmill for the sale of "all the timber for sawmill purposes" on a given parcel of land. A portion of the purchase money was to be paid as soon as the "sawmill was located ready for sawing on said land." If this amount was not paid, the mill was to be removed from the land before "sawing any timber thereon." There were stipulations "that the stumps from which such sawmill timber is sawed or cut shall be two feet high, and not less, from the ground, and no timber is to be sawed or cut from said land * * * that is less than 14 inches in diameter;" that "any stumps less than two feet high, or any timber cut less than 14 inches in diameter, shall be a violation of this contract and a termination thereof;" and that the buyer was "to have twelve months in which to saw said lumber." *Held*, that only such portions of the trees as were capable of being sawed into lumber passed under the contract.

2. EVIDENCE—PAROL TO EXPLAIN CONTRACT.

In the trial of an action founded on a written contract of the character above indicated, parol evidence is inadmissible to show that at the time the contract was entered into it was the intention of the parties that the limbs and tops of trees were to pass under the contract, as well as such portions of the trees as were capable of being sawed into lumber.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; H. M. Holden, Judge.

Action by E. C. Avera against A. F. Pennington. Judgment for plaintiff. Defendant brings error. Affirmed.

Avera brought suit against Pennington upon a promissory note. The defendant filed a plea, alleging that the plaintiff, by a written contract, sold to the defendant all the timber upon 300 acres of land; the consideration being that defendant was to pay \$1,800, and saw for plaintiff 10,000 feet of lumber, and \$1,200 has been paid, and the 10,000 feet of lumber delivered. The defendant under his contract had 12 months within which to remove the timber purchased. After cutting the trees, the plaintiff had prevented him from removing the tops and

limbs, which the defendant had sold for firewood at 20 cents per cord, there being 5,000 cords; and, in view of the foregoing the defendant claims as damages by way of recoupment against the plaintiff \$1,000 for 5,000 cords of wood at 20 cents per cord. The contract attached as an exhibit to the defendant's answer contained the stipulations set forth in the first headnote. The jury returned a verdict for the plaintiff, disregarding the plea of recoupment. A motion for a new trial upon the general grounds was made by the defendant, and amended by the addition of the following ground: "Because the court rejected parol evidence offered by the defendant, tending to show that at the time of the execution of the contract the plaintiff and defendant agreed that the defendant had the right to all the tops, limbs, and trees unfit for timber within the dimensions specified, and defendant could use the same as he saw fit; that the defendant sold this wood at 20 cents per cord, there being 5,000 cords, within the time named in the contract, and it would have been removed from the land within that time; and that the defendant was wrongfully prevented by the plaintiff from delivering the wood." The motion was overruled, and the defendant excepted.

R. L. Gamble and Cain & Hardeman, for plaintiff in error. Jos. K. Hines and B. F. Walker, for defendant in error.

COBB, P. J. 1. "Timber" is not a word of invariable meaning. It may be used to designate wood suitable for building houses or ships, or for use in carpentry, joinery, etc., or trees cut down and squared, or capable of being squared, or cut into beams, rafters, boards, etc., or growing trees suitable for constructive uses, or trees generally, or woods, or a single piece of wood, whether suitable for use in some construction or already in use. Century Dict. Or the body, stem, or trunk of a tree. Bour. Dict., Rawle's Revision. The meaning to be given the term depends upon the connection in which it is used, and sometimes upon the occupation of the person who uses the term. In construing a contract where the word appears, it is not only proper, in determining what is intended by the parties, to look to the terms of the contract, but also the occupation of the contracting parties, and the purpose for which the contract was entered into. See, in this connection, United States v. Stores (C. C.) 14 Fed. 824. In the present case it is contended by one party to the contract that the term "timber" therein used conveyed all of the trees of the dimensions stated, except the stumps two feet high from the ground. The other party contends that under the contract only such portion of the trees was conveyed as was capable of being sawed into lumber. The controversy is as to the limbs and tops, which, it is conceded,

could not be converted into lumber. The contract was for all the timber for sawmill purposes, which means all the timber suitable for sawmill purposes. *Martin v. Peddy*, 120 Ga. 1079 (4), 48 S. E. 420; *Allison v. Wall*, 121 Ga. 823 (6), 49 S. E. 831. It is said that the contract was, in effect, for the sale of the trees, that the words "for sawmill purposes" were descriptive of the trees that passed, and that all of the trees of the size indicated, any portion of which was capable of being converted into lumber, passed under the contract. Of course, there may be a valid sale of trees which would pass to the purchaser every part and portion thereof. When, however, the contract under consideration is taken in its entirety, it does not appear that the parties had in mind any transaction involving the sale of the trees as such. The buyer was to locate a sawmill upon the premises. He was to have a given time to saw that which he bought into lumber. When the trees were cut for the purpose of sawing, a stump of a given height was to be left, and any cutting which left a stump of less than that height was to be a violation of the contract, and terminated the same. On the one side was the owner of the land and the trees; on the other side was the operator of the sawmill. The terms "timber for sawmill purposes," construed to mean timber suitable for sawmill purposes, was to such an extent descriptive of the article sold that all timber which could be sawed into lumber became the property of the buyer, and could be used by him for any purposes he saw fit, whether lumber or otherwise. *Gray Lumber Co. v. Gaskin*, 122 Ga. 342 (5), 50 S. E. 164. The fact, however, that the buyer was a sawmill man is to be looked into in determining whether, under the contract, it was the intention of the parties that any greater portion of the trees would pass than that which would be converted into lumber in the event the buyer saw fit so to use the same. When the occupation of the buyer is taken into consideration, and the contract is construed as a whole, the proper conclusion to be reached is that it was the intention of the parties that only such portions of the trees as were capable of being converted into lumber passed under the contract.

2. Complaint is made that the court rejected testimony that it was the intention of the parties at the time the contract was made that the buyer was to have the tops, limbs, and trees unfit for timber of the dimensions specified under the contract. There was no error in rejecting this evidence. The contract was in writing, and properly construed was unambiguous, and the effect of the evidence would have been to vary the terms thereof. In the case of *Richards v. Gilbert*, 116 Ga. 382, 42 S. E. 715, relied on by counsel for plaintiff in error, the parol evidence as to the understanding between

the parties that at the time of the execution of the mortgage it was understood that certain counters and tables which were in the store of the mortgaged premises was admitted without objection, and the case was decided upon the evidence as it appeared in the record. Attention is called to this fact in *Wolff v. Sampson*, 123 Ga. 400, 51 S. E. 335.

Judgment affirmed. All the Justices concurring.

(124 Ga. 396)

ROUNTREE v. JONES.

(Supreme Court of Georgia. Nov. 20, 1905.)

JUDGMENT — DORMANCY — ENTRY OF EXECUTION.

An entry of the execution on the general execution docket will not prevent the dormancy of a judgment rendered in the superior court, where the execution has not been placed on the execution docket of that court within seven years from the rendition of the judgment.

Candler and Lumpkin, JJ., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by S. S. Rountree, surviving partner, against M. F. Jones. Judgment for defendant, and plaintiff brings error. Affirmed.

S. S. Rountree, as surviving partner of A. J. Rountree & Son and A. J. Rountree & Co., alleging himself to be an execution creditor of William Jones, seeks to enjoin the commission of waste by the defendant, M. F. Jones, upon land alleged to be owned by the estate of William Jones, and included in a homestead which had been set apart to him and which had not terminated. On the hearing for an interlocutory injunction, the court, after considering the evidence, refused to grant an injunction, and the plaintiff assigns such refusal as error in his bill of exceptions. The controlling question is as to the dormancy of the judgments on which the plaintiff's executions issued. Three executions were tendered in evidence: (1) One in favor of A. J. Rountree & Son against Martha J. Jones and William Jones, issued from the superior court of Brooks county on February 23, 1894, based on a judgment rendered November 7, 1893, with the following entries thereon: "Entered on General Execution Docket, Feby. 23, 1894. James D. Wade, Jr., Clerk." "No property to be found on which to levy this fi. fa. Feb. 11th, 1901. A. J. Conolly, Shff." "Received \$10.31 from A. J. Rountree & Son, in payment of my cost. Oct. 3, 1895. J. D. Wade, Jr., Clk." Also an entry of levy on land lot 494, made by the sheriff on May 2, 1905. (2) An execution in favor of A. J. Rountree & Son against Martha J. Jones and William Jones, issued from the superior court of Brooks county on February 23, 1894, upon a judgment rendered November 7, 1893, with the following entries: "Entered on General Execution Docket, Feby. 23, 1894. J. D. Wade, Jr., clerk." "No property

to be found on which to levy this *fi. fa.* A. J. Conoly, Sheriff. Feb. 11th/1901." (3) An execution in favor of Rountree & Co. against Martha J. Jones and William Jones, issued from the superior court of Brooks county on June 13, 1891, and based on a judgment rendered May 7, 1891, with the following entries thereon: "Entered on General Execution Docket, June 13th, 1891. J. D. Wade, Jr., Clerk." "Received from defendants the cost on this execution Oct. 1st, 1894. J. D. Wade, Jr., Clk." "No property on which to levy this *fi. fa.* June 4, 1898. A. J. Conoly, Sheriff." "I have this day levied the within *fi. fa.* on the north half of lot of land No. 473 in 12th district of Brooks county, Ga., containing 204½ acres, as the property of William Jones, one of the defendants. Nov. 14, 1901. A. J. Conoly, Shff." "We, the jury, find the property not subject. C. W. Dennis, Foreman." The first-named execution, with the following entry, was entered February 11, 1901, on the execution docket of the superior court of Brooks county: "No property to be found on which to levy this *fi. fa.* Feb. 11, 1901. A. J. Conoly, Shff." The second execution, with the following entry, was on Feb. 11, 1901, recorded on the execution docket of Brooks superior court: "No property to be found on which to levy this *fi. fa.* A. J. Conoly, Shff. Feb. 11, 1901." The third-named execution was, on January 1, 1899, entered on the execution docket of the superior court of Brooks county, with these entries indorsed thereon: "Received of defendants the cost on this execution. Oct. 1st, 1894. J. D. Wade, Jr. Clerk." "No property on which to levy this *fi. fa.* June 4th, 1898. A. J. Conoly, Sheriff."

D. W. Rountree and J. D. Wade, Jr., for plaintiff in error. L. W. Branch, for defendant in error.

EVANS, J. (after stating the facts). It will appear from the foregoing recitals that more than seven years had elapsed since the rendition of the different judgments before they were entered on the execution docket of the superior court of Brooks county. The judgments were therefore dormant. "In order to prevent dormancy of a judgment, it is required that an execution shall be issued on such judgment, and placed upon the execution docket within a period of seven years from the date of the rendition of the judgment." *Easterlin v. Sewing Machine Co.*, 115 Ga. 305, 41 S. E. 595; Civ. Code 1895, § 3761. When this section of the Code was considered in *Hollis v. Lamb*, 114 Ga. 740, 40 S. E. 751, it was held that the act of 1885 (which is codified in section 3761) "made practically but one change in the law, * * * and that was that the entries made on an execution by the officer, which were sufficient to prevent its dormancy, should be entered upon the execution docket of the court from which it issued," and that

dormancy could also be prevented, without compliance with the terms of the act of 1885, if the plaintiff did any public act indicating an active and bona fide attempt to enforce his execution against the property of the defendant within the stated period. Counsel for the plaintiff in error frankly concedes that the entry of the executions on the general execution docket "does not meet the requirement of Civ. Code 1895, § 3761, which requires that an execution and the entries thereon shall be placed "upon the execution docket of the court from which the same issued;" but he does contend that the record of the executions and the entries thereon upon the "general execution docket" was such a public act as would, between the parties, arrest the running of the dormancy statute. This identical question was before this court in the case of *Columbus Fertilizer Co. v. Hanks*, 119 Ga. 950, 47 S. E. 222, and was decided by a divided court. In the opinion of the majority, the ruling was announced that a judgment will not be kept in life and the running of the dormancy statute arrested by a record of an execution and its entries on the general execution docket; and further, that an entry on the general execution docket was not such a public act as would prevent the judgment from becoming dormant. The arguments supporting both the majority opinion and the dissent were forcibly presented, and the writer, after much deliberation, believes the conclusion reached by Chief Justice Simmons in the majority opinion states the correct view on the subject.

Plaintiff in error further contends that the executions were not dormant because of the effort of the plaintiff to subject this land to the lien of his *fi. fa.* by an equitable proceeding, which terminated in an adverse decree in 1894. In support of this contention, he refers to the following recital of fact in the bill of exceptions: "It was admitted that a bill in equity was filed by the plaintiffs, in which it was sought to subject this lot, together with other lands, to several *fi. fas.* of Rountree & Co. and A. J. Rountree & Son, and that by decree rendered at the May adj. term, 1894, this lot was held to be exempt from levy and sale at that time because same was homestead." If this quoted extract had appeared in the bill of exceptions, with nothing to indicate the contrary, it might well be assumed that the *fi. fas.* therein referred to were the same as the ones which are concerned in the present suit. However, the bill of exceptions shows that the definite article "the," which was therein inserted immediately preceding the words "several *fi. fas.* of Rountree & Co. and A. J. Rountree," was stricken. No other inference can be drawn from the striking of this single word, so definite in its application, than that the *fi. fas.* in the present suit are not identical with any of those involved in the for-

mer equitable litigation. Had their identity appeared, perhaps this would have amounted to such an act of public nature as would have avoided dormancy.

Something was said in the briefs about a pending claim case which would save the execution from dormancy. The only hint about a claim case was a reference in the answer to a claim case which was pending in the Supreme Court. The record before us does not disclose that the *fi. fas.* now under consideration were those under which an attempt was made to subject other land of the defendants in execution, or that the litigation arose within seven years from the date of the judgments. Hence, this reference to a claim case, made in the defendant's answer, standing alone, does not constitute an admission that the plaintiff took any steps towards enforcing the executions, which had the effect of arresting the dormancy statute.

Judgment affirmed. All the Justices concurring, except CANDLER and LUMPKIN, JJ., dissenting.

CANDLER, J. (dissenting). I can add nothing to what was said by Mr. Justice Turner in his dissenting opinion in the case of Columbus Fertilizer Co. v. Hanks, 119 Ga. 955, 47 S. E. 222. With the views there expressed I was then, and am still, in accord, and I am therefore compelled to dissent from the judgment of the majority in the present case.

(124 Ga. 154)

BOOTH et al. v. ROSIER.

(Supreme Court of Georgia. Nov. 10, 1905.)

CONTRACT—CONSTRUCTION.

B., as the transferee of a security deed, and N., as the transferee of another security deed, were proceeding to execute the powers contained in said deeds by advertising for sale the tracts of land described and conveyed in each of said deeds, respectively, which said tracts were subdivisions of a common tract. R., who had purchased the equity of redemption of the property conveyed by each of said deeds, and who claimed title to both of said tracts, and proposed to contest the title of B. and N., filed a petition for injunction against N., and agreed with B. that the advertisement of sale under the power in the latter's deed should be withdrawn pending the judicial adjudication of the claims of N. and R., "and the expense of said advertisement will be paid by such person as should not prevail in the case." N. prevailed in the contest between N. and R. Thereupon R. paid principal, interest and costs, but not attorney's fees to N., and tendered to B. the amount of principal and interest of her notes, for securing the payment of which her said deed had been executed, and paid the advertising fee, as agreed. B. refused to receive the amount of said tender unless 10 per cent. in addition, as attorney's fees, should also be paid. This R. refused to do, and deposited the amount of his tender with the clerk of the court, and B. readvertised for sale the property described in her deed, insisting that she was entitled to recover attorney's fees; whereupon R. filed his equitable petition, setting forth the foregoing facts, and praying that B. be restrained and enjoined from further proceeding under the power of sale. Upon the hearing of the

rule, the court below granted the injunction as prayed for. *Held*, that B. was not entitled to attorney's fees, and that the court did not err in so ruling.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by J. M. Rosier against E. B. Booth and F. W. Capers. Judgment for plaintiff, and defendants bring error. Affirmed.

J. M. Rosier filed his equitable petition against Mrs. Edith B. Booth and F. W. Capers, her attorney, praying that the defendants be restrained and enjoined from advertising the land of petitioner for sale under a power contained in a security deed held by Mrs. Booth as transferee, and alleging, in substance, as follows: On November 17, 1900, one Pearson conveyed the land now sought to be sold to John D. Sheahan to secure a debt of \$500. Sheahan transferred the deed to Mrs. Booth. Pearson sold his equity in the land to one Driggers, who sold it to the Planters' Loan & Savings Bank, and the bank, on February 10, 1905, conveyed the same to petitioner, who has likewise become the owner of the bond for title issued by Sheahan to Pearson at the time the deed was executed, and petitioner is now in possession of the land. One of the interest installments of the note given to Sheahan by Pearson contemporaneously with the security deed became due December 1, 1904, and was not paid; whereupon Mrs. Booth, the transferee of the note and deed, elected to mature the entire debt, principal and interest, and proceeded, through her attorney, Capers, to advertise the land for sale under a power contained in the deed. The advertisement, however, was withdrawn, by agreement between petitioner and defendants, pending the trial of the case of petitioner against H. P. Nichols, under the terms of which agreement petitioner paid the expense of advertising incurred by the defendant Booth. On June 1, 1905, which was after the adjudication of the case of Rosier v. Nichols, the petitioner tendered to the defendant Booth the amount of principal and interest due upon the debt, but she refused to accept the same, demanding in addition thereto 10 per cent. of the principal as attorney's fees. Petitioner declined to pay the additional 10 per cent., alleging that the obligation to pay attorneys was void, as neither he nor his grantor, Pearson, had been sued, and filed defenses which had not been sustained, nor had they been given notice of an intention to sue. Rosier then deposited the amount due, principal and interest, with the clerk of the superior court, thus making his tender continuous. On June 26, 1905, Mrs. Booth notified Rosier of her intention to advertise and sell the property under the power contained in the deed given to secure the debt. Sheahan is dead, and one Schweigert is his executor, and petitioner prays that the defendants be restrained from advertising the property for sale, and that the debt se-

cured by the deed be decreed paid, the deed satisfied and canceled, and Mrs. Booth and her grantor, by his executor, be required to comply with the terms of the bond for title, and to reconvey the property upon the payment of the debt. The power in the deed under which the defendants are attempting to sell the land is substantially as follows: "Now, if default is made in the payment of said note, or any part thereof, or any of the interest thereon when due, * * * then the whole amount of said note shall, at the option of the holder, * * * become immediately due and payable without notice to the first party; and in the event said note shall be collected through an attorney at law, * * * or by sale of the property, * * * the said party of the first part hereby agrees * * * to pay all costs and collection, including 10 per cent. attorney's fees on the same, and the said party of the second part shall have the right to proceed * * * to sell the property, * * * first giving public notice of the time, terms, and place of sale, and of the property to be sold, by advertisement once a week for four weeks in some newspaper printed and published in the county in which the land is situated."

In their answer the defendants admit all the plaintiff's allegations, except that petitioner is ready and willing to pay the debt due Mrs. Booth, which they deny, because petitioner refuses to pay the amount demanded by defendants as attorney's fees. They also deny the allegation that petitioner had filed no defense to the claim of Mrs. Booth, averring that petitioner had brought a bill seeking to enjoin the collection of Mrs. Booth's debt, and unnecessarily and unjustly delayed and hindered the said Mrs. Booth in the enforcement of her legal right to collect her debt, which bill had been adjudicated to be without merit. Defendants further deny that the debt due by Pearson to Mrs. Booth was paid off and discharged by the tender of the principal and interest, and that the power of sale in said deed is dead. Upon the trial of the rule to show cause why the injunction prayed for should not be granted, the following agreed facts were submitted in evidence: The original petition in the case of Rosier v. Nichols, brought to the April term, 1905, of the Richmond superior court, the substance of which is set forth in the report of that case in 123 Ga. 20, 50 S. E. 988, the admitted facts that Frances E. Talbert and Horace C. Pearson were each children by Mary Pearson, and each derived title to their respective tracts of land through the deeds referred to in the petition of Rosier v. Nichols, and that each under like deeds "pledged said tract with John D. Sheahan." Affidavits were submitted to support the contentions of both petitioner and defendants, the contents of which, however, are not essential to a clear understanding of the case. The agreement entered into by the petitioner and defendants, whereby Mrs. Booth agreed to withdraw the ad-

vertisement of the sale of the property pending the adjudication of the case of Rosier v. Nichols, is as follows: "J. M. Rosier, being in possession of what is generally known as the Pearson property, and claiming title thereto, and against which Horace P. Nichols has a claim for some \$300 and interest, and Edith B. Booth a claim for \$500 and interest, the validity of which claims are disputed by said Rosier, it is agreed between counsel of the respective parties: (1) That said Rosier will institute suit contesting the claim of said Horace P. Nichols. (2) That the advertisement in the Chronicle of notice of sale by H. P. Nichols and Edith B. Booth shall be withdrawn pending the judicial adjudication of these claims, and the expense of said advertisements will be paid by such person as shall not prevail in said case." Rosier was cast in the suit, and he paid the expense of the advertisements. The injunction was granted, and the defendants excepted.

L. W. Capers, for plaintiffs in error. W. K. Miller, for defendant in error.

BECK, J. (after stating the facts). It will be observed in this case that there is no contractual obligation on the part of Rosier to pay attorney's fees, nor was he a defendant who had as such filed a plea which he afterwards failed to sustain. Plaintiff in error must rely upon the stipulation in the deed and note for the right to proceed for attorney's fees. But that stipulation was void, not merely voidable, unless the defendant in error or Pearson had done some act to give vitality and force to that stipulation; and the only act that could have been done to give force and effect to the obligation to pay attorney's fees, embodied in the note and security deed, was to file a plea which upon trial should have proved to be without merit. Under Civ. Code 1895, § 3867, as it stood before the act of 1900, an obligation to pay attorney's fees upon a note in addition to the stipulated rate of interest, whether such obligation be contained in the note or in the deed, is void unless that obligation is given force and effect by the defendant's filing a plea or pleas which are not sustained. The section last referred to was under construction in the case of Hall v. Pratt, 103 Ga. 258, 29 S. E. 764, and in discussing its effect Lumpkin, P. J., said: "All contracts to pay attorney's fees incorporated in promissory notes or other evidences of indebtedness must be construed in the light of section 3867 of the Civil Code of 1895, which by operation of law constitutes a part of all such contracts, and renders them void 'unless a plea or pleas be filed by the defendant and not sustained.' A promissory note, therefore, which stipulates for the payment of attorney's fees in the event of its collection by law, must be construed as if it embraced a condition to the effect that such promise is not to be binding unless the maker

of it files a plea or pleas and fails to sustain the same." Plaintiff in error himself invokes the ruling in the case of *Hall v. Pratt*, supra, and contends that it is in one respect analogous to the case at bar, in that in both there is a third party who is attempting to escape the conditions of the statute by holding his principal passive while he urges a meritless defense; but the supposed analogy does not exist, for in the case just cited the party denying in vain his liability for attorney's fees was not a third party relatively to the contract there sought to be enforced, and which contained an obligation to pay attorney's fees, for he had indorsed the note, and thereby became a party to the contract embodied therein, and, as the writer of that opinion says, "he also undertook and promised on his part the payment of attorney's fees in the event he filed and failed to sustain a plea."

The plaintiff in error contends that Rosler's bill against Nichols was an attack upon the title of Booth as well as Nichols. The record in this case and that in the case of *Rosler v. Nichols*, 123 Ga. 20, 50 S. E. 988, does not support this contention. Booth would not have been concluded by a decision in behalf of Rosler in the case of *Rosler v. Nichols*. She had expressly declined to accept a proposed agreement to the effect that the judgment in the latter case should be conclusive as to her. So Rosler had not sued Booth, or failed to maintain as against her a meritless defense. If the latter had been delayed in the prosecution of her remedy, she had been delayed by an agreement voluntarily entered into by her counsel to await the termination of a judicial contest that made her way plain before her, and she is not entitled to attorney's fees as against this defendant in error.

As to Pearson, the grantor in the deed and maker of the obligation to pay attorney's fees, that obligation is void. He has not been sued, or, if the proceeding to exercise the power of sale in the deed be analogous or equivalent to a suit against him, it was voluntarily abandoned in consequence of an agreement with a third party, and the promise to pay attorney's fees, so far as it affects him, is absolutely void. He never did aught to give it life or force. *Stoner v. Pickett*, 115 Ga. 653, 42 S. E. 41; *Demere v. Germania Bank*, 116 Ga. 317, 42 S. E. 488.

Judgment affirmed. All the Justices concurring.

(124 Ga. 215)

SMITH v. STATE.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. HOMICIDE—INSTRUCTIONS.

The charge of the court was adjusted to the facts of the case as presented by the evidence, in no view of which was the homicide either voluntary or involuntary manslaughter.

2. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

A correct charge presenting the law as to

reasonable doubt concerning the whole case is all that one accused of a criminal offense is entitled to. It is not incumbent upon the court to carve the case or the evidence into different propositions, and apply the rule as to reasonable doubt to one or more of them severally.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1991.]

3. SAME—INSTRUCTIONS.

There is no merit in the complaint of the accused that the court failed to correctly instruct the jury as to how they should arrive at the truth of the case as disclosed by the testimony. The court fairly and impartially presented to the jury the contention of the respective parties, and the evidence warranted the conviction of the accused.

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Fred Smith was convicted of murder, and brings error. Affirmed.

The plaintiff in error, Fred Smith, was indicted for murder, the indictment charging him with shooting one Pete Threat. When the case was called for trial, the Solicitor General announced that he had ascertained that the name of the person killed was Pete Threat, and proposed to nolle pros. the indictment, and draw another, charging the accused with the murder of Pete Threat. Thereupon counsel for the accused waived the "seeming defect in the indictment on that account, and agreed to go to trial waiving said defect, and agreeing that the party referred to as killed was the same party as named in the indictment." A trial was had accordingly, the accused interposing the defense that another, and not he, had fired the shot that killed Pete Threat, whom the evidence disclosed was killed while sitting in a chair in one corner of a house at which a dance was in progress. An altercation had occurred in the middle of the floor as to who should be the partner of one of the women present, and she and several other women gathered in the corner where Threat was sitting, apparently asleep, and began "fussing." He took no part in the controversy. According to testimony delivered by some of the state's witnesses, the accused, without any provocation or excuse, drew his pistol, and fired in the direction of the crowd gathered around Threat. One of the witnesses swore that the accused had been sitting in a window across the room, and that without any warning he got up from the window, leaned over, and shot, saying, "I shoot you damn niggers about trying to fuss in here," and that he started to shoot again, when his sister exclaimed, "My brother! Stop him! Stop him! He is ruint." The accused had previously taken no part in the altercation, nor was his sister or any other relative involved in it. Evidence in behalf of the accused was introduced which tended to sustain his defense that he did not fire his pistol, but that another of the men in the room drew his pistol and fired the fatal shot, apparently without reason or any justification. The jury returned a verdict of guilt.

ty, and the accused excepts to the overruling of his motion for a new trial.

Evans & Evans, for plaintiff in error. Alfred Herrington, Sol. Gen., and Jno. O. Hart, Atty. Gen., for the State.

EVANS, J. (after stating the facts). 1. In view of the evidence upon which the state relied for a conviction, the court very properly charged the jury that should they find the accused fired a pistol into a crowd of persons engaged in a difficulty in a house where a dance was going on, and the shot struck a person and killed him, that notwithstanding the accused may have fired at no particular person, but fired for some reason of his own to stop the difficulty, recklessly, and without regard to human life, and with a disregard as to whom he should kill, the shooting would be an unlawful one, and he would be guilty of murder if he fired the pistol intentionally where people were fussing among themselves, and not with him, though he had no intention to shoot any particular person. The complaint that this charge was not warranted by the evidence is not well founded. It presented the theory of the state, and in the same connection the court presented the contention of the accused that he was not the one who fired into the crowd. In no view of the evidence would the jury have been authorized to find that the accused was guilty of either voluntary or involuntary manslaughter, so there is no merit in the further complaint of the accused that the court did not instruct the jury as to the law bearing on the subject of manslaughter. Where, in a case such as the present, there is no circumstance connected with the killing which shows any provocation or mitigation, the law presumes malice. Pen. Code 1895, § 62; Cook v. State, 98 Ga. 201, 18 S. E. 823.

2. In charging upon this branch of the case, the court told the jury that should they find the accused did not fire the pistol, and had nothing to do with firing it, but it was fired by some one else, it would be their duty to find the accused not guilty. It was not, as is insisted by counsel for the accused, incumbent upon the court to add: "Or, if you have a reasonable doubt as to these things, it would be your duty to give the defendant the benefit of the doubt and acquit him." The law relating to reasonable doubt was elsewhere in the charge fully presented, and the presiding judge concluded his charge by cautioning the jury that, should they have "a reasonable doubt as to whether or not the defendant fired the shot—did the shooting"—then it would be their duty to find him not guilty. The court, therefore, fully met every requirement of the law touching this phase of the case. McDuffie v. State, 90 Ga. 786, 17 S. E. 105; Carr v. State, 84 Ga. 250, 10 S. E. 626.

3. In giving to the jury the rules by which they were to be governed in determining the credibility to be given to the witnesses who

had been called on to testify, the court directed the jury to look to the manner of the witnesses on the stand, and instructed them that, should they, "in looking at the testimony in this manner, ascertain any bias or prejudice, relationship (if any such exist), or anything that influences their testimony," the jury could take the same into consideration in making up their verdict; and that they should also look to the opportunity the witnesses had to know the facts about which they testify, and "take into consideration all the facts and circumstances attending the introduction of the testimony, and give to the testimony of the witnesses such weight and credit" as the jury might believe it was entitled to. This instruction is excepted to on the ground that the jury were thereby limited, in their consideration of what had been proved, to the "manner of the witnesses on the stand," and to the "facts and circumstances attending the introduction of evidence," and were not permitted to look to the evidence itself to ascertain whether any bias, prejudice, or relationship, or anything else existed which influenced the testimony of the witnesses, or to ascertain what was the truth of the case. The instruction to which exception is taken was given in connection with other instructions on the same subject, and the jury could not have been thereby misled into the belief that they were not to look to the testimony itself, as well as to the circumstances attending its introduction, in determining its probative value.

Another complaint is that the court, in stating the contentions of the respective parties, gave a stronger emphasis to the side of the state than to that of the defendant, in that the court informed the jury that the state contended that the "facts and circumstances as proven showed that this homicide was murder," and, on the other hand, merely stated that "the defendant contended that he was not guilty of the charge," which statement "was calculated to impress the jury that the defendant was depending upon his own statement alone, rather than upon the sworn evidence, while the state was relying upon sworn evidence." The accused could not have been prejudiced by this fair statement of the issue presented for determination by the jury. So far as appears, he was afforded an impartial trial, and his conviction was fully warranted by the evidence.

Judgment affirmed. All the Justices concurring.

(124 Ga. 223)

BENNETT & CO. v. FARMERS' & MERCHANTS' BANK.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. APPEAL—REVIEW—REFUSAL OF NEW TRIAL.

Where a ground of a motion for a new trial alleged that the court erred in admitting in evidence, over objection, the warehouse book of a certain company, in the absence of any evidence as to the correctness thereof, as movant contends, while kept by a named person, "it be-

ing the entries made by him that were sought to be proven by the books," and where such ground stated that "movants contend" that the admission of the evidence was error because the rules of law laid down for the introduction of books of account were not complied with, but neither set out the entries alleged to be inadmissible, nor showed that this ground of objection was urged at the time when the evidence was tendered, such ground does not raise any question for adjudication by this court.

2. SAME—WAIVER OF OBJECTIONS.

The ground of the motion for a new trial, alleging that certain evidence was admitted which was objected to as hearsay, was not mentioned in the brief of counsel for the plaintiffs in error, and will be treated as not urged.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4256, 4259.]

3. APPEAL—REVIEW.

The verdict is supported by the evidence. (Syllabus by the Court.)

Error from City Court of Sandersville; P. R. Talliaferro, Judge.

Action between Bennett & Co. and the Farmers' & Merchants' Bank. From a judgment, Bennett & Co. bring error. Affirmed.

G. H. Howard and Evans & Evans, for plaintiff in error. Marion Turner, E. W. Jordan, and J. K. Jordan, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 224)

STEWART v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. TRIAL—INSTRUCTIONS—CURING ERROR.

"Due care according to age and capacity is all the law exacts of a child of tender years. Ordinary care, which is that of every prudent man, is not the standard for a child." *W. & A. Railroad Co. v. Rogers*, 30 S. E. 804, 104 Ga. 224. A charge fixing such a standard for a child of tender years would be erroneous; but when, in immediate connection with the charge establishing the usual standard of ordinary care, the court instructs the jury correctly as to the true degree and measure of diligence and care which a child must observe under the actual circumstances, the inappropriate charge does not constitute reversible error.

2. NEGLIGENCE—INJURY TO CHILD—INSTRUCTIONS.

The plaintiff's case was based upon the negligence of the defendant's servants in cutting down a pole in a street without taking proper precautions to insure the safety of persons using the street within reach of the falling pole. The court's charge fairly stated plaintiff's contention. In the absence of a written request for a more specific statement of her contentions as to the constituent elements of the alleged negligence, the charge was sufficiently comprehensive.

3. TRIAL—INSTRUCTIONS.

The judge having charged the jury that they should determine the questions at issue in the case by the evidence, it was not incumbent upon him to further instruct them that they should determine any particular one of the issues by the evidence, especially in the absence of a written request to do so.

4. NEGLIGENCE—EVIDENCE.

The verdict was authorized by the evidence,

and there was no error in any of the other charges complained of, requiring a reversal.

(Syllabus by the Court.)

Error from City Court of Sandersville; P. R. Talliaferro, Judge.

Action by Mamie Bell Stewart, by her next friend, against the Southern Bell Telephone & Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Mamie Bell Stewart, a child eight years old, was hurt by a falling post of the Southern Bell Telephone & Telegraph Company. By next friend she brought suit against that company for damages, alleging that her injury was sustained by reason of the negligence of the company's servants who were engaged in cutting down the post, which was upon the public highway, "without the use of guy wires, ropes, or props with which the fall of said pole could be controlled," and without having "some person stationed at or near the said pole to notify the public, or warn them of impending danger," and that "they failed to notify the said Mamie Bell Stewart of her danger in time for her to avoid the same; she being a child only eight or nine years of age." The defendant company answered, admitting that the pole was cut down in the public street without the use of guy wires, ropes, or props, but denying liability, averring that one of its servants was stationed near the pole for the purpose of warning the public, and that the plaintiff was warned of the danger and admonished to keep away, but she disregarded the warning, and was hurt by reason of her own gross negligence. Upon the trial of the case there was some conflict in the evidence in reference to the time when the plaintiff was warned. The witnesses for the plaintiff testified that she was notified too late to get out the way of the pole, and that she was allowed to walk directly under it just as it was falling, without being told of her peril; while the defendant's witness swore that she was given ample notice, and that the servants of the defendant did all in their power to prevent the injury, which was caused by the plaintiff's gross negligence in disregarding all warning and running under a falling pole. The plaintiff herself testified that she was not warned of the danger, nor was she conscious of it until it was too late to save herself, but upon being cross-examined she said: "If I had stopped when they hollered and told me to look out, I wouldn't have been hurt. The truth is I thought I could get over there before that pole fell on me. * * * When those young men hollered and told us to look out, the other children stopped, but I didn't; I just run ahead anyway. The young men did everything they could to keep it off me." The child's mother testified that she was a "smart, bright little girl." The jury brought in a verdict for the defendant, and the plain-

tiff made a motion for a new trial upon the general grounds, and because of certain errors alleged to have been committed in the charge of the court. The extract, "Now, I charge you further, if the plaintiff by ordinary care could have avoided the consequences to herself caused by the defendant's negligence, she is not entitled to recover," is assigned as error, for the reason that it tended to instruct the jury that the usual standard of ordinary care is applicable to a child of tender age, as the court had in a previous portion of the charge given the definition of ordinary diligence as contained in Civ. Code 1895, § 2898. It appears from the record that immediately preceding the language quoted the judge had instructed the jury as follows: "The question also will arise what would amount to due care on the part of a child eight years of age? Now, I charge you that due care in a child eight years old is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation, and is determined by the jury. When of tender years, and consequent immaturity of understanding, a child is not amenable to so high a standard of diligence. In regard to his or her own safety as that which adults are obliged to observe. Such care as the capacity of the particular child enables it to use naturally and reasonably is what the law requires upon the part of the child." Error is also assigned because the court stated to the jury that the contention of the plaintiff was that while she was passing across a public street the defendant company "cut down a pole upon her, and that defendant * * * failed to exercise that ordinary diligence and care in cutting down said pole that they ought to have taken, and on account of their failure to do so she had been injured," instead of stating to the jury plaintiff's true contention, which was that the defendant was "grossly negligent in cutting down the said pole across the street without having the proper appliances to control the falling of the pole, and thus protect the traveling public from danger, and that the failure to so secure the falling pole was gross neglect, which amounted to an invasion of the right of the public; and further, that plaintiff had the right to be on the said street, and was not under any necessity to take precautionary measures to escape an unforeseen danger." The charge, "Was the plaintiff warned, when the axman was cutting down the pole, of danger, and was she of sufficient mental capacity to understand the danger before her, and did she voluntarily rush into the danger and was thereby injured? If you should find these facts to be established by the proof in this case, then plaintiff would not be entitled to recover," is assigned as error, because, as plaintiff contends, it tended to instruct the jury as to the particular acts which

would constitute negligence, instead of leaving to the jury to decide what was and what was not negligence on the part of the child. This portion of the charge is further attacked because the word "warned," as used therein, was misleading to the jury, leaving them to construe that any warning, no matter at what time given, was sufficient to shift the negligence upon the plaintiff. Plaintiff further contends that this charge was an intimation by the court that the plaintiff voluntarily rushed into danger. The motion further assigns error because "the court failed to charge that if plaintiff used due care for a child of her age and mental capacity, and that defendant was negligent, she would be entitled to recover, but charged instead that she must have used ordinary care, thereby placing upon plaintiff a burden which she was not charged with under the law;" and again, "because the court failed to charge that they [the jury] were to determine from the evidence what would be due care upon the part of the plaintiff, and that they must look to the evidence, and see whether or not she did use such care as she was capable of exercising, under the actual circumstances and the situation actually existing at the moment." The motion was overruled, and the plaintiff excepted.

W. E. Ormistead and E. W. Jordan, for plaintiff in error. Hardwick & Hyman and Hunt, Chipley, Osborne & Lawrence, for defendant in error.

BECK, J. (after stating the facts). 1. Had the court charged without qualification that, "if the plaintiff by ordinary care could have avoided the consequence to herself caused by defendant's negligence, she is not entitled to recover," the duty of this court, under the facts of the case, to reverse the judgment of the court below would be clear; but while the trial judge instructed the jury in the language of this extract from his charge, he also charged, in immediate connection with the same, the proper rule as to the standard of care and diligence for a child of tender years. In the instruction immediately preceding that quoted, the trial judge had given the jury the following explicit directions: "Now, gentlemen, you ask this question: Was the plaintiff warned, when the axman was cutting down the pole, of danger, and was she of sufficient mental capacity to understand the danger before her, and did she voluntarily rush into the danger, and was thereby injured? If you should find these facts to be established by the proof in this case, then the plaintiff would not be entitled to recover; but if, on the other hand, you find that she was not warned, and that the defendant was not exercising proper care and proper diligence, and she was hurt—injured—then she would be entitled to recover. The question also will arise, what would amount to due care upon the part of a child

of eight years of age? Now, I charge you that due care in a child eight years old is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation, and is determined by the jury. When of tender years, and consequent immaturity of understanding, a child is not amenable to so high a standard of diligence in regard to his or her own safety as that which adults are obliged to observe. Such care as the capacity of the particular child enables it to use naturally and reasonably is what the law requires upon the part of the child." The court below here imposed upon the defendant the duty of exercising due care and diligence, and also of warning the plaintiff, and fully, clearly, and unmistakably instructed the jury as to the law for determining what is due care upon the part of a child. He directed their minds to the very question that would arise in their investigation—the question of care and diligence of one of plaintiff's age. Construing the entire charge together, we are constrained to believe that the jury could not have failed to understand what constitutes due care on the part of one of the plaintiff's tender years, and that the plaintiff was not required to prove on her part conformity to any higher standard.

2, 3, 4. The headnotes deal sufficiently with the other assignments of error in the motion for a new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 228)

LEWIS v. OWENS.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. MASTER AND SERVANT—LABORER'S LIEN—FORECLOSURE.

Under the contract in this case, as established by the evidence in the record, the relation of landlord and cropper existed between the plaintiff and defendant; and under the rulings in other cases decided by this court the plaintiff was entitled, upon the completion of her contract of labor, to foreclose her special laborer's lien against the defendant.

2. SAME—DEFENSES.

And where the undisputed evidence proved that the cropper had completed her contract of labor, save that a part of the crop remained ungathered and was seized by the sheriff under levy of valid process against her landlord, she being thus prevented by the law from completing her contract according to its terms, it was error to dismiss her case "on the ground that the evidence showed the contract of labor had not been completed by the plaintiff at the time she foreclosed her laborer's special lien."

(Syllabus by the Court.)

Error from City Court of Sandersville; Frank Mitchell, Judge.

Action by Bettie Lewis against Henry Owens. Judgment for defendant, and plaintiff brings error. Reversed.

Bettie Lewis brought an action against Henry Owens to foreclose a laborer's special lien for labor performed. It appeared upon

the trial that the plaintiff had contracted with the defendant to work a one-horse farm "on halves." Under the terms of the contract Owens was to furnish the land, a mule and his feed, and all necessary farming implements, while it was incumbent upon the plaintiff to furnish all labor necessary to make and gather the crop. The undisputed evidence was that the plaintiff furnished the labor and made the crop and had almost harvested it, when she was stopped by the sheriff under foreclosure proceedings brought by the owner of the land against Owens; it appearing that Owens rented the land from another. When the landlord foreclosed, the plaintiff brought the present action. It further appears that after the foreclosure by the sheriff he hired the plaintiff to gather that portion of the crop still remaining in the fields, but has paid her nothing for that service. Moreover the sheriff seized the crop which had been gathered by the plaintiff before the levy was made, as well as that which was gathered by him, and sold it all at auction. At the conclusion of the evidence the plaintiff announced closed, whereupon the defendant moved the court to dismiss the case on the ground that the contract of labor had not been completed at the time the plaintiff sought to foreclose her lien. The motion was sustained and the case dismissed, to which ruling the plaintiff excepted.

Evans & Evans, for plaintiff in error.
Howard & Jordan, for defendant in error.

BECK, J. Judgment reversed. All the Justices concurring.

(124 Ga. 239)

MEDICAL COLLEGE OF GEORGIA v. RUSHING.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. COLLEGES AND UNIVERSITIES—ACTIONS—SERVICE OF PROCESS—OFFICERS.

The Medical College of Georgia is a public eleemosynary corporation, and neither by its charter, nor by laws adopted under authority of its charter, is a member of the faculty of that institution, or the dean thereof, such an officer or agent of the corporation as is contemplated in Civ. Code 1895, §§ 1899, 1900, providing for service of suits against a corporation by serving one of its officers or agents.

2. PROCESS—ISSUE.

The clerk of the city court of Richmond county has no power, without some direct and express order of the court, to issue more than one process in a suit against a single defendant.

3. COURTS—JURISDICTION—PLEADING—RULING ON DEMURRER.

As the defendant had not been legally served, the court was without jurisdiction to pass upon a demurrer filed by the defendant, under protest that it was not legally before the court.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by James L. Rushing against the Medical College of Georgia. Judgment for

plaintiff, and defendant brings error. Reversed.

James L. Rushing brought suit against the Medical College of Georgia, a corporation, in the city court of Richmond county. The petition was filed on the 16th day of August, 1904, and process was attached returnable to the September term, 1904, of the court. Service of this suit was made on Dr. De Saussure Ford, and the following entry of service was made: "State of Georgia, Richmond County. I have this day served the defendant, Dr. DeSaussure Ford, president of the Medical College of Georgia, personally with a copy of the within petition and process, at Augusta, Ga., this 17th day of August, 1904. G. E. W. Britt, Deputy Sheriff, R. C. Ga." On September 16, 1904, the Medical College filed a traverse to this return of service, making the deputy sheriff a party, who, by leave of the court, amended his return of service so as to make it recite that service upon the defendant had been perfected by serving a copy of the petition and process personally upon Dr. De Saussure Ford, "dean of the faculty of the Medical College." On September 20, 1904, the clerk of the city court, under the direction of the plaintiff's attorney, and without any order of court, detached the original process, and attached to the petition a new process, returnable to the November term, 1904, of that court. A copy of the petition, accompanied by a copy of this new process, was on September 25th served by the deputy sheriff upon W. B. Young, as president of the Medical College. On November 15, 1904, the defendant filed a motion to vacate this entry of service and dismiss the suit, on the ground that the first process attached to the petition was made returnable to the September term, 1904, of the court, and that the clerk was without power, in the absence of an order of court, to detach this process after the convening of the September term, and attach another process to the petition, calling upon the defendant to answer at a later term. The defendant further moved to vacate the entry of service upon Dr. Ford, as dean of the faculty, and to dismiss the suit, on the ground that the original entry of service, as amended by the officer, failed to disclose that the person upon whom service was made was either an officer or agent of the corporation. On November 30th all of the pending issues as to service, both of law and of fact, were submitted to the judge for determination, who reserved his decision until January 20, 1905, when he overruled the traverse to the return of service, and declined to grant either of the motions to vacate the return of service and dismiss the petition. The defendant filed exceptions pendente lite to these rulings of the court. Subsequently, on March 1, 1905, the case came on to be heard upon a demurrer to the plaintiff's petition.

The court overruled the demurrer, and to this ruling the defendant excepted by suing out a bill of exceptions to this court.

Wm. H. Fleming, for plaintiff in error.
F. W. Capers, for defendant in error.

EVANS, J. (after stating the facts). 1. The suit was against the Medical College of Georgia, a public eleemosynary corporation and a branch of the University of Georgia. See Acts 1828, p. 111; Acts 1829, p. 107; Acts 1833, p. 130; Pol. Code 1895, § 1300. The original service was upon Dr. Ford, who was designated in the return of service as the "president of the Medical College of Georgia," but who, in the amended entry of service, was designated as "dean of the faculty of the Medical College." The undisputed facts brought to light on the trial of the traverse to the return of service disclosed that Dr. Ford was not the president of the college, but was elected a professor or instructor by the board of trustees, and that his co-instructors in the college, comprising the faculty, had selected him as their dean or executive head. The duty of managing the institution and examining into its affairs devolved upon the board of trustees. Act Dec. 20, 1828, § 4. The trustees, together with the regular professors in the institution, were constituted a board of examination, the duty of which was to decide on the merits of such candidates as may have studied in the institution, and complied with all the conditions imposed by the board of trustees as preliminary to the examination, and to confer the degree of bachelor of medicine on such as might be worthy of the same. Id. The trustees have authority to fill all vacancies in their body which may occur by death, resignation, or otherwise. Id., p. 112, § 10. The fourth article of the by-laws provided that the officers of the board of trustees should be a president, vice president, secretary, and treasurer, and an executive committee of three to be elected at each annual meeting. It was admitted that the professors in the Medical College were not paid salaries by the trustees, but that the faculty of the college, when elected by the board of trustees, took charge of the management of the college, and collected their own tuition fees, and met the expenses of the operation.

No argument is needed in support of the proposition that a teacher or instructor in an incorporated academy or college is in no sense an officer of the corporation. The co-operation of teachers and trustees as a board of examiners to decide on the merits of candidates for a degree to be conferred by the college relates solely to the educational feature of the project, and does not enter into the business management of the institution. In an ordinary private corporation, whose creation is primarily for the personal gain of its stockholders, and which in

the conduct of its affairs employs agents to carry on the general business, service of process on the corporation may be effected on any agent who has some sort of control or authority over some department or sphere of the corporation's business, but not upon a mere employé or servant. *Southern Bell Tel. Co. v. Parker*, 119 Ga. 721, 47 S. E. 194. Where the corporation is eleemosynary in its nature, and not conducted primarily for private gain, and its affairs are administered and superintended by a board of trustees or officers appointed for that purpose, persons employed to effectuate the general objects of the corporation cannot be said to be its agents, rather than its employées. A teacher in a college is employed to instruct the students. Many methods may be adopted to raise money with which to pay their salaries. It may be derived from an endowment, or from appeals to the general public, or from matriculation fees. The mode of providing the teacher's compensation does not affect the character of their employment. If the trustees of a school contract with teachers that their compensation is to be measured by the tuition fees less the expenses of operation, it cannot be contended the relation of the teacher to the school has been altered by this method of compensation. The arrangement, therefore, between the board of trustees and the faculty whereby the faculty was to defray the expenses of operating the college, and receive as compensation the tuition fees, will not serve to render the faculty or its dean either an officer or an agent in such a sense that process against the corporation may be served upon him so as to conclude the corporation.

2. As has been demonstrated, the service upon Dr. Ford as dean of the faculty of the Medical College was not binding on the corporation. The clerk had no authority, without an express order of court, to detach the original process which had been served upon Dr. Ford, and deliver the petition, with the second process attached thereto, for service upon the president of the college. "There being but one suit, one petition, one defendant, the clerk has no power, without some direct and express order of the court, to issue more than one process. A second process issued by him of his own will, after the appearance term of the case, is void." *Peck v. LaRoche*, 86 Ga. 314, 12 S. E. 638; *Rowland v. Towns*, 120 Ga. 74, 47 S. E. 581.

3. The demurrer was heard after the court's refusal to vacate the return of service and dismiss the suit. The defendant had duly protested that it had not been properly and legally brought before the court, and therefore did not, by interposing its demurrer, waive service. Inasmuch as the court erred in holding that the defendant had been legally served, its subsequent ruling on the demurrer was nugatory and of no effect.

Judgment reversed. All the Justices concurring.

(124 Ga. 354)

TOWN OF WADLEY v. LANCASTER.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. MUNICIPAL CORPORATION — CONTRACTS — PURCHASE OF FIRE ENGINE.

Under the Constitution of 1877 a municipal corporation cannot lawfully purchase a fire engine and apparatus and give negotiable promissory notes therefor, payable annually through a series of years; nor can a resolution passed at a mass meeting of citizens authorize such contract.

2. SAME—BILLS AND NOTES—INDORSEMENT—RIGHTS OF INDORSEE—DEFENSES.

A promissory note to the vendors, under a contract of the character described in the preceding note, payable to them or their orders, is invalid, even in the hands of a bona fide indorsee for value before it became due.

3. SAME — UNAUTHORIZED CONTRACTS — RETENTION OF BENEFITS—ESTOPPEL.

Although but one of the notes given in part for the purchase price of the property may have been paid, and possession of the property may have been retained, this did not prevent the municipal corporation from setting up the illegality of the contract in defense to a suit on the note.

4. SAME—RECEIVERS—GROUND FOR APPOINTMENT.

The holder of such note by indorsement from the original payee was not authorized to have a receiver appointed to take possession of the property, sell it, and pay the note.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; H. M. Holden, Judge.

Action by Lizzie O. Lancaster against the town of Wadley. There was judgment for plaintiff, and defendant brings error. Reversed.

Lizzie O. Lancaster brought suit against the town of Wadley, alleging as follows: On June 18, 1896, the defendant, acting through its intendant and aldermen, in pursuance of a resolution unanimously passed at a public mass meeting of citizens held for that purpose, purchased from Armstrong & Co., agents for a company dealing in apparatus for extinguishing fires, a quantity of such apparatus for the total sum of \$1,200. Of the purchase price \$200 was paid in cash, and five notes for \$200 each, payable annually, were given. All the notes were paid except the last. Being payable to order, the note was negotiable, and the plaintiff purchased it for value in open market before due. The defendant is still in possession of the fire apparatus and making use thereof, and has never tendered it back either to the plaintiff or to the seller, but refuses to pay the last note. The prayer was that a receiver or commissioner be appointed to take charge of the property, and make sale thereof, or of so much as might be necessary to pay the amount of the note; that a general judgment be rendered against the defendant for the amount due on such note, principal, interest, attorney's fees, and costs to be first paid out of the proceeds of the sale of the apparatus; and if they should not be sufficient, then out of any other property of the defendant subject to levy and sale. The copy note set out

in the petition began, "On the first day of November, 1901, we promise to pay," etc. It contained no reference to the town of Wadley, but was an ordinary promise to pay the sum of \$200, with 7 per cent. interest, payable semiannually, and with a provision for attorney's fees if collected by an attorney after maturity. It was signed "G. S. Johnson, Mayor," and had on it the statement "Attested by A. A. Chance, Clerk of Council, Wadley, Ga." Indorsed on it was the name of "J. A. Spier, Chairman Finance Committee of town of Wadley, Ga." Under this was the indorsement of the payees. The defendant demurred to the petition. The demurrer was overruled, and it excepted.

Phillips & Phillips, for plaintiff in error.
Wm. H. Fleming, for defendant in error.

LUMPKIN, J. (after stating the facts). The Constitution declares that no municipality shall incur any debt, except for a temporary loan or loans to supply casual deficiencies of revenue, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law. Const. art. 7, § 7, par. 1; Civ. Code 1895, § 5898. To do so is to violate the Constitution and to incur a debt illegally. For a municipal corporation to purchase a fire engine and apparatus, paying a part of the purchase money in cash and giving notes for the balance payable in installments extending over several years, amounts to the creation of such a debt, and, if done without the authority of an election, is illegal. *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907; *Hudson v. Marietta*, 64 Ga. 286. The cases of *Danielly v. Cabaniss*, 52 Ga. 211, and *Black v. Cohen*, 52 Ga. 621, were decided prior to the adoption of the Constitution of 1877. The Constitution of 1868, which was in force at that time, contained no such provision as that above referred to. Those decisions held that, where a municipal corporation has lawful authority to issue bonds or negotiable notes, they were binding in the hands of innocent purchasers, notwithstanding irregularity in the manner of the execution of the power. The town of Wadley, however, was not lawfully authorized to create such an indebtedness as is represented by the note sued on.

It is urged that the town, having retained and used the property, and having paid all except the last note, has ratified the acts of its officials in creating the indebtedness, or has estopped itself from denying the legality of such debt as against the bona fide purchaser of the note. "Powers of all public officers are defined by law, and all persons must take notice thereof. The public cannot be estopped by the acts of any officer done in the exercise of a power not conferred." Pol. Code 1895, § 268. What

a municipal corporation was without authority to do its officers could not make lawful by ratification. *Dorsett v. Garrard*, 85 Ga. 734, 11 S. E. 768. In *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 734, 32 S. E. 922, it is said: "Even if a benefit has been received by one of the contracting parties from a contract which is void because prohibited by the Constitution, or because contrary to public policy, the receiving of such benefit will not prevent the party receiving it from setting up, against a suit to enforce the contract, the defense that the contract was illegal and void." *Covington R. Co. v. Athens*, 85 Ga. 367, 11 S. E. 663. True, in those cases, the benefit was not in the form of personal property received and held; but the principle would not be different where the action is at law to enforce the illegal contract. The want of constitutional authority appears on the face of the petition. In the cases of *Ford v. Cartersville*, 84 Ga. 213, 10 S. E. 732, and *Lott v. Waycross*, 84 Ga. 681, 11 S. E. 558, the right of a municipal corporation to make an annual contract for a supply of water and lights was considered as giving the right to recover for gas and water consumed during the year. See, also, *Cartersville, etc., Co. v. Cartersville*, 89 Ga. 683, 689, 16 S. E. 25.

It is said that the town cannot retain the property under the contract of purchase, and at the same time refuse to pay the balance of the purchase money on the ground that the contract was illegal; and the plaintiff prays that the court appoint a receiver or commissioner to take possession of the property, sell it, and apply the proceeds to paying the note held by her. The plaintiff did not sell the property to the defendant; nor has she ever had title to it, or any lien or claim upon it; nor is it alleged that the payees who indorsed to her are not solvent and able to reimburse her. The property was not purchased with money advanced by her to the town, or arising from a sale to her of its note or obligation. The defendant had possession of the property long before the plaintiff obtained the note. What she acquired from the original payees was simply the transfer of a promissory note which the town had no authority to give. The suit is by her as indorsee. While certain allegations and prayers of the petition appear to have been drawn with a view to obtaining equitable relief, yet the case made at last rests on the validity of the note. The prayers are that a commissioner or receiver sell the property and pay the note, principal, interest, and cost, and that a general judgment be rendered on the note. It being illegal, the case based on it, and the effort to enforce it as a valid contract, must fail.

Judgment reversed. All the Justices concurring.

(104 Va. 684)

FOREMAN v. GERMAN ALLIANCE INS. ASS'N.

(Supreme Court of Appeals of Virginia. Dec. 14, 1905.)

1. EVIDENCE—ACTS OF AGENT—EXISTENCE OF AGENCY.

Where M. & Co., being both agents for defendant insurance company and for a building and loan association, paid certain premiums for the loan association accruing on policies issued by defendant on property in which the loan association had an interest, a receipt given by M. & Co. to the loan association for the aggregate of eight insurance premiums, one of which was the premium on the policy sued on, not appearing to have been given by them as agents of defendant insurance company, was not admissible as against it.

2. INSURANCE — VACANCY — FORFEITURE — KNOWLEDGE OF AGENTS.

Where M. & Co. were both the agents of defendant insurance company and of a building and loan association, for whose benefit certain property was insured by them, knowledge of the vacancy of the property acquired by M. & Co. as agents of the loan association, and not while attending to the affairs of the insurance company, and not shown to have been present in the minds of M. & Co. at the time they did any act with reference to the insurance as agents of the defendant, was not notice to defendant sufficient to constitute a waiver of a forfeiture by reason of such vacancy.

Error to Law and Chancery Court of City of Norfolk.

Action by C. B. Foreman against the German Alliance Insurance Association. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Robt. W. Mallet, for appellant. White, Tunstall & Thom, for appellee.

BUCHANAN, J. This was an action of assumpsit, instituted against the German Alliance Insurance Association on a fire insurance policy by C. B. Foreman, for the benefit of the Prudential Building & Loan Association.

The defense of the insurance company was that the premises, after the policy had been issued, became and remained vacant, in violation of that condition of the policy which declared that the entire policy shall be void if the building therein described be or become vacant or unoccupied for 10 days.

The plaintiff admitted such vacancy, but claimed that the forfeiture resulting therefrom had been waived by the insurance company. Upon the trial of the cause, the defendant, without introducing any evidence, demurred to the plaintiff's evidence. The court sustained the demurrer, and gave judgment for the defendant. To that judgment this writ of error was awarded.

It appears that the policy, which was for one year, was issued on or about the 8th of May, 1902, through Albert Morris & Co., the general agents of the insurance company in the city of Norfolk. A like policy had been taken out by the insured for the previous year; but upon his informing the build-

ing and loan association, which had a mortgage upon the property, that he could not pay the premium upon a policy for another year, that association took out the policy sued on in his name, with a provision that the loss, if any, should be payable to the building and loan association as its interest might appear. Albert Morris & Co. were also agents in that city for the Prudential Building & Loan Association, and were authorized to pay the premiums on policies of insurance in which it was interested, when such premiums fell due and were not paid, and could not be collected by them from the insured. The premium on the policy sued on not having been paid by the insured, Albert Morris & Co. paid it to the insurance company on the 5th of June.

On the 5th of July the insured vacated the premises, and between that time and the 10th of that month gave the key of the house to Albert Morris & Co., as the agents of the Prudential Building & Loan Association, informing them that he could not keep up the payments due the building and loan association on its loan secured upon the property. Albert Morris & Co. about two weeks after that, notified him that if he did not pay the premium they would have to collect it from the building and loan association. The insured did not pay them, nor did he know at that time that they had paid the premium to the insurance company under their agreement with the building and loan association. Between that time and the following October that association settled with or repaid Albert Morris & Co. the amount which they had advanced in paying the premium on the policy.

In November of that year the buildings on the premises were destroyed by fire. When the insurance company was notified of the loss, it at once denied its liability on the ground that the vacancy clause in the policy had been violated.

During the trial the plaintiff offered to read to the jury a receipt, dated in October, 1902, given to the building and loan association by Albert Morris & Co., for \$83, the aggregate amount of the premiums on eight insurance policies, one of which was the premium on the policy sued on. The receipt was objected to on the ground that it did not purport to have been given by Albert Morris & Co. as agents of the insurance company. The court sustained the objection and refused to allow the receipt to be read in evidence. That action of the court is assigned as error.

The receipt not only did not show upon its face that it was given by Albert Morris & Co. as the agents of the insurance company, but it appeared from the evidence of Albert Morris, who executed the receipt for his firm and proved their signature thereto, that the receipt was given by his firm, not as the agents of the insurance company,

but for insurance premiums which they had paid or advanced for the building and loan association, under its agreement with them, on policies in which it was interested. This being so, the court was clearly right in not admitting the receipt in evidence.

The next question to be determined is, has the plaintiff shown that the forfeiture was waived?

It is well settled that any acts, declarations, or course of dealing by an insurance company, with knowledge of facts constituting a breach of a condition in the policy, leading the party insured honestly to think that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the insurance company from insisting upon the forfeiture, though it might be claimed under the express letter of the policy. *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. 88; *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 260, 21 S. E. 487; *Va. Fire, etc., Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 433, 46 S. E. 463, 102 Am. St. Rep. 846, and cases there cited; *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841.

Applying that principle to the facts of this case, it is manifest, we think, that the plaintiff in error has failed to show that the insurance company has waived or estopped itself from relying upon the forfeiture set up as a defense. The premium was paid on June 5th, and the building did not become vacant until July 5th, and there is no evidence that the insurance company knew that it became vacant before the fire occurred.

It is argued that its agents, Albert Morris & Co., knew that it was vacant, and that their knowledge was notice to the insurance company. It is true that Albert Morris & Co. did know it, but that knowledge was acquired by them as agents of the building and loan association, and not while attending to the affairs of the insurance company. Knowledge acquired in that manner, in order to be binding upon the insurance company, would have to be present in the agent's mind at the time he did the act which it is claimed constituted the waiver, and the burden is on the party relying upon the waiver to prove this. That such knowledge was in the agent's mind may be shown by circumstances, as well as by direct evidence. *Morrison v. Bausermer*, 32 Grat. 225; *Johnson v. Natl. Ex. Bk.*, 33 Grat. 473, 486, 487; 2 *Minor's Inst.* (4th Ed.) 980; 1 *Joyce on Ins.* § 544; *Mechem on Agency*, § 721; *Martin v. South Salem L. Co.*, 94 Va. 28, 26 S. E. 591.

But, even if the knowledge of Albert Mor-

ris & Co. was the knowledge of the insurance company, it did no act afterwards to the prejudice of the insured or the beneficiary in the policy, or which can be held to have been a waiver of the forfeiture. If the insured, when called upon by Albert Morris & Co. to pay the amount of the premium two weeks after the house had been vacated, had paid that sum to them as premium on the policy, believing that they were collecting it as the agents of the insurance company, then he might have had the right to rely upon that as a waiver of the forfeiture; but he did not pay it, or pay any attention to their request. Neither did the insurance company, or its agents, Albert Morris & Co., do any act, or make any declaration, or pursue any course of conduct which gave the building and loan association the right to believe that the forfeiture was or would be waived. The evidence clearly shows that, when that association paid Albert Morris & Co. the amount of the premium, it paid it, not as a premium due the insurance company, but as a debt due from it to Albert Morris & Co. as its own agents for money advanced by them to pay the premium before the building had become vacant or the forfeiture had been incurred.

Mere knowledge by the insurance company of the existence of the breach of the contract does not of itself amount to a waiver or an estoppel. There must exist, in addition to a knowledge of the breach, some positive act of confirmation upon which, in connection with the knowledge, a waiver may be predicated, and by force of which the broken contract may be said to be revived. *Richards on Ins.* §§ 78, 79; 2 *May on Ins.* § 507; *Vance on Ins.* p. 374; *Gibson v. Liverpool, etc., Ins. Co.*, 159 N. Y. 418, 426, 427, 54 N. E. 23.

Having reached the conclusion that the acts and conduct of the agents of the insurance company, conceding that they were binding upon it, were not sufficient to establish a waiver of the forfeiture or to estop the insurance company from setting it up as a defense, it will be unnecessary to consider the effect of that provision in the policy which declares that no officer, agent, or representative of the company shall have the power or be deemed or held to have waived any condition of the policy, unless such waiver shall be written upon or attached to it.

We are of opinion that there is no error in the judgment of the court of law and chancery, and that it must be affirmed.

(104 Va. 587)

TURK et al. v. RITCHIE et al.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT OF ACCOUNTS—REPORTS OF COMMISSIONER.

So long as decrees of reference entered in a suit to settle the estate of a decedent are not fully executed, and the data are not arrived at whereby an accurate account can be made for the final distribution of the assets of the estate, it is proper for the commissioner to whom the cause has been referred to include in his report any outstanding valid debt against the estate and for the court to decree payment of such debt.

2. SAME—DECREES.

A decree in a suit to settle a decedent's estate, adopting certain specific portions of the commissioner's report, directing the payment of certain specified debts and a partial distribution of the assets of the estate among the legatees, requiring such legatees to give refunding bonds, and recommitting the cause to a master to take a further account and not confirming the report, is not a final decree, such as to preclude a creditor from thereafter coming into the cause and asserting a demand against the estate.

3. PRINCIPAL AND SURETY—ACTIONS BY CREDITOR—PLEADING—SUFFICIENCY AS AGAINST SURETY.

A bill alleging the execution of a bond by a principal and sureties, the death of the principal and the sureties, and that the orator and oratrix are entitled to have the sum due collected and paid over, making the personal representatives, heirs, and distributees of the principal and of the sureties, parties defendant, specially praying that the personal estate of the principal and certain land covered by a deed of trust securing the debt be applied to the payment of the debt, and concluding with a prayer for general relief, confers upon the court jurisdiction to render a decree against the personal representatives of the sureties under the prayer for general relief.

4. JUDGMENTS—CONCLUSIVENESS—SCOPE OF ADJUDICATION.

A decree in favor of a debtor and against her creditor settles all questions as to the validity of the debt, and that such debt is not at the time of the decree barred by limitations.

5. EXECUTORS AND ADMINISTRATORS—ACTIONS—LIMITATIONS—LIABILITIES OF DECEDENTS.

A liability accrued against a decedent's estate as surety on a bond on January 15, 1894. December 10, 1906, the obligee in the bond obtained a decree against the principal and sureties. July 15, 1899, the obligee intervened in a suit to settle the estate of the decedent to enforce her decree. *Held*, that the obligee's demand was not barred by Code 1887, § 2920 [Va. Code 1904, p. 1540], providing that a right of action against the estate of a decedent which accrues after the decedent's death shall not continue longer than five years after its accrual.

6. PRINCIPAL AND SURETY—PROCEEDINGS AGAINST SURETY—DEFENSES—LACHES.

The personal representatives and legatees of a surety on a bond cannot assert the defense of laches to defeat proceedings by the obligee to enforce the bond, where the delay was caused by the act of the obligee in prosecuting proceedings against the principal and the estate of the other surety, and such proceedings resulted in a material reduction of the liability sought to be enforced against the estate of the surety in question.

Appeal from Circuit Court, Augusta County.
Settlement suit by R. S. Turk and W. A.

Turk, as executors of Rudolph Turk, deceased, against the creditors of Rudolph Turk. From a decree in favor of Mary E. Ritchie and others, creditors of said deceased, plaintiffs appeal. W. A. Turk died pending the appeal, which is prosecuted by R. S. Turk in his own right as surviving executor, etc., and as administrator of W. A. Turk. Affirmed.

A. C. Braxton, for appellants. J. & R. Bumgardner and Curry & Glenn, for appellee.

CARDWELL, J. In 1890 Rudolph Turk died testate, appointing W. A. and R. S. Turk his executors. By his will he directed that all his just debts and funeral expenses be paid as soon after his death as practicable, and, after making two specific bequests and directing how the residue of his estate was to be divided among his two sons then living and the widow and daughter of a deceased son, empowered his said executors to sell all of his real and personal estate, or so much thereof as they might deem best in order to carry out the terms of his will, conferring upon them full power to make conveyances of any and all real estate which they might sell, etc.

In September, 1891, W. A. Turk and R. S. Turk, in their own right and as executors, as aforesaid, instituted this suit of "Turk's Ex'rs v. Turk's Creditors," the scope and object of which was to convene all the creditors, known and unknown, of the said testator and to settle and distribute his estate under the direction of the court.

At the time of Rudolph Turk's death, the appellee, Mary E. Ritchie, née Shifflett, a daughter of Givens Shifflett, now also deceased, held a bond dated November 20, 1860, for the penal sum of \$5,183.60, conditioned for the payment to David Fultz, her trustee, one day after the death of said Givens Shifflett, the sum of \$2,591.80, in which Givens Shifflett was principal and the said Rudolph Turk and one D. Bashaw were sureties, which bond was secured by a deed of trust executed by Givens Shifflett to David Fultz, trustee, on a certain parcel of land owned by Shifflett, situated in Augusta county. Givens Shifflett died on January 14, 1894, whereby the said bond became due and payable on the following day, January 15, 1894; and in May, 1894, Mary E. Ritchie filed her bill in equity in the circuit court of Augusta county, in which her husband united for conformity, under the short style of "Ritchie and Wife v. Shifflett's Adm'r et al.," to enforce payment of said bond, and to that end to have the deed of trust securing the same enforced. The parties made defendant to this bill were the administrator, widow, and heirs at law of Givens Shifflett, deceased, R. S. Turk and W. A. Turk, the executors of Rudolph Turk, deceased, Darwin Bashaw, and the executor of David Fultz, deceased, who was trustee for Mary E. Ritchie, and as such held the naked legal title to the land conveyed in the deed of trust.

That cause was referred to a master commissioner, who filed his report, to which there was no exception, showing that Givens Shifflett had no personal assets, and that the land (123 acres) covered by the deed of trust securing the bond of Mary E. Ritchie was all of his estate, and that the sum due her was \$2,591.80, with interest from January 15, 1894. This report of the master was duly confirmed and commissioners appointed by decree of May 20, 1895, to sell the land; and these commissioners subsequently reported a sale of the land to R. S. and W. A. Turk for the sum of \$530, which was confirmed. The net proceeds of sale, after payment of costs, was \$405.30, which, being credited on the debt of Mary E. Ritchie, left due thereon, as of the day of sale, the sum of \$2,472.42, to be paid by the sureties, the estate of the principal debtor having been exhausted; and by a final decree entered in the cause December 10, 1895, after setting forth the proceedings aforesaid and ascertaining that the sum of \$2,472.42 was still due to Mary E. Ritchie, it was adjudged, ordered, and decreed that "N. C. Watts, sheriff of Augusta county, and as such administrator of Givens Shifflett, deceased, out of assets in his hands for administration, W. A. Turk and R. S. Turk, executors of R. Turk, deceased, de bonis testatoris, and Darwin Bashaw, de bonis propriis, pay to the plaintiff, Mary E. Ritchie, the sum of \$2,472.42, with interest thereon from the 16th day of November, 1895, till payment."

In the chancery causes, heard together, of *Brown v. Bashaw*, *Ritchie and Wife v. Bashaw*, and *Bashaw v. Bashaw*, the estate of Darwin Bashaw, the co-security with Rudolph Turk on Mary E. Ritchie's bond, was administered, his real estate sold, and the proceeds in part applied to the payment of this debt. The sum realized from Bashaw's estate was \$1,217.29, which left, as the liability against Rudolph Turk's estate, the sum of \$2,302.22, with interest on \$2,279.43 from November 1, 1902.

During all this time the suit of "*Turk's Ex'rs v. Turk's Creditors*" was pending and undetermined, in which there had been several decrees of reference to a master commissioner to ascertain and report the debts outstanding against the estate of Rudolph Turk, deceased, and the assets of the estate, none of which had been fully executed, though there was a report of the master filed January 4, 1895, making a tentative statement of the assets, the unpaid debts outstanding, as far as ascertained, and an estimated balance of assets for distribution among Turk's residuary legatees, of which R. S. Turk and W. A. Turk were each entitled to one-third. This report was acted on in a decree entered May 16, 1895, in which the court, without confirming the report, adopted certain specific portions of it, directed payment of certain specified debts, and a partial distribution of the assets of Turk's estate among his residuary legatees, requiring re-

funding bonds to be given, and recommitted the cause to a master, "to take a further account of the transactions of the executors, and, if possible, to make an accurate distribution between the residuary legatees"; but upon subsequent developments so much of the said decree as invested R. S. and W. A. Turk with title to certain lands of the estate they had purchased was set aside and annulled, and they were directed to pay on account of their purchase-money bonds for said lands a sum sufficient to make up the deficiency in assets necessary to discharge the unpaid debts of the estate. No report was made on this last-mentioned decree of reference till December 15, 1900, and in the meantime a decree was entered, December 9, 1895, requiring a commissioner to whom the cause already stood committed to report particularly as to the liability asserted against the estate by one R. D. Byerley. Commissioner Waddell having failed to execute the references called for in the decrees theretofore entered, a decree was entered December 13, 1898, referring the cause to Commissioner Nelson to take the accounts required by those decrees, and on July 15, 1899, while the cause was before Commissioner Nelson under the unexecuted orders of reference, Mary E. Ritchie came into it by petition, setting up her debt against the estate of Rudolph Turk, deceased, by virtue of the Shifflett bond and the decree in the case of *Ritchie and Wife v. Shifflett et al.*, to which demand Turk's executors interposed the plea of the statute of limitations and the plea of laches.

On November 24, 1899, a decree was entered bringing the cause on for hearing on said petition and directing Commissioner Nelson, to whom the cause then stood referred, to report on the matters set up in said petition in addition to the matters called for in the previous decrees, and in response to that decree Commissioner Nelson filed his report December 15, 1900.

From this report it appeared, *inter alia*, that R. S. and W. A. Turk (who had procured their bonds to the estate for \$11,074.64 to be canceled) were indebted to the estate in their executorial capacity in the sum of \$1,142.30, as of December 13, 1900; that the distribution account, as stated by Commissioner Waddell, should be reduced to meet additional indebtedness; and that there were outstanding against the estate debts due to P. D. Byerley, Mary E. Ritchie, and Jas. O. Hobbs, stating the amount of each—the debt reported as due to Mary E. Ritchie being subject to credit for such amount as might be realized from D. Bashaw's real estate. By an addendum to this report, filed November 12, 1902, Mary E. Ritchie's debt is restated, allowing credit for the sums realized on the debt from Bashaw's estate, and ascertaining the balance of the debt to be paid from the estate of Turk.

Upon the hearing of the cause on said report and the exceptions of Turk's executors thereto, the court by its decree of June 26, 1903, overruled the exceptions, confirmed the report, and adjudged that the estate of Rudolph Turk was indebted to P. D. Byerley in the sum of \$196.54, with interest on \$144.52, part thereof, from December 15, 1900; to Mary E. Ritchie in the sum of \$2,302.22, with interest on \$2,279.34, part thereof, from the 1st day of November, 1902; and to J. O. Hobbs in the sum of \$182.40, with interest on \$100, part thereof, from the 13th day of December, 1900; that said debts constituted valid subsisting debts against the estate of Rudolph Turk, deceased, properly assessed in the cause, and in no wise barred by the statute of limitations or the laches of the parties; and that said debts constituted all the unpaid indebtedness of said estate, except the costs of the suit—and decreed that R. S. Turk and W. A. Turk, executors of Rudolph Turk, deceased, pay de bonis testatoris to the several parties stated the several respective sums, etc.

From this decree R. S. Turk, in his own right and as surviving executor of R. Turk, deceased, and administrator of W. A. Turk, deceased, obtained an appeal to this court.

No ground for reversing the decree with reference to the debt of P. D. Byerley, contracted by the executors of Rudolph Turk, deceased, in preserving the property of the estate, is assigned in the petition for this appeal, nor pointed out in the argument here, and therefore we are not called upon to consider the decree in that aspect.

With reference to the debt decreed to J. O. Hobbs, we deem it only necessary to say that until the report of Commissioner Nelson, filed December 15, 1900, reporting, *inter alia*, the debt due to Hobbs, the decrees of reference theretofore entered directing inquiry and report of the debts outstanding against Rudolph Turk's estate were never fully executed, and the data arrived at, whereby an accurate account could be made for the final distribution of the assets of the estate. Therefore it was until then entirely proper for Commissioner Nelson to report any outstanding valid debt against the estate, and for the court to decree its payment.

The attack upon so much of the decree appealed from as settled the right of appellee Mary E. Ritchie to recover of Turk's estate the balance due her on the Shiffett bond is made substantially upon these grounds: (1) That the decree of May 16, 1895, in Turk's *Executors v. Turk's Creditors*, was a final decree, and a creditor of the estate was thereby precluded from coming into the cause and asserting a demand against the estate; (2) that the decree rendered against Turk's executors, in the suit of Ritchie and Wife v. Shiffett et al., relied on by appellee in her petition in this suit, is absolutely void; and (3) even if said decree were valid,

it could not be relied on in this cause to repel the plea of the statute of limitations interposed by Turk's executors.

There is not, as we view it, an element of finality in the decree of May 16, 1895. The report of the master acted on in the decree did not purport to be a final finding as to the debts outstanding against Turk's estate, but only a partial statement of the accounts and matters necessary to a winding up of the estate. Nor does the decree confirm the report, except as to certain specific findings, and recommitts the cause to the master to take a further account of the transactions of the executors, and, "if possible, to make an accurate distribution between the residuary legatees," thus leaving the assets of the estate still under the control of the court liable for the payment of any valid debts against the estate which might be reported under the unexecuted decrees of reference made in the cause, and which were not fully executed, as we have remarked, until the report of Commissioner Nelson filed December 15, 1900.

The contention of the learned counsel for appellant touching the validity of the decree in favor of appellee and against the executors of Turk, entered in the suit of Ritchie and Wife v. Shiffett et al., and asserted in this cause, is not that the court entering the decree did not have jurisdiction of the subject-matter of the litigation in that cause and of the parties interested therein, but that the court transcended its jurisdiction in decreeing upon the pleadings in favor of appellee against the executors of Turk for the balance ascertained to be due her on the Shiffett bond; in other words, that the bill filed by appellee in that cause contained no intimation of the assertion of any claim against Turk's estate, and therefore the court was without jurisdiction to enter the decree in question.

The bill, upon which the decree was made, fully set forth the facts as to the execution of the bond by Givens Shiffett, with Rudolph Turk and D. Bashaw as his sureties; the execution of the deed of trust to Fultz, trustee, to secure the same; the death of Givens Shiffett, Turk, and Fultz—and charges that "your orator and oratrix are entitled to have the sum due to your oratrix, as secured as aforesaid, collected and paid over to your oratrix, and to convene before a court of equity the personal representative and the heirs at law and distributees of Givens Shiffett, deceased, and the personal representatives of David Fultz, deceased, and the personal representatives of Rudolph Turk, deceased, in order that the conditions of the bond of Givens Shiffett, and Rudolph Turk and D. Bashaw, his sureties, executed as aforesaid to David Fultz, * * * may be enforced." The executors of Rudolph Turk, deceased, as well as the other parties suggested in the charge of the bill, were made parties defendant thereto; the prayer

of the bill being that the personal estate of Givens Shifflett, deceased, might be applied in due course of administration to the payment of said debt, and that in the event that said personal estate proved insufficient, which it was alleged would be the case, the tract of land upon which the debt asserted was secured be sold and the proceeds of sale applied to the payment of the debt, and concluded with the usual prayer for general relief.

Plainly the bill charged a liability upon the sureties of Givens Shifflett, as well as upon his estate, which the plaintiffs would have enforced if the estate of the principal and the land specifically bound for the debt proved insufficient, whereby the sureties or their personal representatives were put on notice of the liability asserted against them. Therefore the granting of the decree over against the executors of Turk for the balance ascertained to be due to appellee on the claim asserted, after exhausting the estate of the principal debtor, was not inconsistent with either the case made in the bill or the prayer for special relief, and was entirely proper under the prayer for general relief. 1 Bar. Chy. Prac. (N. Ed.) 281, 282; *Walters v. Bank*, 76 Va. 12; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572; *Fayette L. Co. v. L. & N. R. R. Co.*, 93 Va. 274, 24 S. E. 1016; *Laurel Creek, etc. Co. v. Browning*, 99 Va. 528, 39 S. E. 156; *Jones v. Tunis*, 99 Va. 220, 37 S. E. 841; *Vaught v. Meador*, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908; *Dunn v. Stowers*, 104 Va. —, 51 S. E. 366.

In *Beverly v. Rhodes*, supra, the bill was filed against the personal representatives of the principal and sureties in the bond sued on, and merely set out the execution of the bond, its assignment to the plaintiff, the qualification of the personal representatives of the deceased obligors, and that they left estates, real and personal, out of which the plaintiff's debt should have been paid, and the personal representatives of the deceased obligors were made parties defendant, the special prayer of the bill being that the payment of the debt demanded be enforced and to this end that all proper accounts might be taken, and concluded with the usual prayer for general relief. Upon a final hearing of the cause the decree was against the defendants for the amount of the debt, to be paid *de bonis testatoris*, and against Jas. B. Beverly, personally, who was the executor of William Beverly, one of the deceased sureties, who had left ample estate to pay his debts, and whose estate had been fully administered in another suit, to which the plaintiff in *Beverly v. Rhodes* was not a party. From this decree Jas. B. Beverly appealed, and insisted that the circuit court erred in not dismissing the bill on demurrer, because the plaintiff had an adequate remedy at law and no pretext for coming into a court of equity, and, further, that the plaintiff's action was nothing but an ordinary action

upon a plain bond, and her bill nothing but a declaration, wherefore, even if the court was of opinion that it had jurisdiction of the case made, it ought to have submitted the questions of payment, laches, etc., to a jury. But this court held otherwise, and affirmed the decree of the circuit court, upon the principle applied in the authorities just cited, and which are in accordance with the opinion in the very early case of *Parker v. Dee*, 2 Chy. Cas. 200, where it was said: "When this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere."

The decree asserted by appellee in this cause being a valid decree, it settles all questions as to the validity of the debt claimed by her, and that the debt was not barred by the statute of limitations when the decree was made. *Brewis v. Lawson*, 76 Va. 36, and authorities cited; *Smith v. Moore*, 102 Va. 260, 46 S. E. 326. In fact it is not contended that the debt was barred when the decree in question was entered, but that as appellee did not assert her right to recover of the estate of Turk on the bond of Givens Shifflett until July 15, 1899, five years and six months after January 15, 1894, when her cause of action thereon accrued, her demand is barred by the statute (section 2920 of the Code of 1887 [Va. Code 1904, p. 1540]), which is as follows:

"Limitations of Personal Actions Generally.—Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years after the right to bring the same shall have accrued * * *: Provided, that the right of action against the estate of any person hereafter dying, on any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have accrued."

The decree for this liability on Turk's estate, rendered on the 10th day of December, 1895, is asserted in this cause on the 15th day of July, 1899, 3½ years afterwards, while the cause was not only still pending and undetermined, but the debts outstanding against Turk's estate not fully ascertained and the estate not distributed, so that by no possible construction to be given section 2920, supra, can it have any application to the case under consideration.

It will be observed that appellee is not asserting in this cause a demand on the original cause of action—the Shifflett bond which became payable January 15, 1894—but the decree of December 10, 1895, into which the right of action on the original demand was merged; and, as we have said, that de-

cree is conclusive of the question whether or not the debt was barred by the statute as against Turk's estate. Therefore the plea of the statute, interposed by Turk's executors, was rightly overruled.

There is no ground whatever for complaint on the part of Turk's executors, or residuary legatees, that appellee first prosecuted her suit of *Ritchie and Wife v. Shifflett et al.*, the result of which was to exhaust the assets of Shifflett's estate, to secure a large contribution from the estate of Bashaw, the other surety of Shifflett, and thereby to reduce the liability of Turk's estate for appellee's demand to the minimum, wherefore appellant's defense of laches is wholly unavailing.

In the able arguments of counsel other questions were raised and elaborately discussed, but in the view taken by the court of the case it becomes unnecessary to consider them.

The decree of the circuit court is affirmed.

(104 Va. 580)

ONEY et al. v. WEST BUENA VISTA LAND CO. et al.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. EASEMENTS—ACQUISITION.

An owner platted land into lots, blocks, streets. A map showing that the streets were to be connected with the streets of a city by means of a bridge to be erected by the owner was recorded. The owner offered to dedicate the bridge to the public but it was not accepted. He sold lots, the deeds referring to the map. He urged the existence of the bridge as an inducement to the purchasers. *Held*, that the conveyances of lots carried with them an implied grant of the bridge as an easement to the property conveyed.

2. SAME—REPAIR.

A grantor of an easement is, in the absence of an agreement to the contrary, under no obligation to keep the same in repair; but this duty rests on those using the easement.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 117.]

3. SAME.

An owner platted land into lots, streets, etc., and recorded a map showing that the streets were to be connected with the streets of a city by means of a bridge to be erected by the owner. The existence of the bridge constituted the principal inducement for the purchase of lots. *Held*, that the purchasers of lots were bound to keep the bridge, constituting an easement to their property, in repair.

4. SAME—ABANDONMENT.

The failure of the owner of an easement, bound to keep it in repair, to do so for an unreasonable length of time, is an abandonment of the easement; an abandonment being presumed on the owner doing or permitting an act to be done which is inconsistent with the future enjoyment of the right.

5. SAME.

Owners of property owned an easement consisting of a right in a bridge. The bridge, on the flooring being removed, was useless, except for foot passengers. The bridge was built mainly of iron and steel, and was, with the exception of the flooring, well preserved. The owners continued to use the bridge and insisted on their right to repair. *Held*, that they had not abandoned their right in the

bridge; but they must repair it within a reasonable time, or the owner of the structure might remove it.

Appeal from Circuit Court, Rockbridge County.

Suit by J. L. Oney and another against the West Buena Vista Land Company and others. From a decree dismissing the bill, complainants appeal. Reversed.

Hugh A. White, for appellants. E. M. Pendleton, for appellees.

CARDWELL, J. During what is now commonly spoken of as the "boom" period, the West Buena Vista Land Company, the owner of a tract of several hundred acres of land lying just across North river from, and west of, Buena Vista, a town then rapidly growing in population, and which afterwards became a city, desiring to enhance the value of its property and make sale of its land in town lots for building purposes, etc., laid the same off into lots, blocks, streets, alleys, parks, and other public places, and on the 23d day of September, 1890, placed a map or plat of said land, so divided, upon record in the clerk's office of the county court of Rockbridge county, according to law. The idea of the West Buena Vista Land Company seems to have been to make its lands across the river from Buena Vista practically a part of that town, and to that end determined to build a bridge across the river connecting the prospective town of West Buena Vista with Buena Vista, and this bridge across North river was shown on the map or plat, made and recorded as stated. The streets of West Buena Vista were to be connected continuously with the streets of Buena Vista by this bridge, and Lexington and Moore streets, appearing on the map of West Buena Vista, and which converge together at the west end of the bridge, form, with the bridge, a continuation of Twentieth street in Buena Vista at the east end of the bridge.

After recording the map showing the streets and bridge, the West Buena Vista Land Company proceeded to make sale of its lots, villa sites, etc., and among the sales it made was a mill, residence, and outbuildings, known as "Moore's Mill," appearing on said map, to J. L. Oney and his associates, on March 20, 1891, at the price of \$6,000, a "boom" price according to the evidence in this record, and about twice as much as the property would have brought, but for the map of West Buena Vista showing the bridge across North river.

This bridge, contemplated and contracted for in 1890, was well under way in construction when Oney and his associates bought the mill property, which was connected by open and convenient streets and alleys with the bridge and within a few yards of its west end, and was subsequently completed, extending not only across the river, but also over the railroad tracks of the furnace company, the Chesapeake & Ohio, and the Norfolk & Western Railway Companies, and

terminated in Sycamore (Twentieth) street, in Buena Vista, with the consent of these several companies; but the completion of the bridge was in accordance with the representations of the company in effecting sales of its lands.

By the bridge "Moore's Mill" was brought within one-half mile of the business center of Buena Vista, while without it the distance was about two miles around by the county road and bridge below. It is admitted that this bridge was built as a passway "for the owners of the West Buena Vista Company," and after its completion the public was permitted to use it, and it was used for both horse and foot passengers by those desiring to use it; and for a long time, while the county bridge below was down, it was the only thoroughfare into Buena Vista from the western portion of the county; but there has never been any other acceptance of it as a highway by the county of Rockbridge or the city of Buena Vista.

After many years of service to the public, but especially to the persons who had bought land of the West Buena Vista Company, and the owners of "Moore's Mill" in particular, the bridge became in need of repairs and unsafe, the flooring thereon having decayed and by reason of a complaint from the railroad companies the flooring over the railroads was removed, so as to avoid any danger to their traffic. This being the condition of the bridge, in order to continue it as a footway, the owners of "Moore's Mill" and others took up a subscription among the public and raised a fund with which a stairway was built from the ground up to the floor of the bridge at the point from which the flooring had been removed back to the end of the bridge over the railroad tracks, whereby the bridge was made a passageway for pedestrians over North river, and has been used as such since. In May, 1904, while the bridge was being used in the way just stated, particularly by the residents on the West Buena Vista side of the river, the West Buena Vista Company, having disposed of all of its other property, made sale of this bridge with the view of dividing the proceeds of sale among the stockholders of the company, and the purchaser thereof began to tear it down, whereupon J. L. Oney and Ella B. Agner, who had become the sole owners of "Moore's Mill," filed their bill in this cause and obtained a temporary injunction restraining the West Buena Vista Company and all others from removing the said bridge or interfering with its use by the public.

In their bill the complainants set out the origin of the bridge, its use, etc., as hereinbefore stated, and charge that they and others similarly situated bought their property in West Buena Vista in good faith on the existence of the bridge as a most valuable easement to their property; that the removal of it would inflict a serious and irreparable injury to the complainants, by reason of the fact that they would then be without access to

Buena Vista, save around by the old county bridge, a distance of two miles; that the West Buena Vista Company is insolvent; and that complainants desire to repair and keep in repair the said bridge as an indispensable and valuable easement to their property, etc.

By its answer the West Buena Vista Company admits that the map or plat exhibited with the bill was made and recorded in accordance with what is known as the "Plat Act" (Acts 1887-88, pp. 553, 554, c. 486 [Va. Code 1904, p. 1280, § 2510a]), that the bridge was used by every one who desired to use it, and that it was offered to the county and city as a public bridge; does not deny that complainants bought with reference to the bridge and would not have paid more than one-half as much for their property without the bridge, or bought it at all. While the answer denies that the company sold with reference to the map, the deeds it made to Oney and his associates for "Moore's Mill" show that it was referred to, and the proof is uncontradicted that the bridge was urged as the inducement to the purchasers of the company's property.

Upon the hearing of the cause on the bill and answer and the proofs submitted on behalf of the respective parties, the circuit court dissolved the temporary injunction theretofore awarded the complainants and dismissed their bill, whereupon they obtained this appeal.

While there was, unmistakably, an offer of appellee to dedicate the bridge in question to both the county of Rockbridge and the city of Buena Vista as a part of a public highway, it is not claimed—at least, it is not shown—that it was in any manner accepted by either; but it is equally as certain from the facts proved that it was not only the purpose of appellees to dedicate the bridge to the public use, but that the bridge was urged as an inducement to appellants and others to purchase the company's lands, and that it was one of the most important, if not the principal, inducement to them to buy. It is true that neither the bridge nor any part of it was conveyed in the deed to appellants, or to any other purchasers of the company's lands; but the map showing the bridge was not only recorded as provided in the plat act, supra, but was referred to in the deeds made to appellants and others. Therefore the law implies a grant of the bridge as an easement to the property conveyed.

But the rule is that the grantor or dedicatory of an easement is generally under no obligation to make repairs, and that this duty rests upon those who use the easement, and if they fail to keep it in proper condition for the uses for which it was granted or dedicated they must suffer the resulting inconvenience. This rule is changed only where there is a special agreement or prescriptive right to the contrary. 14 Cyc. 1209; 2 Min. Inst. 19; 2 Tucker's Com. 7; 9 Am. & Eng. Ency. L. (2d Ed.) 80.

There is nothing in this record to take the

case out of the control of the general rule, so that, while appellants and others similarly situated acquired by their purchase of lands from appellee a right in this bridge as an easement incident to their property, the burden rests upon them to keep it in proper condition for the uses for which it was constructed; and a failure to do this for an unreasonable length of time would amount to an abandonment of the easement, as an abandonment will be presumed where the owner of the right does, or permits to be done, any act inconsistent with the future enjoyment of the right. 10 A. & E. Ency. L. 435; *Buntin v. Danville*, 93 Va. 205, 24 S. E. 830; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749. Nonuser of an easement, however, unaccompanied by proof of an intention to abandon it, is not sufficient. The evidence must be clear that there was the intention to abandon. See the authorities just cited.

While the evidence shows that the bridge, since the flooring was taken up over the railroad tracks, is absolutely useless except for foot passengers, it also shows that the structure, built mainly of iron and steel, is, with the exception of the flooring, well preserved, and the materials therein perfectly sound. Therefore, it cannot be said that it has become entirely useless, as appellee contends, as an easement to the property of appellants. Nor can it be said, under the circumstances, that it has been abandoned by the appellants. On the contrary, appellants have been all along and are now using the bridge, and insist upon their right to repair and restore it to a condition that will render it safe and useful for the purposes for which it was built and used for many years after its construction. It would, we think, be manifestly unjust to permit appellee, after having used this bridge as an inducement to appellants and others to buy its property, and permitted its use as stated, to remove it and thereby deprive these purchasers of a valuable and indispensable easement to their property.

But we are further of opinion that, to entitle appellants to a continuing right or interest in this bridge as an easement, they should be required to restore it, within a reasonable time, to such condition as will render it safe and useful for the purposes for which it was constructed, and that, if this is not done, they should be regarded as having abandoned the easement, in which event appellee will be entitled to make such disposition of the materials in the structure as it may see fit. 13 Cyc. 490; *Bolling v. Petersburg*, 3 Sand. 573; *Harrison v. Parker*, 6 East, 563.

Therefore the decree appealed from will be reversed, the temporary injunction awarded in the cause reinstated, and the cause remanded to the circuit court with directions to put appellants upon the terms that, unless they repair, or cause to be repaired, the said bridge, putting it in a good and safe condition for the uses for which it was con-

structed and formerly used, within a reasonable time, to be fixed by the said court in its decree, the injunction will stand dissolved, and their bill dismissed.

(104 Va. 572)

METROPOLITAN LIFE INS. CO. v. HALL.
(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. EVIDENCE—PAROL—VARYING TERMS OF POLICY.

Where an insurance policy provided that the premiums should be due and payable quarterly on the 16th of the month, evidence that it was agreed, at the time the policy was issued, between insured and insurer's agent, that the premium should not be due until after the 20th of the month, was inadmissible to vary the terms of the policy.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1818.]

2. INSURANCE—PREMIUMS—PAYMENT—EXTENSION OF TIME—AUTHORITY OF AGENT.

Where a policy of insurance provided that no premiums in arrears could be received, except by agreement in writing signed by certain officers of the society, an agent employed or authorized to collect an overdue premium had no authority to bind the insurer to grant an extension of time to pay such premium.

3. SAME—ESTOPPEL.

A policy provided that general agents had no authority to extend the time for the payment of premiums, but a rule of the company authorized acceptance of overdue premiums between the due date and that when the premium receipt must be returned for cancellation, unless paid, provided the superintendent can certify that the former insured is in good health. An agent authorized to accept an overdue premium went to the house of insured to collect the same, and without authority agreed to accept the premium on the succeeding day, requesting the insurer's assistant superintendent to collect the same, which he agreed, but failed, to do, and on such day insured was sick from the illness of which she died. *Held*, that such facts did not estop the insurer from enforcing a forfeiture of the policy for nonpayment of premium.

4. EVIDENCE—COMPETENCY—CONCLUSIONS.

In an action on a policy, questions as to whether insured would have paid the premium on the day it was demanded in case she had been told that the policy would otherwise be forfeited, and whether it was not the duty of the agent of the insurer to collect the premiums at insured's residence after the time for payment had been extended, were incompetent, as calling for conclusions.

Error to Circuit Court, Alleghany County.

Action by Annie T. Hall against the Metropolitan Life Insurance Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

W. E. Allen and O. B. Harvey, for plaintiff in error. Geo. A. Revercomb, for defendant in error.

BUCHANAN, J. This is an action on a life insurance policy, which provides, among other things, that if any premium or installment thereof be not paid when due the policy shall be void; that all premiums are payable at the home office, in the city of New York, but at the pleasure of the company suitable persons may be authorized to receive such premiums at other places, but only on the

terminated in Sycamore (Twentieth) street, in Buena Vista, with the consent of these several companies; but the completion of the bridge was in accordance with the representations of the company in effecting sales of its lands.

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structed and formerly used, within a reasonable time, to be fixed by the said court in its decree, the injunction will stand dissolved, and their bill dismissed.

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4. EVIDENCE—COMPETENCY—CONCLUSIONS.

In an action on a policy, questions as to whether insured would have paid the premium on the day it was demanded in case she had been told that the policy would otherwise be forfeited, and whether it was not the duty of the agent of the insurer to collect the premiums at insured's residence after the time for payment had been extended, were incompetent, as calling for conclusions.

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W. E. Allen and O. B. Harvey, for plaintiff in error. Geo. A. Revercomb, for defendant in error.

BUCHANAN, J. This is an action on a life insurance policy, which provides, among other things, that if any premium or installment thereof be not paid when due the policy shall be void; that all premiums are payable at the home office, in the city of New York, but at the pleasure of the company suitable persons may be authorized to receive such premiums at other places, but only on the

production of the company's receipt, signed by the president or secretary, and countersigned by the person receiving the premium; and that the contract between the parties is completely set forth in the policy and the application therefor, taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received, except by agreement in writing signed by either the president, vice president, secretary, or assistant secretary, whose authority for this purpose will not be delegated, and no other person has or will be given authority.

The premiums on the policy were payable quarterly, on the 16th day of April, July, October, and January of each year. The second premium, which was due July 16, 1902, was not paid. On the 21st of that month, Gilmore, the agent of the insurance company, who solicited the insurance, delivered the policy, and collected the first premium, went to the home of the insured, who was living with her mother, the beneficiary in the policy in certain contingencies, to collect the second premium. The mother informed him that she had the money with which to pay the premium, but as her rent was due that day she would prefer not paying the premium until the next day, if that would be agreeable. Gilmore assented to this arrangement, but told her that he was going to leave the town (Covington, Va.) the next morning, to be absent for several days, and that Mr. Hill, the assistant superintendent, would call and get the premium. Gilmore testified that he reported to Hill the arrangement he had made with Mrs. Hall; that Hill made no objection to it, and agreed to collect the premium the next day. This statement Hill denied. He did not collect the premium, but, on the contrary, about the 25th of that month returned the official receipt, which Gilmore had when he went to collect the premium, to the superintendent of the company at Lynchburg, and the policy was canceled on the books of the company.

On the evening of the day upon which Gilmore returned to Covington, which was the 3d or 4th of August, Mrs. Hall sent the amount of the premium to him, and he gave his receipt as agent therefor. The next morning he took the money to the office of Mr. Hill, but the officials there declined to receive it, stating that the insured was then sick of the disease (typhoid fever) of which she died on the 6th of that month.

The company refused to pay the policy upon the ground that the insured had forfeited all her rights under it by her failure to pay the second premium as provided by the policy. The beneficiary, on the other hand, insisted that there had been no forfeiture, or, if there had been, the company had waived it, or was estopped from setting it up as a defense.

One of the grounds upon which it is claimed that there was no forfeiture is that it

was understood and agreed between the insured and Gilmore, the agent, that the premiums, although made payable by the policy on the 16th of the month, were not in fact payable until after the 20th of the month, and that it was also understood and agreed that the premiums were payable at the house of the insured. Mrs. Hall and Gilmore, the agent, both testified that such was the agreement; but they further testified, or, rather, Mrs. Hall did, and Gilmore's evidence is not to the contrary, that the agreement was made at the time the policy was issued.

This understanding or agreement was in conflict with the express terms of the policy, and could not be proved, under the well-settled rule that contemporaneous parol evidence is not admissible to contradict or vary the terms of a written contract. *Towner v. Lucas' Ex'r*, 13 Grat. 705; *Catt v. Oliver*, 98 Va. 580, 36 S. E. 980.

Richards, in his work on Insurance (section 77), says: "But it is very important to notice that an oral assent or promise made to the insured at or before the execution of the contract, to the effect that he may in the future violate the terms of the policy, is not binding, and cannot be shown by parol, because the oral promise becomes merged in the contract. Thus an antecedent promise by an agent that a premium note need not be paid when due cannot be shown by parol."

Another ground relied on to show that there was no forfeiture was that it was the custom of the company in Covington for its agents to go to the homes of the insured to collect the premiums, and not to go until after the 20th of the month, because that was pay day at the paper mill, in which many of the insured worked, and they were unable to pay until after that time, although the premiums, by the terms of the policy, were due and payable at an earlier day.

It appears that the insurance company issued at Covington two kinds of policies; one known as the "Industrial," and the other as the "ordinary." By the express terms of the Industrial, a different policy from the one sued on, which was the ordinary policy, the agents of the company were required to go to the homes of the insured and collect the premiums. The evidence further showed, perhaps, that as to the Industrial policies the custom of the company was not to enforce strictly the rule as to the payment of the premiums the day they became due; but the evidence wholly fails to establish any such custom as to the payment of premiums on policies like that in suit.

It thus appears that the policy had lapsed for the nonpayment of the second premium when it became due and payable, and that there can be no recovery thereon unless the insurance company has waived the forfeiture, or is estopped by its conduct from setting it up as a defense.

If it be conceded that Gilmore, who had

possession of the official receipt of the company, and was sent by Hill, the assistant superintendent, to the home of the insured to collect the premium after the policy had lapsed, could have received the premium, so as to bind the company, without evidence that the insured was in good health, it does not follow that he had authority to extend the time for its payment, and bind the company afterwards to accept the premium when tendered, if the insured was sick or dead when the tender was made.

An agent employed or authorized to collect a claim does not thereby have authority to bind his principal to grant an extension of time, at least for the payment of an overdue premium. *Hutchings v. Munger*, 41 N. Y. 155; *Critchett v. American Ins. Co.*, 53 Iowa, 404, 5 N. W. 543, 36 Am. Rep. 230; *Richards on Ins.* p. 497.

"As to waivers taking place after issue of policy," says Parsons, in his edition of *May on Insurance*, quoted by this court with approval in *Va. Fire & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. at page 439, 46 S. E. at page 466, 102 Am. St. Rep. 848, "it is very proper to require the assured to look at his policy and conform to it, and the limitation of the agent's authority should be effective, unless the insurance company, by a course of business or otherwise, has waived the limitation on the agent's power of waiver."

And in *Conway v. Phoenix, etc., Co.* (N. Y.) 35 N. E. 420, it was held that where a life insurance policy provides that no agent "can alter, modify, or waive any of the terms or conditions of this policy," and any subsequent premium be not paid when due and a separate receipt signed by the president or secretary of the company in each case given therefor, then the policy shall cease, the general agents of the company, without its consent, cannot extend the time for paying premiums. It was further held in that case that where such agents, under a custom in their office of which the company has knowledge, are at liberty not to make any new agreement as to time for payment of premiums, but to accept payment after they are due and thus waive the right to declare a forfeiture, provided that at that time the conditions have not been changed by an alteration in the health of the insured, and they extend the time of payment of a premium by the insured, the risk is on him that pending the delay granted by the agents he may change in health or die and his insurance be lost; and in case of his death before payment the policy is forfeited.

By the terms of the policy sued on the general agents had no authority to make any agreement for the extension of time for the payment of a premium; but under a rule of the company it was provided that "between the date on which a premium falls due and the date when a premium receipt must be returned for cancellation overdue premiums may be accepted by the

superintendent, provided he can certify that the former insured is in good health."

If Hill, the assistant superintendent, had gone to the home of the insured on the 22d day of July, as Gilmore testified he had agreed to do, and had found that the insured was sick, as she was on that day, so that he could not make the certificate of good health required by the rule, he would have had no authority to receive the premium, under the principles enunciated in *Conway v. Phoenix, etc., Co.*, supra, which we think are correct. The insured had not lived up to her contract, and if she wished further time for paying the premium than is permitted by her policy, the risk incident to such delay ought to be hers, and not the insurance company's. While the contract was in force, as is said in the case last cited, and up to the time when the insured had the right to renew it by payment of the premium in advance, the risk in the matter was on the company; but upon failure to pay, after notice, upon the due date of the premium, the risk was on the insured that, pending the delay permitted by the agents, she might change in health, if not die, and her insurance be forfeited.

From what has been said it follows that, in our opinion, the trial court erred in permitting the plaintiff to introduce evidence to establish a contemporaneous parol agreement or understanding as to the time and place of paying the premiums different from that stated in the policy of insurance, and also erred in giving instruction No. 1, asked for by the plaintiff and objected to by the defendant.

The action of the court in overruling the plaintiff in error's objection to the following questions and answers is assigned as error, viz.:

"Mr. Gilmore, if you had told Miss Hall that the policy would not be good if you did that [referring to the agreement for an extension of time], wouldn't she have paid you that day, or would she?

"Ans. Yes, sir, I suppose she would.

"Now, was it not the duty of the agent of this company to have gone to Miss Hall, or Mrs. Hall, in order to collect this premium, after you had extended the time after the 21st of July?

"Ans. I suppose it was. She was under the impression that the agent would come and collect it, and they had always done so."

The plaintiff insists that the bills of exceptions as to the rulings of the court in question are not sufficient to enable this court to pass upon them.

Without passing upon the sufficiency of the bills of exceptions, as the case will have to go back for a new trial upon other grounds, and these questions may again be asked, it is proper to say that, if objected to by the defendant on the new trial, the objection should be sustained, as the witness is not asked to state facts, but to give his opinion

upon matters upon which opinion evidence is not admissible.

The judgment of the circuit court must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

(104 Va. 539)

CHESTNUT v. CHESTNUT.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. BILLS AND NOTES — DESIGNATION OF AMOUNT — OMISSION — RIGHT TO INSERT.

The amount stated in the margin of a note, whether expressed in words or figures, cannot supply the omission to insert the amount in the body of the note, where a blank has been left; but a bona fide holder is entitled to fill up the blank with the amount stated in the margin and then enforce it at law, unless the blank was left unfilled by mistake, in which case equity may correct it.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 89.]

2. SAME.

In the absence of evidence that the blank in a note with reference to the amount thereof was the result of a mistake, the presumption is that the payee, who is the holder, may fill up the blank with the amount agreed on; and this right continues, unless his exercise thereof has been unreasonably delayed.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 89.]

3. SAME — ACTIONS — DECLARATION — EVIDENCE.

Where the declaration in an action on a note alleged that a specified sum was due thereon, together with interest, a note with a blank for the amount due thereon was inadmissible.

4. SAME — DENIAL OF EXECUTION — AFFIDAVIT — NECESSITY.

A defendant in an action on a note cannot prove that he did not execute the note, unless he files with his pleading, as required by the express provisions of Code 1904, § 8279, an affidavit denying his signature.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1543.]

5. SAME — GROUNDS OF DEFENSE — SUFFICIENCY.

The statement of grounds of defense in an action on a note, that defendant did not execute the note and that she did not owe the sum claimed or any part thereof, was insufficient; for it gave plaintiff no more notice of the defense than the plea of non assumpsit.

6. PLEADING — STATEMENT OF GROUNDS OF DEFENSE — INSUFFICIENCY — FILING SUFFICIENT STATEMENT.

Where a defendant's statement of his grounds of defense is insufficient, the court, on plaintiff objecting thereto, should, as authorized by Code 1904, § 3249, require the filing of a sufficient statement; and, on the failure of defendant to do so, his evidence of the matters not sufficiently described should be excluded.

Error to Circuit Court, Highland County.

Action by John A. Chestnut against Nancy J. Chestnut. There was a judgment for plaintiff, and defendant brings error. Reversed.

The declaration was for a single item stated and interest, which plaintiff alleged to be due him on a promissory note. The statement of grounds of defense was that defendant did not execute any such paper, and that she did not owe the sum of money claimed

in the declaration, or any part thereof, and all other facts which could be proven under the plea of non assumpsit.

Braxton & McCoy and C. P. Jones & Son, for plaintiff in error. J. M. Perry and J. K. Hackman, for defendant in error.

BUCHANAN, J. Several errors are assigned in the petition for the writ of error, but the principal one is to the action of the court in permitting the plaintiff to offer in evidence a paper of which the following is a copy:

"\$1,800. Eighteen hundred dollars.

"Monterey, Va., June 6, 1892.

"Three months after date.....promise to pay to the order of J. A. Chestnut.....dollars negotiable and payable at the Highland County Bank, Monterey, Va.

"Homestead and all other exemptions waived by the maker and each endorser.

"Value received.

"No..... Due.....

"Nancy J. Chestnut."

The objection made to its admissibility is that it is not, as alleged, a promissory note, and in its present form does not evidence a promise to pay or create any liability on the defendant.

The propriety of the court's ruling depends upon the question whether or not the figures and words in the margin of a note fix the amount for which the note was intended to be given, where no amount has been inserted in the blank left for it in the body of the note. Upon this question the decisions of the courts are not in accord, though the weight of authority and the better reason seem to be in favor of the view that the sum named in the margin is generally the limit of the amount with which a bona fide holder may fill up the blank, but until so filled the instrument is incomplete and no recovery can be had upon it. See Daniel on Neg. Instr. §§ 86, 86a, 143; 8 Am. & Eng. Ency. Law (2d Ed.) 130, and cases cited; 7 Cyc. 593, 594, and cases cited; Garrard v. Lewis, 10 Queen's Bench Div. 30; Norwich Bk. v. Hyde, 13 Conn. 281; Patton v. Shanklin, 14 B. Mon. 13; Hollen v. Davis, 59 Iowa, 444, 13 N. W. 413, 44 Am. Rep. 688; Edwards v. Ramsey (Minn.) 14 N. W. 272; Schryver v. Hawkes, 22 Ohio St. 308, 315.

The reason for this rule of construction is that one of the essential requisites of a bill or note is that the amount for which it is made must be clearly expressed in the instrument, and as the marginal figures are not generally regarded as a part of it, but are intended as a convenient index and as an aid to remove ambiguity or doubt in the instrument itself, they cannot supply the omission to insert the amount in the body of the instrument where a blank has been left for that purpose. The blank in such an instrument is presumably intended to be filled with something, and until that something has been added the instrument is not complete. It is not invalid

simply because it is incomplete. It creates certain rights and obligations, and when properly filled up by a bona fide holder may be enforced at law, or, if left blank by mistake, in equity. See *Garrard v. Lewis*, supra; *Norwich Bk. v. Hyde*, supra; *Frank v. Lilenfield*, 33 Grat. 377, 383-387; *Orrick v. Colston*, 7 Grat. 180.

The fact that the amount in the margin of the note in this case is expressed in words as well as figures cannot, as it seems to us, affect the question. The refusal of the courts to hold that the amount of a note or bill cannot be supplied from the margin, where there is a blank left for the amount in the body of the instrument, is not because the amount in the margin is expressed in figures, but because it is in the margin, and not in the body of the instrument.

In the case of *Norwich Bank v. Hyde*, supra, which is a leading case on the subject, the question involved was substantially the same as in this case, both as to the defect in the note and the manner in which the objection to it was raised. The note in that case was as follows:

"\$200 Norwich Ct., Feb. 6th, 1837.

"Sixty days after date, for value received, I promise to pay to the order of Amos D. Allen.....dollars at the Quinebaug Bank. Oliver Allen."

"It is a well-settled principle," said the court in that case, "that no precise form of words is necessary to constitute a note or bill of exchange; yet all the authorities agree that the sum must be specified, so that it may be definitely known what sum was intended. Indeed, it seems to be the first principle that the sum to be paid must be clearly and intelligibly expressed. *Obit. on Bills*, part 1, c. 3, § 11; *Beawes, L. M.* § 193. Does this note, then, clearly and intelligibly import a promise to pay \$200? or does it appear to be an imperfect instrument?"

"The question upon this declaration is not whether this may not properly be made a valid instrument, but whether in its present shape it is precisely what it would have been, had it been filled up in the usual manner. If we so hold, what becomes of the rule, above stated, that the sum must be clearly and intelligibly stated in the body of the instrument? Would not its appearance tend to impede its currency and clog its circulation? It certainly would be a very loose mode of doing business in cases which seem to require great accuracy, and one to which we cannot assent unless we find it settled by authority."

Upon a review of the authorities the court reached the conclusion that the aid which the margin is to give in construing a note or bill is to remove an ambiguity in the body of the note, or to clear up a doubt, not to supply a blank.

How the margin will assist in removing a doubt as to the meaning of the body of the instrument is illustrated in *Elliot's Case*,

Leech's C. L. 183. In that case the body of the note was for "fifty"; in the margin, "£50." The court supplied the word "pounds" from the margin.

In other cases, where there was no sum in the margin to aid, the courts have supplied an omitted word, where it was clear from other parts of the instrument what the omitted word was. This is illustrated by the decision of this court in *Harman v. Howe*, 27 Grat. 676, where the sum to be paid was stated as "seven hundred and seventy-six in lawful money of Virginia." The court supplied the word "dollars," because it was clear, as was said by Judge Moncure in delivering the opinion of the court, from the context of the bond sued on, what the omitted word was.

It does not follow, however, because the blank for the amount of a bill or note has not been filled up, that a bona fide holder shall lose the debt which such instrument was intended to evidence, or be deprived of his security. If the blank was left unfilled by mistake, a court of equity may correct the mistake. Generally, any bona fide holder of a bill or note signed in blank has authority to fill the blank with any sum, not exceeding the limitation in the margin, which the transaction between him and the person from whom he received it will warrant. *Norwich Bk. v. Hyde*, supra; *Garrard v. Lewis*, supra; 7 Cyc. 593, 594; 4 Am. & Eng. Ency. L. (2d Ed.) 130, 131; *Frank v. Lilenfield*, 33 Grat. 377, 383.

In *Frank v. Lilenfield*, 33 Grat. 377, 383, this court held that where a party to a negotiable note intrusts it to the custody of another with blanks not filled up, whether it be for the purpose of accommodating the person to whom it was intrusted or to be used for his own benefit, such negotiable instrument carries on its own face an implied authority to fill up the blanks and perfect the instrument.

In the absence of evidence that the blank in the paper sued on in this case was the result of a mistake, the presumption is that the payee, who is still the holder thereof, had the right to fill up the blank with any amount agreed upon between him and the maker, and that right still exists, unless its exercise, in the opinion of the jury upon all the facts and circumstances of the case, has been unreasonably delayed. The plaintiff would therefore seem to have in his hands, as was said in *Norwich Bank v. Hyde*, supra, the materials to make his note and declaration correspond, although, in the present state of the note, he might as well attempt to prove his case "by introducing the bare name of the maker upon one side of a paper and that of the defendant on the other. And yet, in that case, upon well-settled principles, a bona fide holder might fill up such a paper so as to shape it to the case; the rule being that where a man gives his name in blank it is a letter of credit for an indefinite amount. *Russel v. Langstaffe*,

Doug. 514; *Mitchell v. Culver*, 7 Cow. 336." *Frank v. Lillenfield*, supra.

Thus we see that the objection to the note when offered in evidence ought to have been sustained, since it did not correspond with the note declared on. But we further see that it may be in the power of the plaintiff to make it such as he has described it to be in his declaration, so as to render it admissible in evidence.

Another assignment of error is to the action of the court in refusing to permit the defendant to testify that the note sued on was signed in blank, the purpose for which it was signed, the amount to be inserted in the blank, that she did not execute any note to the plaintiff for \$1,800, and that she was not indebted to him at the date of the note.

The bill of exceptions does not show upon what ground the evidence was objected to by the plaintiff or held inadmissible by the court. The plaintiff's contention here is that the defendant had no right to prove that she did not execute the note, because no affidavit was filed with her plea of non assumpsit denying that she had made the note, in order to put that question in issue as required by section 3279 of the Code of 1904, and that the other evidence rejected was not admissible because the matters sought to be established by it were not so plainly described in the statement of her grounds of defense as to give the plaintiff notice of their character, as required by section 3249 of the Code of 1904.

In the absence of the affidavit provided for by section 3279 of the Code of 1904, the court was clearly right in refusing to permit the defendant to prove that she did not make the note declared on. Neither was the defendant's statement of her other grounds of defense sufficient. It gave the plaintiff no more notice of her defense than the plea of non assumpsit. But the court, when that statement was objected to by the plaintiff, ought to have required a further and sufficient statement to be filed, and, if such statement was not furnished, to have excluded evidence of any matter not described in the grounds of defense so plainly as to give the plaintiff notice of its character. But, instead of requiring such statement, the court overruled the plaintiff's motion, thereby impliedly holding that the statement objected to was sufficient.

The proper practice as to filing bills of particulars and statements of grounds of defense was discussed, Judge Riely delivering the opinion of the court, in the case of *Columbia Accident Association v. Rockey*, 93 Va. 678, 683, 25 S. E. 1000. By following the practice pointed out in that case in the next trial, the error complained of will be avoided.

Other errors are assigned; but, as they are not likely to occur upon the next trial, it is unnecessary to consider them.

The judgment must be reversed, because

of the erroneous admission in evidence of the note sued on in its then incomplete condition, the verdict of the jury set aside, and the cause remanded for a new trial.

(104 Va. 486)

**NORTH BRITISH & MERCANTILE INS.
CO. v. EDMUNDSON.**

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

**1. INSURANCE—FIRE POLICY—PROOFS OF LOSS
—TIME FOR FURNISHING.**

Where a fire policy provides for furnishing of proofs of loss within 60 days, but it is not provided that there should be a forfeiture in case of failure to so furnish them, it is sufficient if they are furnished within a reasonable time.

2. SAME—INSTRUCTIONS.

In an action on a fire policy, the evidence was conflicting as to whether insured was told by the agents of the insurer at the time the insurance was taken that an inventory exhibited by insured was sufficient, and defendant requested an instruction that if it was understood between the parties that the inventory offered was not a sufficient compliance with the provisions of the policy, and that insured promised to make a new inventory and on such understanding the policy was written, plaintiff could not recover. *Held*, that it was proper to modify the instruction by stating that such was the case, unless insured was told by insurer's agent at the time the insurance was taken that the inventory was sufficient.

3. SAME—IRON-SAFE CLAUSE—SUBSTANTIAL COMPLIANCE.

A substantial compliance by an insured in a fire policy with the iron-safe clause is sufficient.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 853.]

4. SAME—PROOFS OF LOSS—WAIVER—EVIDENCE.

Where the general agent of a fire insurance company was presented with proofs of loss, and did not point out any defects in it, but indicated a purpose to contest the policy for failure to comply with the iron-safe clause, it was sufficient to warrant a finding that there was a waiver or a substantial compliance with the requirements as to proofs of loss.

5. SAME—IRON-SAFE CLAUSE—COMPLIANCE WITH CLAUSE—EVIDENCE.

Insured, who was a village undertaker, presented to the insurer an inventory, which was accepted as sufficient on the writing of the policy, and thereafter in an ordinary manilla book, which contained the inventory, he entered all sales made by him and kept the same in an iron safe and produced it after the fire. He had made no purchases. He also kept a ledger, in which he made entries of certain business transactions, but which was kept in a desk and lost. It did not appear that such book contained any entry of transactions essential to an understanding of insured's business. *Held*, that the facts warranted a finding that there had been a substantial compliance with the iron-safe clause.

Error to Circuit Court, Frederick County.

Action by David E. Edmundson against the North British & Mercantile Insurance Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

Sipe & Harris, for plaintiff in error. Barton & Boyd and Harry R. Kern, for defendant in error.

CARDWELL, J. This action was instituted by defendant in error to recover the amount alleged to be due upon a fire insurance policy issued by the plaintiff in error covering such losses as might be sustained by the insured in consequence of the destruction by fire of his stock of merchandise at Middletown, Va., embracing coffins, trimmings, instruments, and other goods and merchandise used in an undertaking establishment.

The policy was underwritten August 21, 1902, for \$700, on the insured's stock of merchandise to the value of \$650, and on office furniture and fixtures, including an iron safe, all in the same building, to the value of \$50. The value of the property burned was \$1,045.50; the fire occurring January 18, 1903. In an inventory made by the insured July 21, 1902, one month before the issuance of the policy, the property of the insured was of the aggregate value of \$1,410.75; but in the inventory there was a hearse and a set of furniture not covered by the policy.

A few days after the fire, in response to an informal notice of the fire to the agent of plaintiff in error at Winchester, Va., the said agent and the adjuster of plaintiff in error visited Middletown for the purpose of ascertaining the character and circumstances of the loss, taking at the time the paper known as a nonwaiver agreement, with the view to avoiding any waiver of the rights of the parties growing out of such examinations as might seem necessary preliminary to an adjustment of the loss. A call was made by the adjuster upon the defendant in error for invoices for the original stock of goods, which he tried to get, but could not, and, while there were some negotiations following, plaintiff in error took no steps to pay the loss, and this suit was instituted.

The defense made is on the ground that the terms of the policy were not complied with, especially the provision known as the iron-safe clause, requiring books which should "clearly and plainly present a complete record of business transacted, including purchases and sales made for cash and credit, from date of inventory," and that these books should be securely kept in an iron safe, or in some place not exposed to fire.

This defense was made under the general issue, and by a number of special pleas, on which the jury found against the plaintiff in error the amount claimed by defendant in error of \$700, with interest thereon from December 10, 1903; and to the judgment on the verdict this writ of error was awarded.

Of the assignments of error made in the petition for the writ of error, only the third, fourth, and fifth are relied on here.

The third is to the granting of the eight instructions offered by defendant in error, which are as follows:

"(1) The court instructs the jury that the law only requires from an insured person a substantial, and not necessarily a literal, compliance with the requirements of his

policy, and if they believe from the evidence that the plaintiff in this case substantially complied with the requirements of the policy sued on, then they must find for the plaintiff the amount of his loss as proved by the testimony, not exceeding the sum of \$700, with interest from 60 days after the proof of loss; the said sum to be three-fourths the cash value of the stock, not exceeding \$650, and three-fourths cash value of office furniture and fixtures and iron safe, not exceeding \$50.

"(2) If the jury believe from the evidence that the defendant company waived any of the requirements or conditions of the policy sued on, then they are instructed that such waiver is equivalent to the performance by the plaintiff of such conditions as they believe were so waived.

"(3) If the jury believe from the evidence that the plaintiff offered to the defendant a proper proof of loss within a reasonable time, under all the circumstances of the case, after the fire and not later than 60 days prior to the end of 12 months from the date of the fire, then they are instructed that such offer was in full time, even though it was made more than 60 days after the date of the fire.

"(4) The court instructs the jury that a substantial compliance with the requirements of the policy is all that is required in a proof of loss, and if the jury believe that the plaintiff in a reasonable time, and more than 60 days prior to the end of 12 months after the fire, offered to the defendant such proof of loss and that the defendant refused to accept the same, but failed to point out any alleged defects in the said proof of loss, then the defendant is to be taken to have waived the defects not so pointed out, and the right to require any further proof of loss.

"(5) If the jury believe from the evidence that an inventory substantially in accordance with the requirements of the policy was made out by the plaintiff within 12 months prior to the date of the policy, then they are instructed that the plaintiff was under no obligation to make any other inventory, or keep any set of books of business transactions or any bills or invoices of any purchases or sales (if any were made), except such business, purchases, or sales as were made since the date of the inventory; and if they believe that the plaintiff did keep such a record of sales or purchases, and did produce it and the original inventory after the fire, then they are instructed that this is a sufficient compliance with the provisions of the policy in this respect.

"(6) The court instructs the jury that, even though the inventory, produced in evidence as taken within 12 months prior to the date of the policy, contained also items which were not insured, that this does not affect the validity and sufficiency of such an inventory.

"(7) The court instructs the jury that no evidence is admissible to change or alter the undertakings and promises of the parties to the contract of insurance, and that the

walvers relied on instead of performance can only have reference to some fact existing at the time of the alleged waiver. No provision of the 'iron-safe' clause can be considered waived in this case other than if the jury believe that the insured was told by the agents that the inventory exhibited to them at the time of the issuance of the policy was sufficient, no other inventory would be required of him, although said inventory did not comply with the requirements of said clause. To this extent, and to this extent only, is any evidence admissible to show a waiver of any provision in said clause. Proofs of loss required by this policy may be waived by words, acts, or conduct that reasonably induced insured to believe a strict compliance with the policy was not required.

"(8) The court instructs the jury that, even though the plaintiff may have promised to produce any bills, invoices, other than those referred to in instruction No. 5, and failed so to produce them, such a promise is not binding upon the plaintiff at all, especially if they believe he was unable to procure them and so notified the defendant company."

During the negotiations for the insurance, defendant in error showed the agents of plaintiff in error, who called at his place of business and solicited the insurance, the inventory he had made one month before, which, as defendant in error contends, was examined by these agents and not objected to, and with the property in sight and with full knowledge of what it was they agreed to and did issue the policy thereon for \$700. The only articles sold by defendant in error after the inventory of July 21, 1902, were one coffin, \$7.50, and one casket, \$22.50, and no additional purchases were made. The book, in which the two sales were listed, was kept in the iron safe, and was the same book which contained the inventory of the stock, etc., insured; and this book, which had been produced to the agents of plaintiff in error after the fire, was before the jury. As to whether the inventory was or was not regarded as sufficient when the policy was issued, there was evidence contradictory of that offered by defendant in error, but that was a question of fact for the determination of the jury.

It is insisted that an affirmative warranty on the part of the insured may be satisfied by a very much less literal performance than a promissory warranty, and therefore the first instruction was calculated to mislead the jury to apply a loose or liberal construction to all the obligations of the policy, including those which should be strictly performed; in other words, that while a substantial compliance with an affirmative warranty may be deemed sufficient, a strict performance of a promissory warranty—i. e., a literal compliance with the iron-safe clause—cannot be dispensed with.

It seems to be conceded as settled law that a substantial compliance with the requirements of the policy, other than the iron-safe clause, is all that can be reasonably exacted.

This is unquestionably the settled law as to the proof of loss. *Georgia H. Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 866, and authorities cited.

A substantial compliance with the provisions of the policy as to proof of loss being all that is required of the insured, and whether or not there has been such compliance being a question for the jury, especially where the policy does not provide forfeiture as a penalty for failure to strictly comply, the court in this case did not err in instructing the jury that if "the plaintiff offered to the defendant a proper proof of loss, within a reasonable time, under all the circumstances of the case, after the fire, and not later than 60 days prior to the end of 12 months from the date of the fire, then they are instructed that such offer was in full time, even though it was made more than 60 days after the date of the fire." The provision of the policy is, not that a failure to furnish proof of loss for "60 days after the fire" shall operate as a forfeiture, but that "no suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 12 months next after the fire."

Where "no forfeiture is provided for in case of failure to furnish proofs, forfeitures being stipulated in case of breach of other requirements, or furnishing the proofs in the specified time is not expressly made a condition precedent to recovery, the great majority of recent decisions hold that the effect of failure to furnish them is merely to postpone the time of payment to the specified time after they are furnished." 13 A. & E. Ency. L. 323, and authorities cited.

The real defense relied on by plaintiff in error is that the terms of the iron-safe clause, requiring books to be kept clearly and plainly showing a complete record of the business transacted by defendant in error, had not been complied with.

In *Prudential Fire Ins. Co. v. Alley*, 51 S. E. 812, recently decided by this court, where the iron-safe clause in the policy was identically the same as in the policy sued on here, it was held that a substantial compliance with that clause was all that could be reasonably required. In that case the insured, to sustain his contention that he had complied with the iron-safe clause, introduced in evidence, over the insurance company's objection, an inventory he had taken a short while before the removal of his business from Gate City, Scott county, to Appalachia, in Wise county, at which last-named place the policy of insurance on his stock of goods was issued; two books, one to show the purchases and the other the sales made by the insured while doing business at Appalachia; and certain witnesses to explain the manner of keeping the books. The book of purchases was objected to because it did not give the items or articles claimed to have been pur-

chased, nor show that they were such articles as were covered by the policy. The objection to the book of sales was that it furnished no data from which the insurance company could tell what had been sold, at what profit, or for what price, but merely purported to give the cash taken in each day; and it was further objected that the books introduced did not "clearly and plainly present a complete record of the business transacted, including all purchases, sales, and shipments for cash and credit from the date of the inventory," as provided by the policy.

In that case, as in this, the evidence was conflicting as to whether or not the agent issuing the policy gave the insured to understand and believe that the inventory produced by him was a sufficient compliance with the provisions of the policy; and upon the question whether or not the books introduced were a substantial compliance with the requirements of the policy the opinion reviews the most recent authorities on the subject, including the decisions by the Supreme Court of the United States, and holds that the provisions of the iron-safe clause, under all the facts and circumstances of the case, were substantially complied with by the insured. The facts and circumstances referred to in the opinion in that case were in many respects more favorable to the contention of insurer with reference to the inventory produced and the books kept by the insured than they are in the case under consideration.

It is true that in this case the only book kept was a "yellow book on inferior manilla paper," but the policy did not inhibit the list of sales made by the insured being kept in such a book, and there were no purchases made by him between the issuance of the policy and the fire to be entered and kept. As we have observed, the only sales made by the insured were entered on this book, and it was in this book that the inventory made before the policy was issued appeared and which was exhibited to the agents who issued the policy. This book was kept in the iron safe, and was produced to plaintiff in error's agent after the fire, who examined it as to the inventory, and only claims that his attention was not called to the entry of the two sales. The entry of the two sales was as plainly written in the book as was the inventory, and the agent who examined it after the fire, if he did not see the entry, made no inquiry as to sales, and it is not shown that the insured made any other sales.

The fourth assignment of error relates to the action of the court in modifying instructions Nos. 2 and 3, and in refusing instructions Nos. 5 and 6, offered by plaintiff in error.

Instruction No. 2 is as follows: "The jury are instructed that under the terms of the policy of insurance on which this action is founded it was the duty of the assured to take a complete itemized inventory of the stock on hand at least once in each calendar

year, and unless such inventory had been taken within 12 calendar months prior to the date of the policy sued on in this action it was the duty of the assured to take such inventory within 30 days after the issuance of said policy; and if the jury believe from the evidence that the list of the property contained in the yellow blank book submitted in evidence was shown to the agents of the defendant company at, or a short time before, the writing of the said policy, and it was then understood between the parties not to be a sufficient compliance with the provisions of said policy in respect to the inventory therein required, and that a promise was then made by the assured to make a new inventory covering the stock embraced in the policy, and that after such promise and understanding said policy was written, the plaintiff cannot recover in this action, unless they shall find that such new inventory was afterwards made by the plaintiff in accordance with the provisions of said policy."

The change made by the court in the instruction was to add to its purport and meaning the qualification, "unless the insured was told by the agents of the insurer at the time the insurance was taken that the inventory exhibited to them was sufficient." The effect of this modification was to tell the jury that if plaintiff in error (the insurer) regarded the inventory taken July 21, 1902, as a sufficiently "complete itemized inventory of the stock," and on the strength of it issued the policy, then the jury was to also so regard it. As the evidence on that point was conflicting, it was entirely proper to modify the instruction as was done; otherwise, it would have been incomplete and calculated to confuse and mislead the jury.

While the refusal to give plaintiff in error's instruction No. 6 is complained of in the assignment of error under consideration, the objection is not urged in the argument. This instruction told the jury that, if they found from the evidence that defendant in error failed to make proof of loss within 60 days after the fire, such failure barred his right of recovery in this action, and they should find for plaintiff in error; in other words, that unless there had been a literal compliance with the requirement of the policy that proof of loss should be furnished by the insured within 60 days after the fire he could not recover on the policy. For the reasons already stated the instruction was rightly refused.

As stated in the petition for this writ of error, the modification of plaintiff in error's instruction No. 3 and the refusal of its instruction No. 5 approach so closely to the crucial question in the case that they may be discussed in connection with the refusal of the court to set aside the verdict and grant a new trial.

The only compliance with the iron-safe clause in the policy, with reference to keeping "a set of books," etc., was the memoran-

dum in the small "yellow blank book on inferior manilla paper," in these words:

"Sept. 30th, 1902.

"Sept. 30. By one coffin, Waters, \$7.50.

"Nov. 14. By one casket, Rennels, \$22.00."

This book, as has been remarked, was kept in the iron safe and produced after the fire, and while defendant in error had another book, spoken of as a ledger, in which he made entries of certain business transactions with customers, and which was kept in his desk and lost in the fire, it is not pretended, so far as this record discloses, that he made a single purchase as an addition to his stock of coffins, etc., covered by the policy, or made any sales not entered in the "yellow blank book." Yet plaintiff in error sought to have the jury instructed that as a matter of law defendant in error had not complied with the iron-safe clause, and therefore could not recover in this action.

Nor is it shown, or attempted to be shown, by any evidence in the cause, that the loss of the ledger, which was burned, operated injuriously to the plaintiff in error. It contained no entry of transactions essential to an understanding of what had been the business transactions by defendant in error as an undertaker.

Three questions were submitted to the jury: The first was as to whether or not the inventory taken by defendant in error July 21, 1902, was regarded by the agents of plaintiff in error as sufficient, and they gave the defendant in error to so understand; second, whether there had been a substantial compliance with the requirement of the policy as to proof of loss; and, third, whether or not the memorandum of sales made by defendant in error in the "yellow blank book," between the date of the policy and the fire, was a substantial compliance with the iron-safe clause.

With reference to the first question, while the agents of plaintiff in error who solicited the insurance and issued the policy testified that the inventory, when submitted to them, was not recognized and admitted to be a sufficient compliance with the terms of the policy with respect to the inventory therein required, the defendant in error testified to the contrary, and the jury chose to believe him, which is conclusive of that question; the case being heard here as upon a demurrer to evidence.

As to the second question, while the notice to plaintiff in error as to the loss, which was total, was informal, its agents appeared on the ground to ascertain the facts as to the fire, etc., and negotiations followed with reference to the payment of the loss, the plaintiff in error taking no steps towards the payment thereof; and when Kern, the attorney for defendant in error, presented to the general agent of plaintiff in error a formal proof of the loss in October, 1903, the latter did not point out any defects in the proof offered, but clearly indicated a

purpose to contest the right of defendant in error to recover on his policy by reason of his failure to comply with the iron-safe clause as to the books he was required to keep. Under these circumstances, the jury was warranted in finding, either that there had been a waiver as to proof of loss, or that there had been a substantial compliance with the requirement of the policy in that respect.

The question whether or not there had been a substantial compliance with the iron-safe clause with reference to the books required by the policy to be kept was submitted fairly to the jury on the instructions given, which told the jury what was the legal effect of the failure to keep such books, and then left it to the jury to say whether or not such books were kept in point of fact. What was required was "a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory * * * and during the continuance of the policy." It was not required that the record of sales should show at what price sold, whether for cash or on time; nor was it required that the book or books show whether the sales were for cash, or on credit, but only that there should be a complete record of the business transacted, etc., and, whether a sale was for cash or on credit, it was to be entered as a sale. Nor did the policy inhibit the list of sales being kept in a "yellow book of inferior manilla paper." There had been no purchases, and only two coffins sold, and these sales were listed in the same book with the inventory made before the policy was issued, exhibited to the agents who agreed to issue the policy. That this book was kept in the iron safe and exhibited after the fire is not denied. Let us suppose that there had been neither a sale nor a purchase by the insured between the issuance of the policy and the fire; could the insurer have avoided the payment of the loss on the ground that the iron-safe clause had been violated? Certainly not.

The opinion in *Prudential F. Ins. Co. v. Alley*, supra, quotes from the opinion of the Supreme Court of the United States in *L. & L., etc., Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460, as follows: "Turning, now, to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions, so far as they relate to the issues in this case? The covenant and agreement to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show to a man of

ordinary intelligence 'all purchases and sales, both for cash and credit.'

In *Prudential F. Ins. Co. v. Alley*, supra, referring to the books kept by the insured, the opinion says: "While the book of purchases does not give an itemized statement of all goods purchased after the inventory was taken, it does show the amount of each bill of goods purchased, when, and from whom. Neither does the book of sales give an itemized statement of the goods sold, but it does give, with a few exceptions which are satisfactorily explained, the amount of each day's sales. It clearly appears that no goods were sold or authorized to be sold by the insured upon credit, and that such goods as were sold without being paid for by the purchaser were treated as cash sales on the book of sales and accounted for as cash by the clerk who sold them." There it was held that the provisions of the iron-safe clause, under all the circumstances of the case, were substantially complied with. In other words, while the books under consideration were not kept as books would be kept by "an expert bookkeeper or accountant in a large business house in a great city," such bookkeeping was not to be expected of a storekeeper in a little mining town, and, if the insurer expected it, it ought to have said so in plain language; that where a record of the sales and purchases in a business is so kept as of itself to show the business transacted, or where with explanation as to the entries it shows the business transacted, such a record is a substantial compliance with the iron-safe clause of an insurance policy.

The reasoning upon which the conclusion is reached is obvious. The object of the iron-safe clause is to protect the insurer against fraud by requiring that in case of the destruction of the property the insured will furnish a set of books which will present clearly and plainly a complete record of the business he has transacted while the policy was in force, and, if the compliance with the requirement be sufficient to protect the insurer against fraud, it is all that can be reasonably required; otherwise, a just liability on the insurer might in many cases be avoided by the defense that the requirement had not been literally complied with, although it was not stipulated what system of bookkeeping was to be employed by the insured, and no harm whatever had come to the insurer by reason of the iron-safe clause not having been literally complied with.

The courts, in construing policies of insurance, do not look for grounds of forfeiture, but rather incline to shut their eyes to them. *L. F. Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177.

As said by this court in *Ga. H. Ins. Co. v. Bartlett*, 91 Va. 305, 21 S. E. 476, 50 Am. St. Rep. 832: "These insurance policies abound with innumerable stipulations, forfeitures, and provisions, hard to understand

and difficult of performance, and it is a well-settled rule that they must be strictly construed against the insurer, and liberally in favor of the insured."

We do not appreciate the force of the contention that "the doors of fraud are thrown wide open" and the "moral hazard" greatly increased, because the insured in this case, a village undertaker, kept the list of his two sales from his stock of goods insured in a "yellow blank book," which he kept in his safe and produced after the fire, instead of keeping another and different "set of books," in which the two sales were listed, when the latter course would have presented no more "clearly and plainly a complete record of the business transacted" than the book he kept and produced.

Upon the whole case, we are of opinion that the judgment of the circuit court should be affirmed.

(104 Va. 599)

TERRY et al. v. McCLUNG et al.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. HIGHWAYS — ESTABLISHMENT — JURISDICTION — REPEAL OF STATUTE — EFFECT ON PENDING PROCEEDINGS.

Under Act Feb. 3, 1888 (Acts 1887-88, p. 68, c. 58), depriving the county court of Highland county of all jurisdiction in road cases and conferring the same on the board of supervisors, and which contains no saving clause providing for the transfer of pending cases to such board, where no final order establishing a road as applied for, and from which an appeal would lie, was made, and while the matter was in fieri and undetermined, said act was passed, the proceedings lapsed with the repeal of the statute under which they were instituted.

2. SAME—WHAT CONSTITUTES ROAD—WIDTH —STATUTORY PROVISIONS.

Va. Code 1904, p. 2061, § 3878, relating to offenses concerning highways, etc., provides: "In this chapter the word 'road' shall be construed to mean any turnpike, state road, or county road." Section 944a (2), p. 440, Va. Code 1904, authorizing the board of supervisors of any county to appoint viewers to examine and report on the expediency of establishing any new road, etc., provides that every road shall be 30 feet wide and that the grade of no road hereafter located shall exceed four degrees at any one point, unless the said board order a different width or grade. *Held*, that the authority conferred by the latter section to order a different width in establishing new roads is for the purpose of enabling the tribunal charged with that duty to meet the exigencies of exceptional cases, and must be exercised subject to the implied limitation that the character of the way as a "road" shall be maintained, and hence the county court had no jurisdiction to establish a bridle way "for horseback travel."

3. SAME—OBSTRUCTION OF ROAD BY LAND-OWNERS—INJUNCTION.

Where the county authorities had never recognized a proposed route, along which the county court, acting without jurisdiction, had directed the opening of a road "for horseback travel," as a public road, nor made any appropriation for its location, construction, or maintenance, and the proceedings, so far as the public were concerned, had to all intents and purposes been abandoned years before the institution of a suit to enjoin the owners of the

lands over which the path passed from obstructing the same, no legal ground for the relief prayed existed.

4. SAME—USER—REVOCABLE LICENSE.

The mere user of a road by the public, for however long a time, will not constitute it a public road, as a mere permission to the public by the owner of land to pass over a road thereon is, without more, to be regarded as a mere license, revocable at pleasure.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 1, 6, 10.]

5. DEDICATION—HIGHWAY—ACCEPTANCE BY COUNTY COURT—NECESSITY FOR.

A road dedicated to the public must be accepted by the county court on its records before it can be a public road.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 69, 70.]

Appeal from Circuit Court, Highland County.

Bill by L. M. McClung and another against A. J. Terry and others. From a decree perpetuating a preliminary injunction restraining them from obstructing an alleged road, respondents appeal. Reversed.

A. C. Braxton and C. P. Jones & Son, for appellants. J. & R. Bumgardner, for appellees.

WHITTLE, J. This appeal is from a decree perpetuating a preliminary injunction upon a bill filed by the appellees to enjoin the appellants from obstructing an alleged public road in Highland county, leading from Big Valley, across Jack Mountain, to Bullpasture Valley. The appellee McClung, who is the moving spirit in the litigation, owns two farms located nearly opposite to each other in these valleys, upon one of which he resides, while the other is used chiefly for grazing purposes. There is no road crossing Jack Mountain between the Staunton & Parkersburg pike on the north and Muddy Run Pass on the south, a distance of more than 20 miles; but between those thoroughfares the mountain is traversed by three bridlevays, or driftways, which, by tacit permission of the proprietors of the lands over which they pass, have been used by the people of the neighborhood and others for many years as passways, and occasionally for driving cattle and sheep across the mountain from one valley to the other.

This was the condition of affairs in the year 1863, when proceedings were instituted in the county court to establish a public road along one of these ways between the points indicated. The proceedings cover the period from August, 1863, to November, 1866, and are evidenced by eight orders of the county court. They were to the last degree irregular, and failed to comply with the requirements of the statute in many essential particulars; but since we are of opinion that none of the orders of the county court establishes a "road," within the meaning of the statute, it is unnecessary to notice in detail mere irregularities of procedure.

The county court undertook to deal with

the route in sections, and the only order which can be fairly said to establish any part of it directs the opening of the two middle divisions "for horseback travel in such manner as to preserve the location." But there has never been a final order, establishing the road as applied for, from which an appeal would lie (R. F. & P. R. Co. v. Johnson, 99 Va. 282, 38 S. E. 195), and while the matter was in fieri and undetermined the act of February 3, 1888, was passed, which deprived the county court of Highland county of all jurisdiction in road cases, and conferred that jurisdiction upon the board of supervisors (Acts 1887-88, p. 68, c. 58). The act contains no saving clause providing for the transfer of pending cases to the board of supervisors, and therefore, upon familiar principles, these proceedings lapsed with the repeal of the statute by whose authority they were instituted, and were never afterwards renewed before the board of supervisors. Dulin's Case, 91 Va. 718, 20 S. E. 821; Yeaton v. U. S., 5 Cranch, 283, 3 L. Ed. 101; Insurance Co. v. Richie, 5 Wall. 544, 18 L. Ed. 540; Assessor v. Osborne, 9 Wall. 575, 19 L. Ed. 748; Railroad Co. v. Grant, 98 U. S. 398, 401, 25 L. Ed. 231; South Carolina v. Gaillard, 101 U. S. 433, 25 L. Ed. 937; Todd v. Landry, 12 Am. Dec. 479, note pages 480, 481; Hunt v. Jennings, 33 Am. Dec. 466; Sedgwick on Constr. Stat. (2d Ed.) p. 108, note A, and pages 111, 112.

It also appears that the only provision made to remunerate any landowner for property proposed to be taken for public use is found in the last order of the county court, which certifies to the board of supervisors \$100 as just compensation to one of the proprietors for a change in the location of the proposed road on his premises; but even that allowance the board of supervisors declined to make until the road should be completed the entire distance at least five feet wide and not to exceed five degrees in grade at any point—conditions which were never complied with, and the order, by its terms, stood revoked.

The word "road," in its generic sense, means all kinds of ways, whether they be carlageways, driftways, bridlevays, or footways; but in the narrower statutory use of the term in this state it signifies a turnpike, state road, or county road, and contemplates a suitable way in width and grade for the convenient passage of vehicles. Va. Code 1904, p. 2061, § 3878.

As early as October, 1748 (22 Geo. II), an act was passed by the General Assembly, to take effect June 10, 1751, prescribing 30 feet as the standard width for public roads, and that requirement has been adhered to in the general statutes of the state down to the present time. 3 Hen. St. pp. 392-394, c. 39; 6 Hen. St. pp. 64, 65, c. 28; Va. Code 1904, p. 440, § 944a (2).

The authority conferred by the last-mentioned section to order a different width in establishing new roads is for the purpose

of enabling the tribunal charged with that duty to meet the exigencies of exceptional cases. It has never, however, been construed as warranting the establishment of a way of inferior dignity to a "road," and must be exercised subject to the implied limitation that the character of the way as a "road" shall be maintained. Consequently, in the absence of special statutory authority, the action of the county court in thus attempting to establish a bridleway "for horseback travel" was plainly in excess of its jurisdiction and void.

Accordingly it has been held by the Supreme Court of Missouri, in *Hughes v. Mermod*, 25 S. W. 891, in construing a statute of that state which declares that a public road should be "not less than thirty nor more than sixty feet wide, to be determined by the county court, according to the utility and necessity of such road," that the county court had no jurisdiction to establish a road outside the discretionary limits fixed by statute.

The county authorities have never recognized the proposed route as a public road, nor made any appropriation for its location, construction, or maintenance; and the proceedings, so far as the public are concerned, had to all intents and purposes been finally abandoned years before the institution of this suit in 1900. It cannot be that this abortive attempt on the part of the appellees to convert a bridleway into a public road furnishes any legal ground for the injunctive relief accorded to them by the decree appealed from.

The remaining contentions of appellees, namely, that there has been a dedication of the road to the public, or else that they have acquired a private right of way along its route, are also unsustainable. The law on the subject is well settled that "the mere user of a road by the public, for however long a time, will not constitute a public road; that a mere permission to the public by the owner of land to pass over a road upon it is, without more, to be regarded as a license, and revocable at the pleasure of the owner; that a road dedicated to the public must be accepted by the county court upon its records before it can be a public road." *Com. v. Kelly*, 8 Grat. 682, and note Va. Rep. Anno.; *Harris' Case*, 20 Grat. 833; *Talbott v. R. & D. R. Co.*, 31 Grat. 688; *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738.

With respect to what is requisite to constitute a private easement, it has been held "that the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, uninterrupted, and with the knowledge and acquiescence of the owner of the estate in, over, or out of which the easement prescribed for is claimed." *Washburn on Easements and Servitudes* (4th Ed.) p. 150; *Gaines v. Merryman*, supra;

Reid v. Garnett, 101 Va. 47, 43 S. E. 182.

The matters of estoppel relied on in this connection, such as the payment of money by McClung for work done upon certain sections of the route, and the like, do not apply to all the proprietors, and the record falls to disclose that the appellees have been thereby induced to injuriously alter their position in any particular with regard to the controversy. Without prolonging this opinion, therefore, to enter upon a specific discussion of the evidence, it is only necessary to observe that it falls far short of establishing any of the foregoing assertions.

It follows from what has been said that the decree appealed from is erroneous, and must be reversed; and this court will enter such decree as the circuit court ought to have entered.

(104 Va. 611)

BRYAN v. AUGUSTA PERPETUAL BUILDING & LOAN CO.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. ADVERSE POSSESSION—DEFECTS IN TITLE.

Defects in a person's title to land are cured by lapse of time, where he has been in the uninterrupted, honest, and adverse possession of the land under color of title for over 25 years.

2. BUILDING AND LOAN ASSOCIATION—USURY—STATUTORY PROVISIONS.

A subscriber for 27 shares of stock of a building association, of the par value of \$100 each, borrowed of the association \$2,700, secured by the stock and a deed of trust. The subscriber agreed to pay, until the stock was paid up, interest in quarterly installments of \$40.50 each and quarterly dues of \$225 each. *Held*, that the contract was not usurious, under Acts 1893-94, p. 560, c. 516 [Va. Code 1904, p. 614, § 1180aa], authorizing building associations to fix the bonus at which they will dispose of the money in their treasury and lend to any member to the value of any shares held by him less the bonus.

Appeal from Corporation Court of Staunton.

Suit by E. M. Pendleton, trustee of R. H. Seamen and others, against the Augusta Perpetual Building & Loan Company and others. From decrees subjecting the lands of L. S. Bryan to sale to satisfy liens he appeals. Affirmed.

L. S. Bryan subscribed for 27 shares of the stock of the Augusta Perpetual Building & Loan Company, of the par value of \$100, and at the same time borrowed from the company \$2,700, and agreed to pay to it, in the manner prescribed by its charter, constitution, and by-laws, until such time as the shares of stock should be paid, interest in quarterly installments of \$40.50 each and "monthly dues" on said shares of \$225 each. The words "monthly dues" were a mistake, and "quarterly dues" were meant.

G. D. Letcher and Curry & Glenn, for appellant. Kerr & Kerr, for appellee.

WHITTLE, J. This suit was instituted by creditors of the appellant, whose debts are secured by a deed of trust on the land in controversy, to enjoin a sale of the property under a prior deed of trust for the benefit of the appellee, on the grounds that the title thereto is under a cloud, which it is insisted ought to be removed before sale, and that the debt of the appellee is usurious.

The cause was thrice referred to a commissioner in chancery, whose findings were adverse to both contentions; and from decrees confirming those reports, and subjecting the land to sale to satisfy liens, this appeal was allowed.

It appears that the alleged clouds upon appellant's title are imaginary, rather than real. But, even if the supposed defects had existed originally, they have long since been cured by lapse of time; appellant having been in the uninterrupted, honest, and adverse possession of the land, under color of title, from the year 1877 to the present time.

With regard to the second contention: On May 22, 1894, Bryan subscribed for 27 shares of the capital stock of the appellee company, of the par value of \$100 each, and at the same time borrowed of the company \$2,700, partly on the credit of the stock and with the deed of trust in question as additional security.

In the state of law prior to March 1, 1894, the exactions demanded by the contract would doubtless have rendered the transaction usurious. *Crabtree v. Old Dom. Bldg. & L. Ass'n*, 95 Va. 670, 29 S. E. 741, 64 Am. St. Rep. 818. But on that day an act, entitled "An act to define the power and limitations of building and loan associations," was passed by the Legislature, legalizing such contracts, and this loan comes within its provisions. Acts 1893-94, p. 560, c. 516 [Va. Code, 1904, p. 614, § 1180aa].

In *Smoot v. Peoples Perpetual Bldg. & L. Ass'n*, 95 Va. 686, 29 S. E. 746, 41 L. R. A. 589, it was held that "it is within the power of the Legislature to designate what transactions shall be subject to, and what shall be exempt from, the influence of the laws against usury. It may take away the defense of usury, or it may remove a disability to contract which it had previously imposed; and, though a court cannot by charter create a corporation with power to make contracts contrary to the usury laws, the Legislature may. In the case in judgment, the legislative enactment has rendered valid contracts which were previously usurious, and this is a valid exercise of power."

There were other assignments of error, but they were either expressly abandoned, or not pressed in argument, and, being without merit, do not require further notice.

The decrees are plainly right, and must be affirmed.

(104 Va. 854)

HAYNES v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 14, 1905.)

1. BRIBERY—EXECUTIVE OFFICERS—POLICEMEN.

A police officer of a city is "an executive officer," within Code, § 3744, providing that, if any person give or offer any gift or gratuity to any executive officer with intent to influence his act, decision, or judgment on any matter or question which is or may be then pending or may be brought before him in his official capacity, shall, on conviction, be punished, etc.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Bribery, § 3.]

2. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES.

Where, at the time accused was prosecuted for bribing a police officer, a charge was pending against her for abducting G., a girl under 14 years of age, it was error to permit the state to prove by G. in the bribery case that she had been given whisky to drink and had had intercourse with a man at the house of accused the previous night.

3. SAME—PREJUDICE.

Where accused may have been prejudiced by evidence erroneously admitted, it is sufficient to require a reversal of the judgment, though it be doubtful whether accused was in fact prejudiced.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3094.]

Error to Hustings Court of Richmond.

Della Haynes was convicted of bribery, and she brings error. Reversed.

Wise & Watkins, for plaintiff in error.
The Attorney General, for the Commonwealth.

HARRISON, J. The plaintiff in error was convicted in the hustings court of the city of Richmond of the statutory crime of bribery. While under arrest for keeping and maintaining a disorderly house, resorted to for immoral purposes, she offered John H. Tyler, a police officer of the city of Richmond, \$25 if he would agree to drop and dismiss the proceeding against her.

The indictment was found under section 3744, Code 1887 [Va. Code 1904, p. 2007], which is, so far as material, as follows:

"If any person give, offer or promise * * * any gift or gratuity to any executive, legislative, or judicial officer, * * * with intent to influence his act, vote, opinion, decision, or judgment, on any matter, question, cause or proceeding which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall upon conviction be confined in the penitentiary not less than one nor more than ten years."

It is contended on behalf of the accused that a police officer is not such an officer as was contemplated by section 3744 of the Code; that he is not an "executive," but a purely ministerial, officer.

A policeman is a state officer (*Burch v. Hardwicke*, 30 Grat. 24, 32 Am. Rep. 640); and we are of opinion that the statute was

designed to embrace such an officer within its terms. In the triple classification employed by section 3744, the term "executive officer" is not limited in its application to the chief magistrate of the commonwealth, but embraces as well inferior executive officers, whose duties are for the most part ministerial.

In Throop on Public Officers, § 23, the author, quoting from Judge Cooley, says: "The duties imposed upon the officer are supposed to be capable of classification under one of these heads, the legislative, executive, or judicial, and to pertain accordingly to one of the three departments of government designated by those names. But the classification cannot be very exact, and there are numerous officers who cannot be classified at all under these heads. The reason will be apparent if we name one class as an illustration. Taxing officers perform duties which in strictness are neither executive nor judicial, though in some particulars they must execute the orders of superiors, and others they judge for themselves what is to be done; but sometimes, also, their duties partake of the legislative. All such officers are usually called administrative, while inferior executive officers are designated ministerial."

In the light of this authority, a ministerial officer is an executive officer, and is included within the class embraced by that term, though he may be regarded as an inferior executive officer. A policeman is not, however, a purely ministerial officer. His general duties are defined by clause 1, § 1017a, p. 1018, Va. Code 1904, as follows: "The officers and privates constituting the police force of the cities and towns of the commonwealth of Virginia shall be, and they are hereby, invested with all the power and authority which now belong to the office of constable at common law in taking cognizance of, and enforcing, the criminal laws of the commonwealth, and the ordinances and regulations of the city or town, respectively, for which they are appointed or elected, and it shall be the duty of each and every one of such policemen to use his best endeavors to prevent the commission within the said city or town of offences against the laws of said commonwealth and against the ordinances and regulations of said city or town; to observe and enforce all such laws, ordinances and regulations; to detect and arrest offenders against the same; to preserve the good order of said city or town, and to secure the inhabitants thereof from violence and the property therein from injury."

Some of the duties here prescribed are ministerial, but many of them are in a high degree executive. It is the chief duty of a policeman to execute the laws of the commonwealth, both for the punishment and prevention of crime; indeed, his most important powers and duties are executive. But, if his functions be regarded as chiefly ministerial, he comes within the reason, letter, and mean-

ing of the statute, which makes it a felony to offer a bribe to any executive officer of the commonwealth to influence his act; for, as already said, public officers whose duties are ministerial are included under the head of "executive officers." It cannot be supposed that the Legislature intended that the crime denounced by section 3744 of the Code, could be committed with impunity by those executive officers whose duties may be defined as being chiefly or entirely ministerial. Such a construction would exclude from the operation of the statute a large number of the public officers of the commonwealth.

Bills of exception Nos. 1 and 2 are to the action of the court in permitting certain questions to be asked the witness, Alma Goddin, and answered by her, against the protest of the prisoner.

Alma Goddin was 14 years old, and was one of two small girls who were found in the house of ill fame kept by the accused. This witness was asked and answered the following questions:

"State whether or not you went upstairs with a man.

"Ans. Yes, sir; she made me go up there.

"You say they gave you something to drink.

"Ans. Yes, sir; after I got up there.

"Tell whether the man had intercourse with you, or something to do with you, on Thursday night.

"Ans. Yes, sir."

The indictment in this case was for the crime of bribery, and at the time of trial there was pending against the accused another proceeding, charging her with having abducted Alma Goddin.

It is a well-settled rule of law that the evidence must be confined to the matter in issue. The facts laid before the jury must consist exclusively of the transactions which form the subject of the indictment; for it is these alone that the prisoner can be expected to have come prepared to answer. *Trogdon v. Commonwealth*, 31 Grat. 862; *Moore v. City of Richmond*, 85 Va. 538, 8 S. E. 387.

Evidence of collateral facts is generally inadmissible, because it tends to draw away the minds of the jury from the point in issue, and to excite prejudice and mislead them. There are exceptions to this rule, as in cases where the intent or guilty knowledge of the party accused is a material ingredient in the issue of the case. In such cases collateral facts—that is, other acts and declarations of a similar character—tending to establish such intent or guilty knowledge are admissible, provided they are not too remotely connected with the offense charged. *Trogdon's Case*, supra; *Bottomley v. U. S.*, 1 Story, 135, Fed. Cas. No. 1,688.

The collateral fact that Alma Goddin had been given whisky to drink and had had intercourse with a man at the house of the prisoner the previous night had no connection with the alleged attempt to bribe the officer.

These are not acts of a similar nature or character, and they do not tend to prove that a bribe was offered with intent to influence the officer. The intent to influence the act of the officer had been shown by clear proof of the offer of \$25 if he would release the accused and drop the case, and the introduction of the evidence here objected to could only have had the effect of prejudicing the minds of the jury, and causing them to heighten the punishment for the crime of bribery with which the plaintiff in error stood charged.

If the accused may have been prejudiced by the evidence, even though it be doubtful whether in fact she was so or not, it is sufficient for reversing the judgment. *Trogdon's Case*, supra.

For these reasons the judgment of the hustings court must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

CARDWELL, J., concurs in result.

(104 Va. 547)

JOHNSTON'S ADM'R v. MOORE LIME CO.
(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

MASTER AND SERVANT — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUESTIONS FOR JURY.

Evidence in an action for the death of an employé, in consequence of the explosion of the throttle valve of a steam engine operated by the employé, examined, and held, that the questions of the employer's negligence and the employé's contributory negligence were for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1001, 1069.]

Error to Circuit Court, Botetourt County.

Action by J. Webster Johnston's administrator against the Moore Lime Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

Benj. Haden and W. R. Allen, for plaintiff in error. James L. Shelton, for defendant in error.

KEITH, P. This is the sequel to the case of Moore Lime Company v. Johnston's Administrator, 103 Va. 84, 48 S. E. 557. We refer to that opinion for a discussion of the evidence as it then appeared in the record. For reasons there set forth the case was, upon the petition of the Moore Lime Company, reversed and remanded for a new trial. Upon the new trial there was a demurrer to the evidence, a verdict of the jury in favor of Johnston's administrator, and a judgment upon the demurrer in favor of the Moore Lime Company; and the proceedings culminating in the latter judgment are before us for review.

Counsel for plaintiff in error fully concedes the correctness of the former judgment of this court, and the conclusive force of the reasoning upon which it was based, but in-

sists that the record now before us entitles his client to a recovery.

After a careful review of the evidence, we are of opinion that it presents a case which should have been submitted to the jury, both upon the question of the negligence of the defendant in error and upon the allegation of contributory negligence on the part of plaintiff in error's intestate.

There is evidence which tends to prove that upon the morning of the accident the young man whose death is the subject of this suit had gotten up steam in his boiler, that there was the proper gauge of water in the boiler, that the steam had not been turned on upon the machinery, and that the machinery and no part of it had been put in motion; that having gotten up the steam and while waiting for the signal to turn it on, he had "cracked the valve"—that is to say, he had opened it slightly so that the water which had accumulated in it from the preceding Saturday might gradually escape; that it was necessary to do this, and that it was done in the accustomed manner. It appears that the accumulation of water was the necessary result of the condensation of the steam which was in the pipes on the preceding Saturday, and that the cold weather then prevailing had frozen the water which had thus formed in the throttle valve, by reason of which it cracked, became unsafe, and burst. It appears that the engine had at one time been provided with a "drip cock" or "by-pass," which had been removed and the hole from which it was taken filled with an iron plug; that with this drip cock in position the water from the pipe would have been drained off, no ice would have formed, and the valve would not have been injured by the formation of ice. It further appears that it would not have been safe to have "cracked the valve" and left it in that position, as there was danger of starting the machinery. There is evidence to the effect that the engine in use by the Moore Lime Company prior to December, 1901, was equipped with a drip cock; that about that date another engine was put in, to which a drip cock was also attached until about two weeks before the accident; that during the two weeks intervening between the removal of the drip cock and the plugging of the hole the weather was not so cold as it afterwards became; and that it turned cold on the 15th or 16th of March, and was very cold Sunday evening and Sunday night.

Upon these facts, considered as upon a demurrer to evidence, we are of opinion that the verdict should not have been disturbed. The jury was doubtless of opinion that the machinery had been rendered unsafe by the removal of the drip cock, and that in removing it the Moore Lime Company had failed in its duty to exercise that reasonable care to provide reasonably safe instrumentalities which the law imposes; and they were further of opinion that the change

which rendered the throttle valve unsafe did not constitute a danger so open and obvious as to convict the employé who used it of contributory negligence, and of contributory negligence in any other aspect of the case there is no evidence whatever.

It is proper to observe that the evidence upon the last trial of this case varies in several material respects from that which was given on the first trial, which was found insufficient to maintain the verdict. Especially is this true with respect to the drip cock. The proof upon the first trial was that "there was no 'drip cock' to the throttle valve originally, and no provision made for its use, and the engine had been safely operated for years without that appliance. Indeed, the 'drip cock' was first attached to the valve by Hammitt (who was employed by the defendant for one month as a machinist) in December, 1901, by drilling a hole through the globe valve and inserting the 'drip cock.' A short time before the accident happened, Fairburn, the successor of Hammitt, discovering that the 'drip cock' was out of order, removed it, and closed the hole with an iron screw plug, thus restoring the valve to its original condition." *Moore Lime Co. v. Johnston*, supra. The evidence now before us tends to show that prior to December, 1901, the engine then in use had a drip cock, and had never been operated without it; that the engine which was brought to the mill in December, 1901, was a secondhand engine from Richmond; that it came "tapped" for a drip cock, and that in the fixtures that came with the engine there was a drip cock for the purpose of being placed there; that this latter engine, thus equipped, with a drip cock to the throttle valve, was so used until about a fortnight before the accident, at which time it was taken out and the hole filled with an iron plug. There was evidence upon the former trial which strongly tended to show "that the proximate and efficient cause of the accident was the reckless conduct of plaintiff's intestate in suddenly starting the engine, which, according to the collective opinion of the witnesses, could not with safety be set in motion in less time than from two minutes to eight minutes" (*Moore Lime Co. v. Johnston*, supra); while upon this point the proof now before us is that the steam had not been turned on, but the valve had merely been cracked.

We are of opinion that the judgment should be reversed, and this court will enter judgment upon the verdict for plaintiff in error.

(104 Va. 350)

JERNIGAN v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 7, 1905.)

FISH — CRIMINAL TRESPASS — RIGHT OF APPEAL.

Code 1904, p. 1045, § 2071, declares any one who fishes in the waters on another's land guilty of a trespass, and provides that on conviction he shall be fined. Section 2073,

p. 1046, provides that the offender shall be carried before a justice, who shall try the case, and that, if judgment be rendered against the offender, it shall be for the forfeitures and costs, and if he does not satisfy the judgment the justice shall commit him to jail for one month, unless satisfaction be made. Section 2070b, cl. 8, p. 1044, provides that all penalties imposed or collected under the provisions of the chapter of which the above sections are a part shall be paid to the commonwealth. Section 3879, p. 2061, declares offenses which are not felonies to be misdemeanors. *Held*, that sections 2071 and 2073 create a criminal offense of the misdemeanor class and prescribe a criminal proceeding for their violation, and consequently an appeal from a judgment of conviction lies to the circuit court under Code 1904, pp. 2152, 2154, §§ 4108, 4107, providing for appeals to the circuit court from judgments of conviction in criminal cases before justices, although the fine imposed is less than \$10, so that no appeal would lie to the circuit court under section 2947, p. 1562, providing for appeals in civil cases.

Error to Circuit Court, Princess Anne County.

J. W. Jernigan was convicted before a justice of committing a willful trespass, and appealed to the circuit court, where his appeal was dismissed, and he brings error. Reversed.

J. M. Keeling and N. T. Green, for appellant. The Attorney General, Wm. A. Anderson, and W. W. Old, for the Commonwealth.

BUCHANAN, J. The plaintiff in error was arrested upon a warrant issued by a justice of the peace for committing a willful trespass by going upon and fishing in waters on lands owned by one Bradford, in violation of section 2071, p. 1045, of the Code of 1904.

Upon a hearing of the case he was found guilty and fined \$5 and the costs. From this judgment he appealed to the circuit court. Upon motion of the attorney for the commonwealth, that court dismissed the appeal, upon the ground that it did not have jurisdiction of the case. To that judgment this writ of error was awarded.

By section 2071, p. 1045, of the Code of 1904, it is provided, among other things, that if any one, without the consent of the owner or tenant, fish in the waters on another's land lying east of the Blue Ridge, he shall be guilty of a trespass, and upon conviction thereof shall be fined not less than \$5 nor more than \$50, and in addition thereto shall be liable for damages.

By section 2073, p. 1046, it is provided that every person violating either of the two preceding sections may be arrested and held to await judgment; that the offender shall be carried before a justice in the county in which the offense was committed, who shall proceed to try the case and give judgment thereon. If judgment be rendered against the offender, it shall be for the forfeitures, pecuniary and otherwise, and the costs and expenses incurred; and if the offender does not satisfy the judgment in full, the justice shall

commit him to jail for one month, unless satisfaction be sooner made.

By clause 8, § 2070b, p. 1044, in the same chapter of the Code, it is provided that all fines and penalties imposed or collected under the provisions of that chapter (95) shall be paid to the commonwealth.

It is conceded by the accused that if the proceeding against him was a civil proceeding the circuit court had no jurisdiction of his appeal, as the judgment against him did not exceed \$10. Section 2947, p. 1562, Va. Code, 1904. But his contention is that the proceeding against him was a criminal proceeding, and that under the provisions of sections 4106, 4107, pp. 2152, 2154, of the Code of 1904, he has the right of appeal.

Whether a proceeding is civil or criminal is sometimes difficult to determine. At common law the mere going upon another's land was a civil injury, but not a crime (Henderson's Case, 8 Grat. 708, 710, 56 Am. Dec. 160); and if the offense with which the accused was charged and convicted is criminal it is because it is made so by statute.

Mr. Bishop, in discussing the difference between public and private wrongs, says that: "Whenever, therefore, the public deems an act of private wrong as of a nature requiring the public protection for the individual, it makes the act punishable at its own suit, or, in other words, makes it a crime." 1 Bish. New Crim. Law, § 233.

Judge Cooley, in his work on Torts, quoting with approval from Austin's Jurisprudence, says: "An offense which is pursued at the discretion of the injured party or his representative is a civil injury. An offense which is pursued by the sovereign or the subordinate of the sovereign is a crime." Cooley on Torts (2d Ed.) p. 96.

It is said in 12 Cyc. 131, that the real distinction between a tort and a crime lies in the method in which it is pursued.

In a note to the case of Reg. v. Page, 3 Post. & F. 29, it is stated that "the distinction" between a civil and a criminal proceeding "taken in the most ancient and approved authorities is not whether the crown is a party (for so it is in mandamus and quo warranto), but whether the real end or object of the proceeding is punishment or reparation." See, generally, as to what is a criminal proceeding, Cooley on Torts (2d Ed.) 94-96; 1 Bish. New Cr. Law, 230 et seq.; State v. Pate, 44 N. C. 244, 245; State v. McConnell (N. H.) 46 Atl. 458, 460; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591.

It would seem clear from the authorities cited that the proceeding under consideration lacks the essential elements of a civil proceeding. The act with which the accused was charged was forbidden by statute, and a fine imposed for its violation; the warrant against him, under which he was arrested, tried, and convicted, was a proceeding by the

commonwealth; the penalty imposed was for her benefit; and for a failure to satisfy the judgment rendered against him the justice was not only authorized, but required, to commit him to jail for one month, unless the judgment was sooner paid. While the warrant was issued upon the complaint and information on oath of the tenant of the land trespassed upon, it was in no sense a proceeding for his benefit, or for the benefit of the owner of the land, and was not intended in any way to make reparation for the private injury done by the accused in going upon the land, but was intended to punish him for violating the statute forbidding the act.

We are of opinion that the proceeding was not a civil, but a criminal, proceeding under a public statute; and as all offenses in this state which are not felonies are misdemeanors [Va. Code 1904, p. 2061, § 3879], the offense for which the accused was prosecuted, found guilty, and fined was a misdemeanor, and he had the right to appeal to the circuit court under the provisions of sections 4106, 4107, pp. 2152, 2154, of the Code.

The judgment of the circuit court dismissing the appeal must therefore be reversed, and the cause remanded to be proceeded in according to law.

(104 Va. 860)

CREMEANS v. COMMONWEALTH.*

(Supreme Court of Appeals of Virginia. Dec. 14, 1905.)

1. CRIMINAL LAW — RIGHT OF ACCUSED TO CONFRONT WITNESSES — CONSTITUTIONAL PROVISION.

Under Const. Va. art. 1, § 8, p. ccx, securing to one accused of crime the right to call for evidence in his favor, it is error to force the accused into trial in the absence of his witnesses, on the theory that they will be summoned and examined if they arrive before verdict, and, if not, that their testimony may be made the basis of a motion for a new trial.

2. SAME—HARMLESS ERROR.

Where, in a prosecution for murder, it appeared, both by the return on the process and the uncontroverted testimony of the deputy sheriff of one county and of the sheriff of another county, that no such persons as certain witnesses, the absence of whom was the sole ground relied on by defendant in his motion for a continuance, lived in either county or could be found there, the error in overruling the motion, the court stating that it would award process for the witnesses and permit them to testify, provided they arrived before the trial was concluded, and that otherwise their evidence would be taken and considered on a motion to set aside the verdict, was not cause for reversal.

3. SAME.

The rule that though the ruling of the trial court may have been erroneous on some proposition submitted to it, yet if from the whole record it appears that the party complaining was not and could not be prejudicially affected by such ruling, it affords no ground for reversal, is of general application, except when

*Rehearing denied.

a mandatory requirement of the law is involved, in which case the principle of *strictissimi juris* obtains.

Cardwell, J., dissenting.

Error to Circuit Court, Giles County.

Morris Cremeans was convicted of murder, and brings error. Affirmed.

Jno. W. Williams and A. H. Woodyard, for plaintiff in error.

WHITTLE, J. This writ of error is to a judgment of conviction of the plaintiff in error, Morris Cremeans, of murder in the first degree.

It appears that on the night of April 24, 1906, Cremeans shot George Kid, while the latter was in bed at his home in Giles county, inflicting upon him a mortal wound of which he died a few days thereafter. Cremeans was pursued by the officers of the law, arrested the day following the shooting in Bluefield, W. Va., and brought back into Virginia without a requisition. Having waived a preliminary examination, he was lodged in jail to await indictment and trial.

On May 8, 1906, he was indicted by a special grand jury summoned for that purpose; and, being without counsel, the court assigned two members of the bar to defend him. Thereupon the prisoner moved the court to continue the case until the first day of the next term, on the ground of the absence of material witnesses, and testified in support of his motion that four men were eyewitnesses to the homicide, two of whom were unknown to him, but that the other two, whom he named, were residents of Buchanan county. In further support of the motion, counsel for the prisoner represented to the court that, though they had not had the opportunity of talking with those witnesses, they believed from information derived from the accused that their evidence was not only material, but indispensable, to his defense.

The motion was resisted by the attorney for the commonwealth, who introduced the widow and daughter of the deceased, both of whom testified that they were in the room when the fatal shot was fired, "and that the door of the house was closed, and that there were no such witnesses on the outside as claimed by the defendant, or, if there were, they did not know it." Whereupon the court overruled the motion for a continuance, and also the motion of the prisoner to set the case for trial at a later day of the term, and he was forthwith put upon trial. The court in that connection observed that it would award process for the witnesses and permit them to testify, provided they arrived before the trial was concluded; otherwise, their evidence would be taken and considered upon a motion to set aside the verdict.

This ruling of the court was made the ground of exception, and constitutes the as-

signment of error relied on here to reverse the judgment.

There is no rule of practice better settled in this state than "that a motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case, and that, although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous. Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then, though the witnesses have been summoned and the party has sworn to their materiality and that he cannot safely go to trial without them, the continuance should be refused." This doctrine is laid down in *Hewitt's Case*, 17 Grat. 627, and the principal case has been followed and cited as authority for the proposition enunciated in numerous decisions of this court. The cases on the subject will be found collected in a note to 17 Grat. (Va. Rep. Anno.) 441.

While we approve the wisdom of the above-mentioned rule, and are in entire sympathy with its object, which is to prevent unnecessary delay and promote the prompt and effective administration of the criminal law, still the wide discretion vested in trial courts in that respect must be exercised with due regard to the provisions of the Bill of Rights, which secure to one accused of crime a fair and impartial trial, and to that end safeguard his right "to call for evidence in his favor." Const. Va. art. 1, § 8, p. cxx.

In deference to that fundamental requirement, we cannot sanction a practice which, in "a capital or criminal prosecution," forces the accused into trial in the absence of his witnesses, upon the theory that they will be summoned and examined if they should arrive before verdict, and, if not, that their testimony may be made the basis of a motion for a new trial. Such practice, we conceive, violates both the letter and spirit of the Constitution. In a case of the gravity of the one in question, involving the life of a citizen, we are of opinion that, under the circumstances narrated touching the motion for a continuance, the circuit court ought to have postponed the trial for a reasonable time to afford the prisoner opportunity to prepare for his defense. And we have no hesitation in saying that but for subsequent developments in the case, which in our opinion justify the conclusion that there were no such witnesses in existence as those relied on by the prisoner, we should feel constrained to reverse the judgment and award the prisoner a new trial.

It appears, however, both by the return upon the process and the testimony of the deputy sheriff of Buchanan county and the sheriff of Dickenson county, that no such persons lived in either county, or could be found there; and as the sole ground assigned for delay was the absence of these alleged

witnesses, the prisoner could not have been prejudiced by the ruling of the court in the particulars mentioned. Therefore such ruling does not constitute reversible error; for it is the settled rule of this court that though the ruling of the trial court may have been erroneous upon some proposition submitted to it, yet if it is apparent from the whole record that the party complaining was not and could not have been prejudicially affected by such ruling, it affords no ground for reversing the judgment. *Colvin v. Menefee*, 11 Grat. (Va. Rep. Anno.) 87, and note; *Kincheloe v. Tracewells*, 11 Grat. 587; *Farmers', etc., Ass'n. v. Kinsey*, 101 Va. 236, 244, 43 S. E. 338.

While it is true that the authorities cited were civil cases, the principle announced is of general application, except when the court is dealing with a mandatory requirement of the law, in which case the principle of strictissimi juris obtains. The testimony of the deputy sheriff of Buchanan county and the sheriff of Dickenson county was not controverted, and it would be a vain thing for this court to reverse the judgment and remand the case for a new trial on account of the absence of imaginary witnesses.

On the merits, the record presents a case of unwonted atrocity. The prisoner, who had invaded the home of the deceased in the nighttime for an immoral purpose and made indecent proposals to his married daughter, and was ordered off, for that cause alone shot his defenseless victim, while in his bed with his wife and in the presence of his family.

The other assignments of error were not pressed, and, being without merit, do not demand further notice.

It only remains to say that the judgment must be affirmed.

KEITH, P. (concurring in judgment). The law applicable to continuances, as declared in *Hewitt's Case*, 17 Grat. 627, is set forth in the opinion of the court. The rule and the exceptions are both clearly stated.

The rule is that the affidavit of the prisoner as to the materiality of an absent witness will entitle the accused to a continuance or to time to procure his attendance. The exception is that it will not so entitle him if it appears to the court that the object of the accused is to postpone the trial and not to make preparation for a trial.

This is the issue addressed to the court on the motion for a continuance: Is it made in good faith, or is it a mere pretext for delay? This issue is tendered to and must be decided by the court upon all the circumstances before it. It is addressed to the sound discretion of the court, and the exercise of its discretion, while reviewable, will not be reversed, unless it plainly appears that it has been improperly exercised.

In the case before us the accused made the required affidavit; but the circuit court, after

hearing evidence, concluded that his motion was not made in good faith.

At the moment of the homicide, there were present in the room in which it was committed the deceased, his wife, his married daughter, a little child, who was asleep, and the prisoner. He claims that there were four men on the outside of the house. The wife and daughter say that the door was shut, and that they neither saw nor heard of the presence of any one else at any time. The weight of evidence, then, was against the prisoner. But this is not all. It subsequently appeared, by the return of the sheriff and deputy sheriff and by their testimony, that no such witnesses were found, and that no such persons dwelt in the counties to which the writs of summons were directed at the instance of the accused. It also appears from the testimony of the prisoner that on the night of and just before the homicide he went into the store of W. T. Ould, and that he was accompanied to the store by the four men who were on the outside of the Kid house; but Ould says that the prisoner came into his store alone, and that he neither saw nor heard of any companions of the accused.

On the whole case I am of opinion that the circuit court decided the motion for a continuance in accordance with the weight of evidence, as it appeared when the motion was made and disposed of, and that the conclusion of the court was vindicated by all the facts and circumstances of the case as they were subsequently developed; and on the whole case I fully concur with the judgment of the court.

CARDWELL, J. (dissenting). I am unable to concur in the opinion of the court in this case.

How the course pursued by the trial court with reference to the motions made for a continuance and to lay the case over to a later day of the term, in order that counsel might confer with the prisoner and prepare for his defense, made in the utmost good faith, as counsel assured the court, can be condemned as it is in the opinion, and yet it be held that the denial of these motions was harmless error, is beyond my comprehension.

The offense with which the prisoner was charged was committed on April 24, 1905. The prisoner was arrested in Bluefield, W. Va., the next day, and voluntarily returned to Giles county, where he was lodged in jail to await indictment by the grand jury; he having waived a preliminary examination before a justice. The regular grand jury terms of the court of Giles county are February and September, and prisoner did not know and had no reason for knowing that a special grand jury would be impaneled to consider his case, and had therefore made no preparation for the trial, when on the 8th day of May, 1905, a special grand jury was

impaneled and brought in an indictment against him for murder in the first degree. The prisoner being unprepared for trial, without counsel to conduct his defense, and without means to employ counsel, the court appointed two members of the bar to defend him, and the trial was immediately gone into.

Even after the refusal of the continuance asked by the prisoner, to which he was entitled, as the opinion of the court admits, and the request of the counsel that the case be laid over till a later day in the term, that they might properly prepare the prisoner's defense, was denied, the trial court saying, that "it would award process for the witnesses and permit them to testify, provided they arrived before the trial was concluded, otherwise this evidence would be taken and considered upon a motion to set aside the verdict," and after the evidence for the commonwealth had gone to the jury, counsel for the prisoner again asked that the case be passed until the summons addressed to the sheriff of Buchanan county on the first day of the term had been returned, and this request was also denied.

It will be observed that the opinion of the court, after discussing the rights of one accused of crime which are to be safeguarded, and stating the course pursued at the trial of the prisoner, says: "Such practice, we conceive, violates both the letter and spirit of the Constitution." Yet it is held that the several errors committed by the court below were harmless, because "both by the return upon the process, and the testimony of the deputy sheriff of Buchanan county and the sheriff of Dickenson county that no such persons lived in either county, or could be found there, and as the sole ground assigned for delay was the absence of these alleged witnesses, the prisoner could not have been prejudiced by the ruling of the court in the particulars mentioned."

This leaves out of view the fact that the prisoner had been afforded no opportunity whatever to be prepared to refute the statements made by the deputy sheriff of Buchanan county and the sheriff of Dickenson county, after he had been tried and convicted, and assumes, to the prejudice of the prisoner, plainly, that these officers knew every person who could be found in their respective counties, although they did not profess to have such knowledge. Was it to be expected, under these circumstances, that the prisoner would be prepared to refute the statement of these officers? Surely not. Who knows but that, by reason of these persons whom prisoner desired as witnesses being at or near the deceased's house when the alleged crime was committed, and the excitement in the neighborhood over the occurrence, they were in hiding in the apprehension that they might be considered as participants criminis? The widow and daughter of the deceased, it will be observed, qualify

materially their statement that "there were no such witnesses on the outside of the house, as claimed by the defendant," when they add, "if there were, they did not know it."

Of course, whenever it is made to appear that the application for a continuance is for the mere purpose of evading or to delay a trial, the continuance should be denied. In *Hewitt's Case*, cited in the opinion of the court, the indictment for assault and battery was found April 25, 1863, and the accused was arrested September 23, 1863, and admitted to bail. There was no term of the court of Bedford county till April, 1864, when the case was called for trial. The accused was not present when his counsel made a motion for a continuance, based on the affidavit of the accused as to the materiality of a witness who had been summoned, but was absent, made two days before, and on the morning that the motion was made the accused was at Liberty (the county seat), and left going west, not saying where he was going. Held, that the trial court did not err in its opinion "that the defendant was attempting to evade a trial by absenting himself from court, so as to prevent a personal examination in open court on his motion for a continuance."

That case and the case before us are wholly dissimilar.

The cases cited in the opinion of the court in this case in support of the conclusion that the prisoner was not prejudiced by the rulings of the trial court complained of by the prisoner are all civil cases, in which the court was dealing only with the question whether or not the party complaining was prejudiced by instructions given or refused, and not with the question presented in this case.

The case before us involves human life, and the question to be determined is whether or not the citizen condemned to suffer the extreme penalty of the law has had that fair and impartial trial guaranteed to him by the Constitution of the state. In the consideration of that question, the enormity of the crime charged and the evidence in support of the charge are to be left out of view; for, however grave the charge, or incriminating the evidence in support of it, or low the accused's station in life may be, he was nevertheless entitled to the trial the mandate of the Constitution of the state requires in all cases involving the life or liberty of the citizen.

If, however, we are to look to the evidence for the prosecution in determining the question, whether or not the prisoner in this case has had such a trial—which, I repeat, we have no right to do—a horrible murder has been committed by him, and if, upon such a trial, he had been found guilty of the crime charged against him, he would rightly share the fate that now awaits him; but not with-

out such a trial, as appears plain to me. Although the commonwealth was in the acquisition and submission of its evidence unhampered, it fails to show malice on the part of the prisoner towards his victim, or that there was any premeditation in the act of shooting him; while the theory of the prisoner's defense was that the shooting was accidental, and he, who alone testified in his behalf, so testified. The record does not, in my opinion, justify the statement in the opinion of the court that the prisoner invaded the home of the deceased, etc. On the contrary, it appears that he had been there that very evening of the shooting as the guest of the deceased, on the most friendly terms, and had been gone from the house but a very short while, when he returned to look for something he claimed to have left or missed after he went away.

Under the circumstances surrounding the trial of the prisoner, can it be safely said what the verdict of the jury would have been, had the trial court done what clearly it should at least have done—postponed the trial for a reasonable time to afford the prisoner an opportunity to prepare for his defense? I think not.

Far better and safer, in such a case, as it seems to me, to award the prisoner a new trial, than to carry the doctrine of harmless error to the extent of establishing the dangerous precedent that a trial court may impose upon one accused of a crime a hardship and a wrong, and then put him upon terms of extricating himself, in the event the jury finds him guilty, without affording him an opportunity to do so, and bind him to the results by subsequent testimony taken and considered by the court, which the victim of the practice could not, under the circumstances, by any possibility have refuted.

In stating my views of this case, I have done so with the utmost deference to the views of the majority of the court, and of the learned and conscientious judge who presided at the trial in the circuit court; but, believing as I do that a very dangerous precedent is to be established in the refusal of a new trial to the prisoner, I deemed it necessary to state my reasons for dissenting.

(104 Va. 673)

ROWLAND et al. v. ROWLAND et al.
(Supreme Court of Appeals of Virginia. Dec. 7, 1905.)

1. APPEAL—PARTIES ENTITLED TO APPEAL.

A party has no right to appeal from a decree, the reversal of which would give him nothing more than that which he had received thereunder.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 947.]

2. WILLS—SUIT TO ESTABLISH—ISSUES.

Code 1887, § 2544 [Va. Code 1904, p. 1297], provides for the filing of a bill in equity to impeach or establish a will, on which bill a jury shall be ordered to ascertain whether any, and, if any, how much, of what was offered for

probate, is the will of the decedent. *Held*, that where a bill stated a case which, if true, avoided the whole will, and the answer accepted the issue, an issue framed for a finding for or against the will in its entirety was not erroneous, on the theory that under the statute it should have been so phrased as to permit a finding sustaining a part of the instrument.

Appeal from Circuit Court, Clarke County.

Bill by John J. Rowland and others against George W. Rowland and others to review a decree entered in a contest over the will of Thomas J. Rowland, deceased. From a decree in favor of defendants, petitioners appeal. Affirmed.

A. Moore, Jr., and Chas. M. Broun, for appellants. Marshall McCormick, for appellees.

KEITH, P. A bill was filed in the circuit court of Clarke county by George W. Rowland and others, in which it is stated that Thomas J. Rowland, of Clarke county, died seised of a tract of land valued at about \$4,000, and that in addition thereto he left some personal property; that since he died a writing, purporting to be his last will and testament, has been admitted to probate in the county court of that county, which, as plaintiffs allege, is not the true last will and testament of the decedent, who, as they charge, was incapable by reason of physical and mental infirmity of making a will, and because it was obtained by undue influence and fraud practiced by certain of the defendants.

The defendants, who were the beneficiaries under the will, answered, denying the allegations of the bill, and maintaining, on the contrary, that the said paper writing so admitted to probate "is the true last will and testament of Thomas J. Rowland, deceased, and that he was perfectly capable, both mentally and physically, of making a will."

Upon the pleadings an issue was awarded to ascertain "whether or not the paper, dated February 18, 1901, purporting to be the last will and testament of Thomas J. Rowland, is the true last will and testament of the said Thomas J. Rowland"; and it was provided further that "on the trial of this issue the propounders of the will shall be the plaintiffs and contestants are defendants."

A jury was impaneled on the common-law side of the court, which rendered a verdict as follows: "We, the jury, on the issues joined, find that the paper dated February 18, 1901, signed by Thomas J. Rowland, witnessed by Daniel Hefflebower and C. W. Conrad, and purporting to be the last will of said Thomas J. Rowland, is not the last will of said Thomas J. Rowland."

This verdict was certified to the court upon its chancery side, which received and approved it, and decreed accordingly; and the cause was retired from the docket.

On the 2d of February following John J. Rowland, Jennie Posten, and others presented a bill of review, in which they set

out the object of the original bill, the proceedings thereunder, and then allege that Abbie Posten was, at the time of the decree which they ask to be reviewed, and now is, an infant under the age of 21 years, and that, while she was made a party to the original bill, no guardian ad litem was appointed or asked for as to her, and she is therefore advised that the proceedings in the said suit are, with respect to her, null and void.

The complainants in the bill of review assign also as error that the issue tried by the jury under the original bill is not the issue prescribed by the statute in such cases, that it was irregular, and that the verdict of the jury thereon is illegal, because upon the issue as framed the jury were compelled to find for the will in its entirety or against it in its entirety, while the issue prescribed by the statute is so phrased as to permit a jury upon the issue of *devisavit vel non* to sustain the instrument submitted to it in part and reject it in part.

Answering this bill, the defendants tendered and offered to bring into court the full amount of the bequest to Abbie Posten in the will under investigation, to be received in full discharge of the legacy to her. They denied that the issue directed by the decree of the February term, 1902, is not the issue prescribed by statute in such cases.

Upon the issue raised by the bill of review, the answer thereto, and the depositions of witnesses, the court entered a decree denying the relief prayed for with respect to the adult defendants, and with respect to Abbie Posten the decree recites that "the verdict of the jury as to her is set aside, by the consent of all of the other parties in interest, except the complainants in the bill of review. As to said infant defendant it is by like consent ordered that the will shall be established as to the infant defendant, and as to her legacy said decedent died testate; but this consent does not extend beyond her interest, and it is ordered as to all other parties in interest said decedent died intestate.

"In order that no one can be prejudiced by this decree, the defendants to the bill of review moved the court to permit them to pay \$100, the amount of the legacy left her by the will of the alleged testator, with interest thereon from the 8th day of August, 1901, into the hands of the general receiver, to be by him held until in the proper course of administration the same shall be disbursed by proper proceedings, which said motion the court granted. Thereupon the said defendants paid the said money to the general receiver. As to the decree for costs the said Abbie Posten by like consent is relieved and released from the payment of all costs, either in the original proceeding or in this proceeding had upon the bills of review. In all other respects the final decree in this cause, sought to be reviewed, is approved and confirmed."

In order that an appeal may be successfully prosecuted, it must be shown that the appellant has been aggrieved. It is manifest that Abbie Posten is in no respect interested in the case before us. A reversal of the decree would give her nothing more than that which she receives under the decree.

The remaining question to be considered is as to the form of the issue submitted to the jury.

By section 2544 of the Code of 1887 [Va. Code 1904, p. 1297] it is provided that "after a sentence or order under this section, a person interested, who was not a party to the proceeding, may, within two years, proceed by bill in equity to impeach or establish the will, on which bill a trial by a jury shall be ordered, to ascertain whether any, and if any, how much of what was so offered for probate, be the will of the decedent."

The statute does not undertake to prescribe the terms of the issue. It states the object in view in the framing of the issue, which is to ascertain whether any, and, if any, how much, of what was offered for probate is the will of the decedent; but it was not intended to make hard and fast the exact terms in which the issue should be framed. A substantial compliance with the statute, looking to the object to be accomplished, is sufficient.

The bill in this case attacks the will as a whole. It states a case which, if true, avoids the whole and every part of the paper which had been probated as the will of the decedent. The answer accepts the issue thus tendered, and undertakes to maintain the will in its entirety. There is no suggestion in bill or answer, or in the evidence adduced, that a part of the paper may be established as a will, and the residue rejected as having been obtained by fraud or undue influence. The issue was framed by the court precisely as it was tendered by the plaintiffs and accepted by the defendants, and it is manifest that it did not and could not have operated to the prejudice of appellants.

We are of opinion that the decree complained of should be affirmed.

(204 Va. 665)

NORFOLK & W. RY. CO. v. COFFEY.
(Supreme Court of Appeals of Virginia. Dec. 7, 1905.)

On petition for rehearing. Order reversing and remanding the cause set aside, and judgment of circuit court affirmed.

For former decision, see 51 S. E. 729.

PER CURIAM. Upon the petitions of both the plaintiff in error and defendant in error to rehear the judgment of this court, rendered in this case on the 26th day of

September, 1905, at its place of session in the city of Staunton, reversing the judgment of the circuit court of Rockbridge county, and remanding the case to that court for further proceedings to be had therein not in conflict with the opinion of this court, it appearing from said petitions that the plaintiff in error has expressly waived its pleas of the statute of limitations, and that both parties desire a final disposition of this case upon the merits as presented by the record, independently of the defense of the statute of limitations:

On mature consideration whereof the court, being of opinion that the plaintiff in error was guilty of actionable negligence in failing to use ordinary care to keep its rock quarry, in which the defendant in error was employed as a laborer, in reasonably safe condition (and that said unsafe condition was not attributable to the work which was being conducted in said quarry), which negligence was the proximate and efficient cause of the injuries suffered by the defendant in error, and that the charge of contributory negligence alleged against the defendant in error is not sustained by the evidence, doth so decide and declare.

Therefore (without in any manner receding from the views expressed by this court in its opinion delivered in the case, as originally submitted on the pleadings) upon the case as now presented by the record, with the pleas of the statute of limitations withdrawn, it is considered by the court that the order heretofore entered in the case be set aside, and that the judgment of the circuit court be affirmed.

And it is further considered by the court that the plaintiff in error pay to the defendant in error damages according to law, and also his costs by him about his defense herein expended.

Which is ordered to be entered in the order book here, and forthwith certified to the clerk of this court at Staunton, who will enter the same in the order book there and certify it to the said circuit court of Rockbridge county.

(104 Va. 501)

NORFOLK & W. RY. CO. v. HARMAN.
(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. CARRIERS—BILLS OF LADING—CONSTRUCTION.

A bill of lading, made out on a form used for the transportation of live stock, was issued to cover a shipment of live stock and also of household goods. One clause of the bill required the shipper to give notice of his claim as a condition precedent to his right to recover "for loss or injury to said animals." Held, that the shipper was not required to give notice of a claim for injury to his household goods before suing for damages on account of such injury.

2. TRIAL—INSTRUCTIONS—DISREGARD OF EVIDENCE.

In an action against a carrier for injuries to goods in transit, a charge that the bill of lading constitutes the contract between the parties and that the jury must disregard parol evidence in conflict therewith was properly refused, as leaving the jury to review the rulings of the court in admitting testimony and to decide for themselves whether any evidence conflicted with the bill of lading, whereas no evidence was admitted to which defendant excepted as inadmissible.

3. CARRIERS—BILLS OF LADING—CONSTRUCTION.

A bill of lading having on it the characters "Rel. Val. Lts. [or Ltd.] 5 cwt." will not, in the absence of evidence on the subject, be construed as an agreement limiting the value of the property covered by the bill to five dollars per hundred pounds, especially in view of another clause of the bill of lading placing a different and higher valuation upon certain of the property.

4. APPEAL—HARMLESS ERROR—MODIFICATION OF INSTRUCTIONS.

In an action against a carrier for injury to property in transit, defendant requested the court to charge that the jury must, under the bill of lading, estimate the damage on the basis of five dollars per hundred pounds weight. The court gave the charge, subject to the modification, "provided the jury believes the bill of lading was a special contract," etc. There was in fact nothing on the bill of lading which the court could as a matter of law declare to constitute a contract fixing the value of the goods at five dollars per hundred pounds. Held, that the modification of the charge was not prejudicial to defendant.

Error to Circuit Court, Botetourt County.

Action by O. E. Harman against the Norfolk & Western Railway Company. There was a judgment in favor of plaintiff, and defendant brings error. Affirmed.

E. M. Pendleton and M. McCormick, for plaintiff in error. Benj. Haden, for defendant in error.

CARDWELL, J. O. O. Harman, the plaintiff in this cause, was a farmer, and had resided with his family at Ewing, in Lee county, Va., until the early part of November, 1904, when, determining to return to Botetourt county, where he had lived formerly, he loaded in a box freight car his household goods, family supplies, wagons, utensils, and animals (two mules, one horse, and a cow and calf), and accepted and signed a bill of lading from the Louisville & Nashville Railroad Company for the transportation of said articles by that company from Ewing, Va., to the terminus of that company's line at Norton, Va., there to be delivered to the Norfolk & Western Railroad Company for transportation to Cloverdale, Va., this being a station of the Norfolk & Western Railway Company in Botetourt county nearest to the new home to which Harman was moving.

The car was duly transported without special incident by the Louisville & Nashville Railroad Company, and delivered at Norton to the Norfolk & Western Railway Company,

and from thence by the latter company was duly transported to Roanoke, Va., arriving at the latter point on the night of November 12, 1904; Harman and his young son traveling in the same train, and generally in the same car. While upon the yards of the Norfolk & Western Railway Company at Roanoke, and being shifted onto the line of that company, over which the car was to be transported to Cloverdale, the car was so roughly handled as to cause serious damage to the two mules, the family supplies, household goods, etc.; and to recover for this injury Harman brought this suit against the Norfolk & Western Railway Company.

There was a verdict and judgment in favor of the plaintiff for \$500, with interest thereon from June 8, 1905, till paid, to which a writ of error was awarded by one of the judges of this court.

The first error assigned is that the trial court erred in refusing to give to the jury the following instruction, asked by plaintiff in error, viz.:

"The court instructs the jury that a bill of lading is a contract between the shipper on the one part and the carrier on the other, and they must be controlled in their verdict by it; and if the jury believe from the evidence that the plaintiff did not give notice to defendant's agent at Cloverdale, as required by the twelfth clause of the bill of lading, then the jury must find for the defendant."

The twelfth clause of the bill of lading is as follows:

"As a condition precedent to the shipper's right to recover damages for loss or injury to said animals, he will give notice in writing of his claim thereof to the agent of the railroad company or other carrier from whom he receives said animals before said animals are removed from the place of destination above mentioned, or from the place of delivery of the same to said shipper, and before said animals are mingled with other animals."

This bill of lading is of the class used by the initial carrier "for the transportation of live stock over its lines," while opposite the name of "consignee, destination," etc., and under the heading, "Description of Stock," besides "3 Head Horses," "2 Do. Cattle," there also appear "H. H. Goods." "Rel. Val. Lts., 5 cwt." Clearly, as is readily to be observed, clause 12 of the bill of lading could not have had and was never intended to have, application to suits to recover damages for loss or injury to property other than "animals." In fact, it was nowhere claimed in the conduct of the case before the jury that this clause of the bill of lading had any such application. Defendant in error sued to recover for injuries, not only to his two mules, but to family supplies, household goods, furniture, etc., contained in the same car and set out in the bill of particulars filed with his declaration, amounting to \$728.55, of which amount \$300 was claimed for injuries to the

mules; yet the trial court was asked to instruct the jury that he could not recover for the damages done to his household goods and other property unless he gave written notice to the agent at Cloverdale about the injury to his mules. If the full force and effect, as claimed by plaintiff in error, be given the bill of lading, it would not have justified the giving of this instruction, inasmuch as it could have no application to anything contained therein other than the "animals." For this all-sufficient reason, the instruction was rightly refused.

After the court had passed upon the instructions asked for by both parties, and after the argument had been partly made, it was asked by plaintiff in error to give the following instructions:

"B. The jury is instructed that the bill of lading introduced in evidence in this case, in all of its parts, constitutes the contract between the parties, and no parol evidence is admissible to vary its terms. If such parol evidence has been before the jury, which is in conflict with this contract, the jury must disregard it.

"C. If the jury believe from the evidence that the plaintiff is entitled to recover in this action, then in assessing such damages against the defendant the jury must estimate the damages on the supposition that the plaintiff's goods, live stock, etc., were only worth \$5 for every hundred pounds of weight they weighed, and the burden of proof of their weight is on the plaintiff. In no event can the jury find, on account of damage to the mules, more than \$5 per hundred of their weight; the court telling the jury in this case that the measure of the railway company's liability is to be determined by the weight of the articles loaded in the car."

Instruction B directed the jury to disregard any parol evidence which the jury might decide to be in conflict with the bill of lading. It did not tell the jury that any evidence had been admitted which was in conflict with the bill of lading, and which they should disregard, but left them to review the rulings of the court in admitting testimony, and to decide for themselves whether any evidence introduced did conflict with the bill of lading, what that evidence was, and to disregard it, when in point of fact the record discloses that no evidence was admitted by the court to which plaintiff in error excepted as inadmissible. It has been said again and again by this court that it is the duty of the court, and not the jury, to pass upon the effect of written instruments. *City of Richmond v. Gallego Mills*, 102 Va. 165, 45 S. E. 877, and authorities cited. It is also too well settled to admit of citation of authority that the admissibility of testimony is for the court, and not for the jury.

It was sought by instruction C to announce to the jury as the court's interpretation of the bill of lading, in the light of the evidence, that the measure of the plaintiff's damage

was \$5 for every hundred pounds that his property—his goods and live stock—weighed, when there is nothing whatever in the evidence of any agreement between the parties that the value of the plaintiff's property was only \$5 for every one hundred pounds of weight, or was to be limited to that valuation in case of injury thereto by reason of the negligence of the carrier, unless it be that the characters, "Rel. Val. Lts. [or Ltd.] 5 cwt.," appearing on the bill of lading as before stated, meant that the plaintiff and the defendant had agreed that the property should be considered as worth only \$5 for every hundred pounds of weight.

There is certainly no evidence in the record as to what the characters stood for, or that they had any meaning at all. We have taken occasion to examine the original bill of lading, and find that the characters in question are not only badly written, but have no such connection with the intelligible portions of the paper as would throw any light upon them as showing their meaning, and therefore it cannot be said that their meaning was discernible to a person of ordinary intelligence. There is no dollar mark in front of the figure 5. Its use would be meaningless, certainly to a person even of a high order of intelligence, in the hurry usual in the issuing and receiving of a bill of lading for goods shipped. But, even if the characters of which we are speaking would bear the interpretation claimed for them, they would be glaringly inconsistent with the tenth clause of the bill of lading, in which a different and higher valuation is placed upon the mules.

Upon the record before us, we do not consider that we are called upon to review the authorities cited by counsel for plaintiff in error for the proposition that a statute such as we have (section 1294, p. 668, Va. Code 1904), providing that no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid, does not prohibit the making of a contract between a common carrier and a shipper limiting the liability of the former for injury or loss occasioned by its own neglect or misconduct as a common carrier. In the cases decided by this court, holding that a common carrier can make a valid and binding contract, not exempting the carrier from liability for the negligence of itself or its servants, but limiting the amount in which the carrier shall be liable, in consideration of carriage at a reduced rate, it is declared that the test to be applied in all such cases is, was the contract fairly entered into, and are its terms just and reasonable?

If it were conceded that the terms of the contract here contended for by plaintiff in error are just and reasonable, it cannot, in the

face of the facts to which we have adverted, be maintained that such a contract was fairly entered into by the defendant in error, and therefore instruction C, asked by plaintiff in error, was properly rejected.

The third assignment of error relates to the modification of plaintiff in error's instruction A, which, as given, the modification being italicized, is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff is entitled to recover in this action, in assessing damages against the defendant, they must estimate the damages upon the supposition that the plaintiff's goods, live stock, etc., were only worth \$5 for every hundred pounds they weighed; that is to say, if the plaintiff's mule weighed 1,000 pounds then in estimating damages they must treat it as worth not more than \$50 when received by defendant, and the jury cannot find any more damages on account of injuries to the mule than the difference between \$50 and the value of the mule when it was delivered by defendant to the plaintiff, and under this bill of lading plaintiff can recover no more than \$50 for each mule injured: *provided the jury believes the bill of lading was a special contract, fairly made in consideration of a special rate of transportation, and that the minds of the parties fairly met on the agreement.*"

To what we have said in considering the second assignment of error, all of which is applicable to the assignment here under consideration, it need only be added that the circuit court, in the absence of evidence, could not, as a matter of law, say what these characters, "Rel. Val. Lts. [or Ltd.] 5 cwt.," meant, or that the minds of the parties had met as to their meaning. Therefore the modification of the instruction is no ground of complaint on the part of plaintiff in error, since the most it could reasonably ask was to have submitted to the jury the question whether the parties understood and agreed that the characters had the meaning contended for by plaintiff in error in the instruction A, with the modification made to it by the court.

The remaining assignment of error is to the refusal of the court to set aside the verdict and grant plaintiff in error a new trial.

The evidence proves clearly the negligence—gross negligence—of plaintiff in error, resulting in injury to defendant in error's property, and the latter proves his whole bill of particulars filed in the cause, amounting to \$728.55, while the jury found for him a verdict of \$500 only, thereby leaving to plaintiff in error no ground whatever for complaint as to the amount of damages assessed against it.

The judgment of the circuit court is right, and will therefore be affirmed.

(104 Va. 650)

WOOD'S ADM'X v. SOUTHERN RY. CO.*
(Supreme Court of Appeals of Virginia. Dec. 7, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DUTIES OF MASTER—SAFE APPLIANCES.

Where a handhold on the manhole of an engine tender, while primarily used to raise the manhole cover, is also commonly used, without objection from the railroad, by brakemen and others as the most convenient and safe way to assist them in getting on and off the tender, the railroad is bound to exercise ordinary care to see that such handhold is in a reasonably safe condition for the use to which the brakemen and other employees put it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 174.]

2. SAME—ACTIONS—QUESTIONS FOR JURY.

In an action against a railroad for the death of a brakeman, evidence held sufficient to require the submission to the jury of the question whether the death of the brakeman was not to be attributed to the negligence of the railroad in failing to keep a handhold on the tender on which the brakeman was riding in a reasonably safe condition.

3. EVIDENCE—WEIGHT AND SUFFICIENCY—PREPONDERANCE OF PROOF.

Plaintiff in an action for personal injuries is not required to prove his case beyond a reasonable doubt, but all that is required to make out a prima facie case is to make it appear more probable that the injury was the proximate result of defendant's negligence than of anything else.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 287.]

4. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for the death of a brakeman, alleged to have been caused by the giving way of a manhole cover, to the handhold on which the brakeman was clinging while getting off the tender, evidence held to authorize a finding that the brakeman was not guilty of contributory negligence in making use of the handhold while getting off the tender.

Error to Circuit Court, Amherst County.

Action by Anna P. Wood, as administratrix of J. Buckner Wood, deceased, against the Southern Railway Company. There was a judgment in favor of defendant, and plaintiff brings error. Reversed.

Strode & Tucker and Caskie & Coleman, for plaintiff in error. Horsley & Kemp, for defendant in error.

BUCHANAN, J. This action was brought by the personal representative of J. Buckner Wood, deceased, to recover damages for the death of his decedent, caused, as alleged, by the negligence of the Southern Railway Company.

Upon the trial of the cause, the defendant company's demurrer to the evidence was sustained, and judgment rendered in its favor. To that judgment this writ of error was awarded.

There was evidence tending to prove that about 10 o'clock on the night of February 7, 1904, one of the defendant company's freight trains from Alexandria arrived at

Monroe, a station on the defendant's road in Amherst county. The train was to be placed on a siding there and the engine taken to the roundhouse. The front brakeman on the train not being acquainted with the switches at the station, the plaintiff's decedent, who was a yard brakeman, was ordered by the yardmaster to assist in "putting away" the train, and was engaged in that service when he lost his life.

The train came in from the north on the main track, and after passing the depot was switched to another track, where the engine and tender were cut loose from the cars. The engine and tender proceeded over another switch to the main line, and were backed down that track with the intention of getting on the "lead" track through another switch, so as to get to the roundhouse. As the train went south over the main line, and before the engine and tender were cut loose, the deceased lit a "fusee," which makes a flaming red light and burns about 10 minutes, and stuck it in the ground to give warning to an approaching train from the south. After the engine and tender had been cut loose, and as they were backed north on their way to the roundhouse, the deceased picked up the lighted fusee, and with his lantern got on top of the tender of the engine and sat on its rear end, holding the fusee in his hand to signal the engineman, and to give warning to the train approaching from the south and another which was expected from the north. The position of the deceased was a proper one for the duties he had to perform.

When the engine and tender reached the switch over which they had to pass to reach the "lead" track, it was the duty of the deceased to throw or change the switch. As the engine and tender approached the switch, and were within 100 or 125 yards of it, running at the rate of about 12 miles an hour, the deceased was seen sitting on the "manhole" on the rear end of the tender by the engineman, as he turned to shut off the steam and slow down his engine so as to go in on the switch. There was some slight hitch in reversing the lever and slowing down the engine, and when the engineman again looked in the direction his engine was backing he did not see the plaintiff's intestate, but took "it for granted," as he testified, "that he had gotten down and later would throw the switch." As soon as the engine stopped the attention of the engineer was attracted by the action of the car inspector upon the track over which the engine and tender had just passed. The engineer got off his engine and went back to the car inspector, where was found the dead body of plaintiff's intestate.

The car inspector, who was following after the engine, came first upon the lamp of the deceased, then the "manhole" cover, and, a little nearer the engine, upon the dead body of the deceased, all between the rails of

*Rehearing denied.

the track. The cross-ties and ballast between the ties showed that the manhole cover and the body of the deceased had both been dragged some distance.

The manhole, upon the cover or lid of which the deceased was sitting when last seen alive, and immediately before his death, is located in the center of the rear of the tender, in a line with the top of the ladder leading up and down the rear end of the tender. The manhole cover is about 40 inches in length and 21 inches in width, oblong in shape, is made of iron, and has upon it an iron handhold, parallel with the rounds of the ladder referred to above, and of about the same diameter, located on the side of the cover nearer the end of the tender; and the cover is fastened to the tender by hinges on the side next to the engine. It was the common practice of brakemen and others passing over the tender to use the handhold of the cover for the purpose of pulling themselves up on the tender from the ladder and in letting themselves down the ladder. The location of the handhold was such that it was convenient and inviting, as well as in common use for those purposes, and there was nothing else by which a person ascending or descending the ladder could as conveniently and safely catch hold of. The handhold was also used for raising the manhole cover to put water into the tank, and that was most probably its primary use.

About 30 miles from Alexandria, on the run from there to Monroe, the manhole cover slipped when one of the brakemen caught hold of the handhold in coming up the ladder and getting on the tender from the rear. The hinges of the cover, when found on the track after the accident, were broken; one hinge showing a fresh break, and the other an old break, which was rusty and had the appearance of having been made some time before. When both hinges were in proper condition, there was no danger of the cover slipping or breaking loose by the use of the handhold in getting off or on the tender at the rear.

The contention of the plaintiff is that the proximate cause of the accident, which resulted in her decedent's death, was the failure of the defendant to exercise due care in keeping in a reasonably safe condition the manhole cover, the handhold of which the deceased was using and had the right to use in performing his duty at the time of the accident.

The contention of the defendant as to the negligence charged is that it is not proved that the plaintiff's intestate had the right to use the handhold in getting off the tender, or, if he had, that he was so using it in the performance of his duty when he fell from the tender and was killed.

The evidence not only tends to prove, but the jury, if the case had not been taken from

them by the demurrer to the evidence, might properly have found, that one of the hinges of the manhole cover was broken, and that it had been broken for so long that the defendant knew, or could by the exercise of reasonable care have known, of its condition. The jury might have further found, even though the primary use of the handhold on the manhole cover was to raise it for the purpose of putting water into the tank, that it was the most convenient and safe way for brakemen and others to get on and off the tender by way of the ladder at the rear end of the tender, and that it was their common practice to so use it, without objection by the defendant; and since it did not prohibit such use (which probably would have seemed absurd), it ought, therefore, to have exercised ordinary care in seeing that it was in a reasonably safe condition for such secondary use. *Coates v. Boston, etc., R. Co.* (Mass.) 26 N. E. 864, 10 L. R. A. 769; *McIntyre v. B. & M. R. Co.* (Mass.) 39 N. E. 1012.

The jury might have further found that the deceased, when last seen alive, was sitting on the manhole cover at the rear of the tender, in the performance of his duties, when the engine was within 125 yards of the switch, to change which was his next duty; that in discharging that duty in the customary and most speedy and convenient way he would have used the handhold on the manhole cover in going down the ladder at the end of the tender, preparatory to getting on the ground to change the switch; and that while thus using the handhole, the other hinge in the manhole cover was broken, and by reason thereof he fell, or was thrown, in front of the backing engine and tender and killed.

Upon all the facts and circumstances of the case, considered as on a demurrer to the evidence, we cannot say as a matter of law that the injury complained of was not more naturally to be attributed to the negligence of the defendant than to any other cause. A plaintiff in an action to recover damages for personal injuries is no more required to prove his case beyond a reasonable doubt than in any other civil action. All that he is required to do to make out a prima facie case is to make it appear to be more probable that the injury was the proximate result of the defendant's negligence than from any other cause. *Griffin v. Boston, etc., R. Co.* (Mass.) 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; *Labatt on Master & Servant*, § 835; *Marshall v. Valley R. Co.*, 99 Va. 798, 805, 34 S. E. 455; *Va. Iron C. & C. Co. v. Tomlinson*, 104 Va. —; 51 S. E. 362, 364; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96.

It is insisted by the defendant that, even if it was guilty of negligence in failing to exercise ordinary care to maintain the man-

hole cover in a reasonably safe condition and the plaintiff's intestate had the right to make use of the handhold thereon in getting off the tender, he was guilty of contributory negligence in attempting to do so under the facts and circumstances of the case.

Without discussing further the evidence in the case, and the proper inferences which the jury might have drawn from the facts and circumstances proved, it is sufficient to say that we are clearly of the opinion that, if the jury had found that the plaintiff's intestate was not guilty of contributory negligence, the court could not have set aside the verdict because contrary to the evidence. We are of opinion, therefore, that, since the jury might have found for the plaintiff upon both the question of negligence and of contributory negligence, we must so find.

The judgment of the circuit court must be reversed, and this court will enter such judgment as that court ought to have entered.

(104 Va. 635)

FISHER'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of Virginia. Dec. 7, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEGREE OF CARE REQUIRED—SAFE PLACE TO WORK.

It is the duty of a master to exercise ordinary care to provide for the safety of his servant while engaged in the discharge of his duties, and to that end he must use ordinary care to furnish a reasonably safe place to work.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 174, 179.]

2. SAME—ORDINARY CARE.

Ordinary care is such care as reasonable and prudent men use under like circumstances in providing safe and suitable appliances and instrumentalities for the work to be done and in providing generally for the safety of the servant in the course of his employment; regard being had to the work and difficulties and dangers attending it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 174, 179.]

3. SAME — RAILROAD TRACKS — ADJOINING BANKS AND BLUFFS.

The duty of a railroad company to its servants employed on trains requires it to use ordinary care in guarding against obstructions caused by landslides and rocks falling from adjoining banks and bluffs.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 174, 179, 218, 224.]

4. SAME—QUESTIONS FOR JURY—NEGLIGENCE OF MASTER.

In an action against a railroad company for injury to its engineer, evidence considered, and held, that defendant's negligence should have been submitted to the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1000, 1001.]

5. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for injuries to an engineer, evidence considered, and held, that whether deceased was guilty of

contributory negligence should have been submitted to the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089–1132.]

Error to Circuit Court, Bedford County.

Action by E. C. Fisher, administrator of George Fisher, deceased, against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff brings error. Reversed.

Caskie & Coleman and F. T. Glasgow, for plaintiff in error. Harrison & Long, for defendant in error.

WHITTLE, J. This action was brought by the plaintiff in error to recover damages for the death of his intestate, which is ascribed to the negligence of the defendant.

The case arose as follows: Fisher had been employed for many years by the defendant in the capacity of locomotive engineer on its passenger trains on the James River Division, a line of road extending from the city of Richmond, along James river, to Clifton Forge. The road was built by the predecessor in title of the defendant, the Richmond & Alleghany Railroad Company, in the year 1881, and was located principally upon the old towpath of the James River and Kanawha Canal.

For the distance of three-fourths of a mile, including the point at which the accident happened, in a westerly direction, the river is on the right-hand side of the track; while on the shore side there are a series of bluffs, with intervening ravines, rising abruptly from the water line in some places to the height of 200 feet, along the base of which the roadbed has been cut, and the face of which forms its southern side or wall.

The property was transferred to the present company in the year 1897, and has been since that time operated by it. In its operation the defendant exercises control over these bluffs, and keeps a watchman continuously on the beat in question, whose duty it is to keep a lookout for rocks, trees, and other obstructions likely to fall or wash upon the track, and remove them when practicable, or else flag approaching trains.

On Sunday, December 29, 1901, the regular west-bound passenger train having been delayed by an accident east of Lynchburg, the passengers and baggage were transferred to a special train, composed of an engine and tender, a combination baggage and express car, and a passenger coach. This special train left Lynchburg for Clifton Forge about 6 o'clock in the evening, two hours behind schedule time.

The watchman on the beat in question was returning from the western end of his course, and had proceeded about one-fourth of a mile eastward when he heard the train blow for Reusens, a station four miles west of Lynchburg and two miles east of the scene of the accident, and stepped off the track to allow it to pass him. While thus waiting,

he heard a rock fall on the track towards the eastern end of the bluff, and hurried forward, waving his lantern across the track to stop the train.

The railroad approaches the bluff from the east on an 11° reverse curve, and at that point Fisher, in obedience to the rules of the company, reduced the speed of the train to "almost a stand-still," and came around the curve very slowly; but on clearing it he observed a white light ahead, and, believing the track to be unobstructed, increased his speed to 15 miles an hour, which rate was maintained until the engine collided with a rock weighing about a ton, which had broken loose from the adjacent bluff and fallen upon the track between the rails. The rock was wedge-shaped, and the pilot "rode up on it" with all the wheels of the engine except the back drivers. An examination showed that the engine was not seriously damaged, but it was impossible to replace it on the track, and a messenger was dispatched to Reusens to telegraph to Lynchburg for assistance.

It had been raining continuously for several days, and the night was intensely dark. The passenger coach was crowded, and the trainmen and most of the male passengers assembled in the baggage and express car, where they remained for more than a half hour, awaiting assistance, smoking, and discussing the accident. At intervals, during that time, gravel and rock were falling from the bluff above, and it was suggested that it would be safer for the passenger coach to be pushed back from under the bluff. Accordingly, with the assistance of the passengers, the coach containing the women and children was shoved back some 65 feet. Thereupon the conductor requested the passengers to aid in removing the baggage and express car also; and while the express messenger was engaged in uncoupling the car for that purpose, a large quantity of rock and earth fell from the side of the bluff upon and against the car, casting several men into the river, part of the mass falling upon Fisher and the express messenger, and held them fast, despite the efforts of their companions to release them, until they were overwhelmed and killed by another mass of matter which shortly thereafter came down upon them.

The trial court sustained a demurrer to the evidence and rendered judgment for the defendant; and the plaintiff brings error.

The defendant denies liability for the death of plaintiff's intestate on the grounds that the evidence fails to show actionable negligence on its part, and also that it establishes such contributory negligence on the part of Fisher as would defeat a recovery, even if the initial negligence of the railroad company had been proved.

The relation of the parties being that of master and servant, the law imposed upon the defendant the duty of exercising ordinary

care to provide for the safety of its servant while engaged in the discharge of his duties, and to that end required the use of ordinary care on the part of the company to furnish him a reasonably safe place in which to work.

Ordinary care is defined to be "such care as reasonable and prudent men use under like circumstances, in providing safe and suitable appliances and instrumentalities for the work to be done, and in providing generally for the safety of the servant in the course of his employment; regard being had to the work and difficulties and dangers attending it." *Bertha Zinc Co. v. Martin*, 93 Va. 804, 22 S. E. 869; *Richlands Iron Co. v. Elkins*, 90 Va. 261, 17 S. E. 890.

In the case of *Grand Trunk R. Co. v. Ives*, 144 U. S. 417, 418, 12 Sup. Ct. 679, 36 L. Ed. 485, it is said: "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in the case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury." *B. & O. R. Co. v. Griffith*, 159 U. S. 603, 611, 16 Sup. Ct. 105, 40 L. Ed. 274.

In case of railroad companies, the duty involves proper construction of the roadbed and track, primarily, and also the correlative obligation of maintenance and inspection.

The principle is thus stated by the Supreme Court of the United States: "The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary, and both are intended for one result, which is the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill, and the banks are not the result of natural causes, but of direct intervention of the company's work. If it be the duty of the company (as it unquestionably is), in the erection of the fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause landslides and consequent dangerous obstructions to the track itself

from ill-constructed railway cuts. To all intents and purposes, a railway track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the debris created by the common processes of nature is overhung by those banks. Ordinary skill would enable engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the traveling public by a mere item of increased expense in the construction of railroads, and, after all, an item in the great number of cases of no great moment." *Gleeson v. Va. Mid. Ry. Co.* 140 U. S. 435, 440, 11 Sup. Ct. 859, 861, 35 L. Ed. 458.

It is not perceived that there can be any difference, in principle, between the duty of a railroad company with respect to the artificial banks of a cut, and natural banks and bluffs along the base of which it has chosen to locate its road. The mandate of the law, which imposes upon companies the duty of using ordinary care to furnish the employé a reasonably safe place in which to work, is as imperative in the one case as in the other; and this rule is founded upon the just, reasonable, and humane principle that, where human life is at stake, such precautions must be taken as will afford reasonable assurance of its preservation.

In the case of *Union Pacific R. Co. v. O'Brien*, 161 U. S. 452, 459, 16 Sup. Ct. 618, 620, 40 L. Ed. 766, Chief Justice Fuller, in delivering the opinion of the court, says: "This engineer was entitled to rely upon the company as having properly constructed the road, and to presume that it had made proper inquiry in respect to latent defects, if there were any, in the construction, for such was its duty; and he cannot be held to knowledge of the danger lurking in this narrow seam in the mountain side, by whose inequalities its sinuosities were hidden. We agree with the Circuit Court of Appeals that the Circuit Court properly instructed the jury in this regard, and that no error was committed in allowing the jury to consider the evidence in the light of its own judgment and knowledge, taking into consideration all the facts bearing on the defective construction in question."

So, also, in the case of *Beam v. Western N. C. R. Co.* (N. C.) 12 S. E. 600, the court observes: "The masses of stone just above and near to the railroad track on which trains were moved, were in condition, as to situation, to slide or fall upon the track, were dangerous, were a standing menace, and were allowed to be so for several years; and the agents of the defendants knew the fact. The stone ought to have been removed when the road was constructed. The fact that the defendant kept a 'track walker,' whose duty was to examine and see, just after a train had passed the dangerous point, whether rock had fallen or was about to

fall, cannot excuse the defendant. It was its serious duty to avert such danger, because it was obvious, could be seen, and ought to have been removed. It is not sufficient to be simply cautionary, when a manifest danger exists that may and ought to be removed." See, also, *Elledge v. Nat'l City, etc., R. Co.*, (Cal.) 34 Pac. 720, 38 Am. St. Rep. 290.

In our view it is unnecessary, in either aspect of the case, to enter upon a circumstantial discussion of the evidence.

Upon the first proposition, involving the question of the defendant's negligence, considered from the standpoint of a demurrer to the evidence, there is no escape from the conclusion that the evidence strongly tended to establish it. It was in testimony that the bluff, at the point of the accident, appeared to be, and was believed to be, in an unsafe condition; that it was not solid, but seamed; and that there was a dry crack across the face of it, through which loose earth had exuded, which circumstance, in the opinion of some of the witnesses, indicated the presence of an earth pocket behind the surface of the rock. These conditions were discernible from the track beneath, and had been long known to the defendant's watchmen and supervisor of track. Yet the defendant had wholly failed to make it the object of special inspection, or test its stability by scaling or otherwise. In this state of the case, the trial court was not warranted in declaring, as matter of law, that the allegation of negligence on the part of the defendant had not been sustained. On the contrary, it is the settled doctrine of this court that under such circumstances the question of negligence is one for the determination of the jury.

Thus, in the case of *Kimball & Fink v. Friend*, 95 Va. 125, 140, 27 S. E. 901, 904, the court said: "The question of negligence in such a case is peculiarly one for the consideration of the jury. In *Carrington v. Ficklin*, 32 Grat. 670, 676, 677, the court, Judge Burks delivering the opinion, said: 'Where the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must be either certain and incontrovertible, or they cannot be decided by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ.'" *Richmond & D. R. Co. v. Medley*, 75 Va. 499, 505, 40 Am. Rep. 734; *Winchester v. Carroll*, 99 Va. 727, 744, 40 S. E. 87.

On the issue raised by the defendant's second ground of defense, that plaintiff's intestate was guilty of contributory negligence, there was also a conflict of evidence. The witnesses were not agreed as to the character and size of the particles of gravel and rock which at intervals fell from the bluff before the fatal slide occurred. It was conceded

that the darkness of the night was so intense that it was impossible to discover the true condition of the face of the bluff, and the impression made on one of the witnesses was (to quote his own language) "that, when the first small slide occurred, it left a ragged place, and the downfall of rain was washing down the gravel and dirt that had been torn up by the other rock in its passage down the cliff. The fact that practically all the adult male passengers, some 15 in number and of various occupations, volunteered, after the passenger coach had been pushed back from under the cliff, to assist the crew in removing the combination car, is convincing evidence of the fact that Fisher, in remaining at his post of duty, to say the least of it, was not guilty of negligence per se. Their collective opinion, as evidenced by their conduct, refutes that contention. Therefore the question of his alleged contributory negligence was for the jury, and not for the court.

In *Bass v. Norfolk Ry. etc., Co.*, 100 Va. 1, 8, 40 S. E. 100, 102, it was held: "Whether or not the plaintiff's intestate, under all the facts and circumstances of this case, was guilty of contributory negligence, is a question about which reasonably fair-minded men might differ. The inferences to be drawn from the evidence must be certain and incontrovertible, or they cannot be decided by the court."

"It was, therefore, a question for the jury. And since the jury might have found for the plaintiff on the question of contributory negligence of the plaintiff's intestate, on the defendant's demurrer to the evidence, the court must so find." See, also, *Wood's Adm'r v. Southern Ry. Co.* (decided at the present term) 52 S. E. 371.

For these reasons we are of opinion that the judgment complained of is erroneous, and must be reversed; and this court, proceeding to render such judgment as the circuit court ought to have rendered, will overrule the demurrer to the evidence and enter judgment for the plaintiff in error for the damages awarded by the jury.

HARRISON, J., absent.

(104 Va. 645)

SHANNON'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of Virginia. Dec. 7, 1905.)

1. CARRIERS — INJURIES TO PASSENGERS — LIMITATION OF LIABILITY.

Under Code 1904, p. 668, § 1294c (25), providing that "no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid," a contract between an express company and its messenger, stipulating that the messenger shall exempt the company from liability for its own negligence, and undertaking to afford similar immunity to railroad companies in whose cars he might travel in the performance of his duties, was void, and afforded no

defense in an action against a railroad company for negligence resulting in such messenger's death.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1252-1255.]

2. SAME—CARE REQUIRED AS TO SERVANTS OF EXPRESS COMPANIES.

A messenger in the employ of an express company, while engaged with the servants of a railroad company in the service of transportation on the road, is entitled to at least as high a degree of care for his protection by the railroad company as it owes to its employés.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 978.]

Error to Circuit Court, Bedford County.

Action by J. Boyd Shannon, as administrator of John H. Shannon, deceased, against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff brings error. Reversed.

Lee & Howard and Caskie & Coleman, for appellant. Harrison & Long, for appellee.

WHITTLE, J. This case is controlled in all respects, except one, to which we shall presently advert, by the case of *Fisher's Administrator v. Chesapeake & Ohio Railway Company*, 52 S. E. 373, in which an opinion was handed down at the present term.

The cases arose out of a common accident, and were brought to recover damages for the deaths of Fisher and Shannon, respectively, alleged to have been caused by the negligence of the defendant. The trial court sustained a demurrer to the evidence in each case, and rendered judgment for the defendant; and the judgment in *Fisher's Case* was reversed by this court in the opinion referred to.

In addition to other defenses, applicable alike to both cases, in the case under review the defendant filed a special plea in which it averred "that, as a condition of its permitting the plaintiff's intestate to travel in its car over its line of railway as express messenger in the employ of the Adams Express Company in his performance of his duties as such, * * * plaintiff's intestate * * * entered into a contract in writing with said Adams Express Company, which contract was in force at the time of the death of the plaintiff's intestate, whereby, in consideration of such employment and the compensation to be paid therefor, the said plaintiff's intestate did assume all risks of death or accident or damage to him or his property, whether from negligence or otherwise, and did release and discharge the said Adams Express Company and any connecting carrier, railroad company, express company, or other person or company or connecting carrier [in this instance the defendant], in whose cars or other conveyance he might travel in the performance of his duties aforesaid, from any and all claims, liabilities, and demands of every kind, nature, and description for or on account of his death, or any injury or damage to his

person or property of any kind or nature sustained by him, whether caused by negligence of the said Adams Express Company, or any of said railroad companies or other carriers, or otherwise, and did further agree that he voluntarily assumed the risks of injury or death from said negligence or otherwise, and that none of said companies or persons should incur any further liability whatsoever than therein expressed by reason of permitting him to ride in said cars or other conveyance; * * * that at the time of the death of the plaintiff's intestate he was in an express car being transported by the defendant over its said line in pursuance of his contract with said Adams Express Company, and not otherwise."

The circuit court sustained a demurrer to the plea, and that ruling is assigned as cross-error by the defendant.

It will be observed that the precise question presented by this plea is a narrow one, and involves the validity of the contract set forth therein under section 1294c (25), p. 668, Va. Code 1904.

The section reads as follows: "No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid."

The status both of the express company and the defendant as "common carriers" is fixed by the legislative declaration that the phrase shall include every railroad company and express company chartered by this or any other state and doing business in this state. Acts 1891-92, p. 971, c. 614, § 18.

The Virginia statute is merely declaratory of the common-law doctrine that contracts which stipulate for immunity from negligence are invalid as contrary to public policy, and emphasizes the legislative policy on that subject in the state. The language is so plain that an attempt at exposition would rather tend to obscure than elucidate the meaning of the statute.

In the recent case of *Norfolk & Western Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721, this court, in construing the foregoing section, held "that a person traveling upon a free pass is clothed with every right appertaining to a passenger for hire; and a railway company, having by virtue of the pass undertaken to carry the person to whom it is issued, is charged with the duty of transporting that person safely, even though by agreement signed by the passenger it undertook to relieve itself from the consequences of the negligence of its servants. Such an agreement, being against the policy of the state, is inoperative and void."

It is sought to withdraw this case from the precept of the statute, and the well-established rule of the common law upon which it is founded, and bring it within the influence of that line of authorities (of which the case of *B. & O. S. W. Ry. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560,

is a conspicuous type) which hold that, as it is not one of the duties of a common carrier to transport for an express company its messenger and merchandise, the defendant could therefore contract with the express company for exemption from liability for the death of plaintiff's intestate, although occasioned by its own negligence; the express messenger also voluntarily entering into a contract with the express company, in consideration of his employment, that he would assume such risk and absolve his employer and the defendant from all liability in the premises.

It will be seen that there is a marked difference between the contract set out in the plea in this case and the tripartite agreement in the *Voight Case*. The only parties to this contract are the express company and its servant, and its purpose is manifest. It stipulates, in the first place, to exempt the master from liability for its own negligence to its servant, and, secondly, undertakes to afford similar immunity to the defendant for its negligence. It is plain that such contract is violative both of the letter and spirit of the statute, and illegal. Indeed, independently of statute, the almost unbroken current of authority declares such contracts void.

The *Voight Case* constitutes a distinct exception to the general rule, and the averments of the plea do not bring the defendant within the exception. If, notwithstanding the unmistakable policy of this state in the interest of human life and safety, we were disposed to follow that case rather than the line of authorities of which *Railroad Company v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, is an exponent, as to which no opinion is expressed, it would not be permissible to do so under the pleadings in this case.

It follows from what has been said that the demurrer to the plea in question was properly sustained.

As remarked, the case in its other aspects is ruled by the decision in the *Fisher Case*.

In *Voight's Case*, 176 U. S., at page 514, 20 Sup. Ct., at page 391, 44 L. Ed. 560, it is said of his relations as an express messenger to the railroad company: "He was there as a servant, engaged with the servants of the railroad company in the service of transportation on the road. His duties were substantially the same as those of the baggage master in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage master."

Upon that theory, the defendant owed the plaintiff's intestate at least as high degree of care for his protection as it owed to its

employé Fisher, and the judgment ought to be the same in both cases.

We are of opinion, therefore, that the circuit court erred in sustaining the demurrer to the evidence, for which error its judgment must be reversed; and this court, pronouncing such judgment as that court ought to have rendered, will overrule the demurrer to the evidence, and enter judgment for the plaintiff in error for the damages assessed by the jury.

HARRISON, J., absent.

(104 Va. 700)

ACKISS' EX'RS v. SACHEL et al.
(Supreme Court of Appeals of Virginia. Dec. 14, 1905.)

1. JUDGMENT — LIENS — HOMESTEAD EXEMPTIONS—ENFORCEMENT—LIMITATIONS.

Under Code 1904, pp. 1904, 1908, §§ 3567, 3578, making judgments liens on real estate, and providing that no suit shall be brought to enforce the lien on which the right to issue execution or bring an action is barred by sections 3577, 3578 (pages 1910, 1912), prescribing the time for bringing an action, and directing that in computing the time any time during which the right to sue out execution on the judgment is suspended by the terms thereof or by legal process shall be omitted, and section 3649 (page 1946), providing that on the death of a householder, leaving neither wife nor minor child, the exemption of any estate of such householder shall cease, and it shall pass, as other estate, according to the law of descent and distribution, where a judgment was not rendered until a homestead was set apart, and it was barred by limitations before the exemption ceased, a suit to enforce the lien after the householder's death, leaving neither widow nor minor child, instituted more than 20 years after the issue of execution, was barred.

2. SAME.

A judgment on which an execution has issued may be kept alive by other executions within the statutory period.

Appeal from Law and Chancery Court of City of Norfolk.

Suit by W. H. Taylor and others, executors of C. B. Ackiss, deceased, against R. D. Satchel and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Burroughs & Bro., for appellants. White, Tunstall & Thom, for appellees.

BUCHANAN, J. This suit was brought in the year 1903 to enforce the lien of a judgment on land which had been held as a homestead. The homestead was set apart in January, 1875, and the judgment was rendered in December of that year. An execution was issued, returnable to March rules, 1876, and returned "No effects." The householder died in the year 1900, leaving neither widow nor minor child.

The defense is that more than 20 years had elapsed from March, 1876, before the institution of this suit, and that the judgment was barred by the statute of limitations.

Section 3567, p. 1904, of the Code of 1904, so far as it affects this case, provides that "every judgment for money rendered in this state, heretofore or hereafter, against any person, shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled at or after the date of such judgment. * * * This section is qualified by section 3649 and the three following sections."

By section 3573, p. 1908, of the Code of 1904, it is provided that "no suit shall be brought to enforce the lien of a judgment upon which the right to issue an execution, or bring a scire facias, or an action, is barred by sections thirty-five hundred and seventy-seven and thirty-five hundred and seventy-eight."

Section 3577 (page 1910), so far as it affects the question involved in this case, is as follows: "On a judgment, execution may be issued within a year, and a scire facias or an action may be brought within ten years after the date of the judgment; and where execution issues within the year, other executions may be issued, or a scire facias or an action may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return. * * *"

Section 3578 (page 1912), among other things, provides that "no execution shall issue, nor any scire facias or action be brought, on a judgment in this state, other than for the commonwealth, after the time prescribed by the preceding section, except that, in computing the time, any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted. * * *"

It is conceded that under the foregoing provisions of the Code the right to issue execution, or bring a scire facias or action upon the judgment, or to enforce the lien thereof on real estate other than the homestead, is barred by the statute of limitations. But it is insisted that, under the provisions of section 3649, p. 1946, of the Code of 1904, the right to subject the homestead land to the payment of the judgment is not barred. That section is as follows:

"When any person, entitled as a householder, to the exemption provided for in section thirty-six hundred and thirty, ceases to be a householder, or when any person removes from this state, his right to claim or hold any estate as exempt under the provisions of this chapter, shall cease; and upon the death of a householder leaving neither wife nor minor children surviving him, or if she or any of them survive him, and he leaves any estate which they or any of them are entitled to hold, or to have set apart to be held by them, as exempt under the pre-

ceding sections of this chapter, then upon her death or marriage, and if there be minor children, as soon as the youngest of those who attain the age of twenty-one years attains that age, or all marry, if they all marry before attaining that age, the exemption of any estate, real or personal, of such householder, then remaining and held as exempt under the provisions of this chapter, shall cease, and it shall pass as other real and personal estate, according to the law of descents and distributions, or as the same may be devised or bequeathed by said householder, subject to his debts; but the lien of a judgment, or decree for money, rendered against a householder, and which is not paramount to the exemption provided for in this chapter, shall, as to the real estate held as exempt by him, his widow, or minor children, attach to such only of that estate as he may be possessed of or entitled to at the time the exemption thereof ceases, as aforesaid, and until that time the said lien shall not be enforced."

Prior to the Code of 1887, where that section first appears, there had been a diversity of opinion as to what interest or estate the householder had in the property set apart as his homestead. To put at rest as far as possible that vexed question was one of the objects of that section.

Judge Burks, one of the revisors of the Code of 1887, says, that the "main object of that section, in declaring when the exemption shall cease, was to fix the time when the judgment lien shall attach to the exempted real estate; and it is declared that it shall not attach except to such real estate as the householder shall have at the time the exemption ceases, and it shall attach then. This leaves the householder at liberty, while the exemption continues, to alien the exempted real estate, free from any incumbrance by the lien of a judgment (in the absence of waiver) recovered during the time the right of exemption exists, and thus enables him to make a good title to the purchaser, at least so far as any such judgment is concerned." Burks' Address before the State Bar Association, Reports Va. Bar Ass'n, vol. 4, pp. 137, 138; 2 Barton's Law Pr. (2d Ed.) 1402.

In *Williams v. Watkins*, 92 Va. 680, 24 S. E. 223, in construing that section, it was held that as to debts not paramount to the homestead exemption the householder or head of a family holds the property set apart exempt, and may alien the same at pleasure; and, although a limit is fixed to the duration of the homestead, no lien attaches thereon until that time has arrived.

This being so, the judgment sued on never was a lien upon the homestead property. It was not rendered until after the homestead had been set apart, and it was barred by the statute of limitations before the exemption ceased. But, if it were a lien, as the appellants insist, and they were prohibited

from enforcing it until the exemption ceased, that prohibition did not suspend the running of the statute of limitations as to the judgment.

Section 3578, p. 1912, of the Code of 1904, provides that "no execution shall issue, nor any *scire facias* or action be brought on a judgment in this state, other than for the commonwealth, after the time prescribed by the preceding section, except that, in computing the time, any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted. * * *"

Prohibiting the bringing of a suit to enforce the lien of a judgment is not one of the exceptions mentioned in the statute. The general rule is, that the courts have no authority to make any exception in favor of a party to protect him from the consequences of the statute, unless they come clearly within the letter of the saving clauses therein contained, and that the exercise of any such authority by the courts is an usurpation of legislative powers wholly unwarranted, and to which the courts should never resort. By making the exceptions which exist in the statute, the Legislature has exercised its prerogative, and the fact that no others were made clearly indicates that no others should exist, and the courts have no power to add any, however much the ends of justice in a particular case may seem to demand it. 2 Wood on Lim. § 252; Angel on Lim. §§ 194, 476; *Bickle v. Chrisman*, 76 Va. 678, 685; *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 530, 32 L. Ed. 946.

There are, however, some exceptions to the general rule, it seems, and the statute may be suspended by causes not mentioned in the statute itself. But the cases where the general rule does not apply, as was said by the Supreme Court of the United States, in *Amy v. Watertown*, *supra*, are very limited in character, and are to be admitted with great caution; otherwise, the courts would make the law, instead of administering it.

The ground relied on in this case to take it out of the operation of the statute of limitations is not only not within the letter, but it is not within the spirit, of the statute, and none of the cases cited furnish a precedent for holding that the general rule is not applicable to the case. There is nothing in section 3649 which prohibited the judgment creditor or the appellants from issuing other executions or bringing a *scire facias* to keep the judgment alive so that when the exemption ceased they would have a lien. But if the judgment, to which the lien owes its existence, is barred by the statute of limitations—has ceased to exist—it is clear that the lien, which is a mere incident to the judgment, has also ceased to exist. *Flemming v. Dunlop*, 4 Leigh, 341; *Werdenbaugh v. Reid*, 20 W. Va. 592.

The appellants' counsel insists, or at least suggests, that the utmost limit of a judg-

ment is 20 years from the return day of an execution issued, and that the life of a judgment cannot be prolonged by issuing other executions.

Whilst doubts have been expressed by some members of the bar, and perhaps by some of the trial courts, whether or not under the provisions of section 3577 of the Code a judgment could be preserved in force after 20 years by issuing other executions, the better and the prevailing opinion seems to have been that it could. See Report of Revisors, Code 1849, p. 920, note; Rowe's Adm'r v. Hardy's Adm'r, 5 Va. Law Reg. 672-675, note; Id., 861, 862. But that question is no longer an open one since the decisions of this court in *Gunnell v. Dixon*, 101 Va. 174, 43 S. E. 340, and *Wicks v. Scull*, 102 Va. 290, 46 S. E. 297, in which it was held that a judgment might be kept alive by the issue of other executions within the statutory period. The same construction has been placed upon a similar statute by the Court of Appeals of the state of West Virginia. *Laidley v. Kline*, 23 W. Va. 565; *Reilly v. Clark*, 31 W. Va. 571, 8 S. E. 509.

We are of opinion that there is no error in the decree appealed from, and that it must be affirmed.

(104 Va. 679)

NORFOLK RY. & LIGHT CO. v. WILLIAR.
(Supreme Court of Appeals of Virginia. Dec. 14, 1906.)

HUSBAND AND WIFE—INJURIES TO WIFE—DAMAGES.

Under the married woman's act (Acts 1899-1900, p. 1240, c. 1139 [Va. Code 1904, p. 1138]), the husband is entitled to the services of his wife; and, in an action by a wife for injuries, it is error to instruct that, in assessing the damages, the jury can consider the diminution, if any, of the plaintiff's physical ability to perform the ordinary duties of life.

Error to Law and Chancery Court of City of Norfolk.

Action by Margie E. Williar against the Norfolk Railway & Light Company. From a judgment for plaintiff, defendant brings error. Reversed.

White, Tunstall & Thom, for plaintiff in error. R. B. Tibbett and Brooke & Elliott, for defendant in error.

HARRISON, J. This action was instituted by Margie E. Williar, a married woman, to recover damages for personal injuries caused, as alleged, by a collision between two cars of the plaintiff in error, in one of which she was a passenger.

The declaration charges that by said collision, without contributing thereto by any act or neglect on her part, and as the direct result thereof, she was badly bruised, etc., and suffered therefrom great nervous shock, physical pain, and anguish of mind, and as the direct result thereof she had become permanently disabled and a helpless invalid.

The trial resulted in a verdict in favor of

the plaintiff for \$4,500, which the court of law and chancery of the city of Norfolk refused to set aside, and entered thereon the judgment to which this writ of error was awarded.

The first assignment of error is to the action of the court in giving for the plaintiff the following instruction:

"The court instructs the jury that, if they find for the plaintiff, they may, in assessing damages, take into consideration her physical and mental suffering, if any, arising from said injury; the diminution, if any, of her physical ability to perform the ordinary duties of her life, caused by said injury; and whether her said injuries are of a permanent or temporary character."

This court has held that, notwithstanding the provisions of chapter 103, p. 1138, of the Code of 1904, the husband is entitled to the services of his wife. *Richmond, etc., Co. v. Bowles*, 92 Va. 738, 24 S. E. 388; *A. & D. R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. 319. These cases dealt with the law touching married women and their estates as it was under chapter 103 of the Code of 1904. We now have a new married woman's act. See Acts 1899-1900, p. 1240, c. 1139. A careful reading of this later act, however, discloses no ground affecting the view taken by this court in the cases cited. The new act is no broader than the prior law, and under it, therefore, the husband is still entitled to the services of his wife.

This being so, we are of opinion that it was error to instruct the jury that in assessing damages they could take into consideration the diminution, if any, of the plaintiff's physical ability to perform the ordinary duties of her life, for the reason that "the ordinary duties of her life" embrace elements of damage which would be properly recoverable by the husband, and which constitute no part of the wife's separate estate.

Granting it to be true, as contended, that the ordinary duties of a married woman's life include duties in which she has a personal interest, separate and apart from her husband's right to her services, still the language also includes, as already said, those duties the performance of which constitute services belonging to the husband and which he alone had the right to recover. The only testimony as to a diminution in her ability to perform her ordinary duties related to her impaired capacity for attending to her household duties, and as to these her husband was entitled to her services. The instruction made no discrimination, but included all the ordinary duties of life, and therefore it was equivalent to telling the jury that they could find, in a case brought by her alone, damages for that for which the husband alone could recover.

As said in a New York case, damages for the injury to her person belong to her, because the statute has given them to her, but damages for the loss of her services belong

to her husband, because the common law gave them to him and the statute has not taken them away. *Blaechinska v. Home for Little Wanderers*, 180 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215.

The action of the court in refusing to give the following instruction, asked for by the defendant company, is also assigned as error:

"The court instructs the jury that if they believe from the evidence that prior to the date of the alleged accident, namely, the 4th day of December, 1902, the plaintiff had pseudo angina pectoris, or any nervous disorder, then she cannot recover under the declaration and proofs in this cause on account of such pseudo angina pectoris, or other nervous disorder, existing before said accident, or any aggravation thereof produced by said accident."

It is contended that the declaration and the proof adduced in its support were expressly based upon the theory that the plaintiff, before the accident, was well, hearty, and healthy, and had no pseudo angina pectoris, nor any nervous disorder, but that those troubles had been produced by the accident and were the direct result of it, and, therefore, that the refusal to give this instruction was a refusal to tell the jury that the plaintiff was to be restrained by the case she had claimed and attempted to sustain, and could not recover upon another and different case. It is further insisted that there can, as stated in the instruction, be no recovery for the aggravation of an existing disease, where the declaration is framed upon the theory that the particular disease was produced by the injuries, and not merely aggravated thereby.

For the error already pointed out the case will have to be remanded for a new trial, and therefore we forbear to express an opinion upon this last-mentioned assignment of error, for the reason that the plaintiff will, before another trial, have an opportunity to amend her declaration, and thus avoid the difficulty suggested by the court's refusal to give the instruction under consideration.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

(104 Va. 707)

MURRAY et al. v. MOORE.

(Supreme Court of Appeals of Virginia. Dec. 14, 1905.)

1. DAMAGES — TRIAL—VERDICT—RESPONSIVENESS OF ISSUES.

In an action of tort for conspiracy and fraud of defendants, resulting in depriving plaintiff of an interest in a mine, where there was no allegation that plaintiff was deprived of any one's services, or deprived of compensation for his own services, by any act of defendant, a verdict finding for plaintiff and assessing

his damages at \$500 "for loss of services" was not responsive to the declaration, and it was error to enter judgment thereon.

2. EVIDENCE—RELEVANCY—COLLATERAL MATTERS.

In an action for fraud and conspiracy of defendants in depriving plaintiff of an interest in a mine, a letter written by one defendant to plaintiff, while he and plaintiff were interested in the mine together, and which indicated that they were using disreputable devices to make a success of their undertaking, was collateral to the issues and inadmissible in evidence, either against the writer or his codefendant.

3. WITNESSES—IMPEACHMENT—JUDICIAL RECORDS.

In an action for fraud and conspiracy of defendants in depriving plaintiff of an interest in a mine, defendant was asked on cross-examination whether he had ever been found guilty of any other fraudulent transaction, and replied in the negative. Plaintiff's counsel thereupon introduced in evidence parts of the record in a chancery suit to set aside a fraudulent conveyance to which defendant was a party. Plaintiff was neither a party nor privy to any party to the chancery suit. *Held*, that the record in the chancery suit was inadmissible, and its introduction in evidence was prejudicial.

4. SAME—EXPLANATION OF IMPEACHING TESTIMONY.

Parts of the record having been admitted in evidence over defendant's objection, it was error to refuse to permit defendants to show, by the attorneys who represented the parties in the chancery suit, that the charge against defendant was purely technical, so far as the question of fraud was concerned, and that neither party to the suit considered him guilty of any moral turpitude.

Error to Circuit Court, Buckingham County.

Action by Charles A. Moore against N. R. Murray and another. There was a judgment in favor of plaintiff, and defendants bring error. Reversed.

H. D. Flood, for plaintiffs in error. R. T. Hubbard, for defendant in error.

CARDWELL, J. Charles A. Moore and N. R. Murray held an option on what was considered a valuable gold-mining property, situated in Buckingham county, Va., known as the "Bondurant Gold Mine," which gave to Moore and Murray the right to work and develop the mine during the continuance of the option, but to expire by its terms on December 1, 1902, if the property was not purchased by Moore and Murray on or before that date.

A company was organized and stock issued. Moore worked and managed the mine, and Murray undertook to finance the enterprise by the sale of stock and the negotiation of loans. R. M. Anderson was a large merchant, doing business near the mine and deriving considerable profit by selling supplies to the mine operatives and their workmen, and for this reason was very much interested in the continuance and success of the operation of the mine. On December 1, 1902, Moore and Murray were unable to comply with the terms of the option con-

tract, and the same by limitation expired. Subsequently R. M. Anderson aided Murray in making another contract with the owners of the mine, by which Murray became the purchaser thereof with the view of carrying on the work. Whereupon Moore instituted his action of trespass on the case in the circuit court of Buckingham county against Murray and Anderson, charging them with a conspiracy to defraud him; the gravamen of the amended declaration, upon which the case was tried, being that defendants "did combine, confederate, and conspire to defraud and injure the plaintiff, and to deprive him of a valuable equitable interest in a gold mine in said county [Buckingham] and to break up and destroy his business or trade of miner in said mine." The facts and circumstances of the alleged fraud and conspiracy are then set out in detail, and the declaration concludes with the charge that: "By reason of which conspiracy and fraud of said defendants against said plaintiff, and wicked devices in the execution thereof, said plaintiff has been injured in the destruction aforesaid of his business and deprivation of his said mineral rights in the sum of \$8,000."

The demurrer to the declaration being overruled, issue was joined on the defendants' plea of not guilty, and upon this issue the jury rendered the following verdict: "We, the jury, upon the issue joined, find for the plaintiff and assess his damages for loss of services at five hundred dollars, and allow nothing for loss of interest in the mine." To the judgment upon this verdict this writ of error was awarded.

We are of opinion that the amended declaration set out, and with sufficient clearness, the plaintiff's cause of action, and that there was no error in overruling the demurrer thereto. In fact, the demurrer was not urged in the oral argument here.

It will be observed that upon the allegation of the declaration that the conspiracy and fraud of the defendants had deprived plaintiff of a valuable equitable interest in the Bondurant gold mine the jury found for the defendants, and on the other allegation, that the fraud charged had broken up and destroyed plaintiff's business or trade as a miner in said mine, the verdict is silent. There was no allegation in the declaration that plaintiff was deprived of the services of any one, or that he had been deprived of compensation for his own services, by any act or default of the defendants; and, had there been such an allegation, it would have rendered the declaration plainly demurrable, on the ground that the plaintiff was seeking to recover for a tort and in assumpsit in the same action. This cannot be done in any case. Therefore, as the verdict of the jury does not respond in plaintiff's favor to any allegation in his declaration, clearly it was error to enter judgment for him thereon. But, as we must remand the case for a new

trial, it is necessary to consider other assignments of error relating to the introduction and refusal of evidence during the progress of the last trial.

It appears that during the cross-examination of the defendant Murray the plaintiff offered to introduce three letters, which it was claimed had been written by Murray to Moore, two in November, 1901, and one in August, 1902, to the introduction of which the defendants, by counsel, objected, on the ground that the letters were not pertinent to the inquiry before the jury and would tend to prejudice them against defendants. But the objection was overruled, and the letters were introduced in evidence, to which ruling the defendants excepted.

The court is of opinion that this exception is well taken. These letters formed a part of a correspondence between the plaintiff, Moore, and the defendant Murray, when these parties were endeavoring to make a false impression as to the value of the Bondurant gold mine property, in order to make sale of the stock of the company organized under the option they then held, and with which transactions or correspondence the defendant Anderson had no connection or interest. The letters indicate plainly that both the writer, Murray, and Moore, to whom they were addressed, were using very disreputable devices to make a success of the undertaking in which they were engaged at the time; but they tended to prove only collateral facts, not pertinent nor relevant to the matter in issue in this suit. It is true that large latitude is always given to the admission of evidence where the issue is fraud; as, where fraud in the sale or purchase of property is in issue, evidence of other frauds of like character, committed by the same parties at or near the same time, is admissible, its admissibility being placed upon the ground that, where transactions of similar character are executed by the same parties and closely connected in point of time, the inference is reasonable that they proceed from the same motive. *Piedmont Bank v. Hatcher*, 94 Va. 229, 28 S. E. 505, and authorities cited. But that is not the case here. The conditions were not such as to make the letters in question admissible as evidence against the defendant Murray, and it is inconceivable that they could have been introduced to the prejudice of the defendant Anderson under any conditions. *Greenleaf on Ev.* § 458; *Trogdon's Case*, 31 Grat. 862; *Moore v. City of Richmond*, 85 Va. 538, 8 S. E. 387.

The fifth, sixth, seventh, and eighth assignments of error may be considered together.

It appears that, while the defendant Anderson was on cross-examination by plaintiff's counsel, he was asked if he had ever been found guilty of any other fraudulent transaction by decree of the court in which he was then testifying, to which he answered that he "never knew or heard of such

charges." Whereupon, over the objection of counsel for the defendants, the plaintiff's counsel introduced in evidence certain parts only of the record in a chancery suit finally ended in the circuit court of Buckingham county several years before, in which a deed was attacked and set aside as being a fraudulent conveyance of property to different parties, among others, to a trustee to secure the payment of a debt of \$500 due to Anderson; and after the said parts of the chancery record had been allowed to go to the jury the defendants offered to introduce as witnesses the attorneys who represented both parties in that suit, and who were then present in court, willing to testify that in the prosecution of the said chancery suit neither side considered that Anderson was guilty of any moral turpitude in connection with the transaction which was attacked, and that the charge against him was purely technical, so far as the charge of fraud was concerned; but the objection of the plaintiff to the introduction of said attorneys as witnesses was sustained.

We are of opinion that the error in the rulings of the circuit court in this connection is twofold. First, in no view of the proceedings in the chancery suit was the record therein or any part thereof relevant or pertinent to the issue being tried in this suit. The plaintiff, Moore, was neither a party nor a privy to any party to the chancery suit, and the introduction of that record or any part of it in this suit could only serve to draw away the minds of the jury from the point in issue, and to excite, prejudice, and mislead them. There are exceptional conditions under which evidence of that character might be admissible, but they did not exist in this case. *Piedmont Bank v. Hatcher*, supra; *Bargamin v. Clarke*, 20 Gr. 544.

Second, portions of the record in the ended chancery suit having gone to the jury, the purpose and effect of which was to attack Anderson's character and to prejudice the minds of the jury against him, it was unjust and unfair to the defendants to deny them the right to refute the attack by the introduction of witnesses who would testify to the bona fides of Anderson's conduct in the transaction dealt with in the chancery suit.

The ninth and tenth assignments of error relate to the giving, over the objection of the defendants, of certain instructions for the plaintiff, and the refusal to give others asked by the defendants, except as modified by the court.

With reference to these assignments, we consider it only necessary to say that we are further of opinion that the defendants were not prejudiced by the four instructions given at the instance of the plaintiff, nor by the giving of the one instruction in lieu of the two they asked. The instructions, as given, fairly submitted the question at issue

to the jury, and could not have misled them to the defendants' injury.

The remaining assignment of error requiring consideration is to the refusal of the court to set aside the verdict of the jury as contrary to the law and the evidence.

It is only necessary to say, in addition to what has been said of the verdict, that if it is to be interpreted as meaning that the plaintiff was injured by being thrown out of employment, and damages awarded him for that reason, which would seem to be the only interpretation to be given their finding, the evidence utterly fails to sustain it. In fact, there is no evidence whatever of that character in the record, nor does the finding in favor of the plaintiff of damages for loss of services respond to any issue made in the pleadings.

The judgment of the circuit court will be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial, to be had in accordance with the views expressed in this opinion.

(104 Va. 716)

ELLIOTT v. ASHBY.

(Supreme Court of Appeals of Virginia. Dec. 14, 1905.)

1. APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY.

The Court of Appeals has jurisdiction on appeal of a suit involving defendant's liability on a stock subscription amounting to \$1,000, though the judgment appealed from was for \$140.

2. CORPORATIONS—SUBSCRIPTION TO STOCK—PROCEEDINGS BY RECEIVERS—DEFENSES.

Under Code 1904, p. 519, § 1103a, providing that all suits or motions for the recovery of unpaid subscriptions to the stock of joint-stock companies shall be brought in the courts of common law of the commonwealth, and they shall have exclusive jurisdiction to determine all questions involving the validity of each subscription, but it shall not be construed to deprive the chancery courts of the power to settle the affairs of an insolvent corporation, on motion by a receiver of an insolvent corporation for judgment against a subscriber to its stock, defendant may make any defense involving the validity of his subscription.

3. SAME—EVIDENCE.

On motion by a receiver of an insolvent corporation for judgment against a subscriber to its stock, evidence by a stockholder, who solicited defendant's subscription, that before the charter was obtained defendant requested his name stricken from the subscription list and that defendant was not regarded as a stockholder, was sufficient to warrant a finding that defendant's subscription was not regarded either by himself or the company as binding.

Error to Corporation Court of Newport News.

Motion by C. A. Ashby, receiver of the Schulz Brewing Company, against J. W. Elliott, for judgment against him as a stockholder. From a judgment for plaintiff, defendant brings error. Reversed.

A. C. Garrett, for plaintiff in error. Ashby & Read, for defendant in error.

KEITH, P. A chancery suit was brought by Phipps against the Schulz Brewing Company and others, an insolvent corporation, for the payment of its debts, which resulted in an assessment of 14 per cent. upon the stock subscribed, and C. A. Ashby was appointed a receiver, with direction to bring an action at law in his own name against the several subscribers for that amount.

Acting under this order, the receiver gave notice of a motion for judgment against J. W. Elliott, which afterwards came on for trial in the corporation court of the city of Newport News, and a judgment was rendered against the defendant for \$140. To this judgment a writ of error was awarded the defendant.

We are met by a motion to dismiss the writ of error for want of jurisdiction; defendant in error relying upon the proposition, which as a general rule is true, that the real matter in controversy is that for which the suit is brought and judgment is rendered, and not that which may or may not come in question—in other words, that the sole test of jurisdiction is the amount which the defendant may pay and thereby discharge himself, and, if that sum be less than the minimum jurisdiction of the court, the appeal or writ of error should be dismissed.

On behalf of the plaintiff in error it is urged that while the judgment before us is for \$140, which could be satisfied by the payment of that sum, this suit involves the liability of plaintiff in error (defendant in the court below) upon a stock subscription amounting in the aggregate to \$1,000, which was the real subject in controversy.

It is needless to consider what our view would be of the law, were the subject an open one in this court. In the case of *Stuart v. Valley Railroad Co.*, 32 Grat. 146, it was held that, though the judgment against S. for the \$300 and interest was less than \$500, yet the subject in controversy was the validity of the subscription for five shares of stock (of the par value of \$500), and the Court of Appeals had jurisdiction to hear the case. That case was decided at the September term, 1879; Judge Moncure delivering the opinion. Since that time the laws of the state have been codified, and two of the judges who were then upon the court were upon the commission charged with that duty, and the statute upon the subject was re-enacted in totidem verbis. More than that, since that time a new Constitution has been adopted, which has retained, so far as it affects this case, the language of the preceding Constitution, which was the law when *Stuart v. Railroad Co.* was decided. The jurisdictional sum, it is true, was diminished from \$500 to \$300, but in no other respect was it changed.

We have, then, a judgment of this court, which has remained unquestioned as the law of this state for more than a quarter of a century, construing a provision of the Constitution and a statute passed in pur-

suance thereof, and the construction placed upon them has not only been unchallenged, but must be taken as having been approved by the adoption of the identical language in the Code and the Constitution.

Defendant in error also insists that plaintiff in error could not question in the court of law the fact that he had subscribed to and become a stockholder in the Schulz Brewing Company, but that he would be confined to defenses in the nature of confession and avoidance; that is to say, which admit that he had subscribed as a stockholder, but that by reason of fraud or misrepresentation he should not be bound by his contract of subscription—and in support of this proposition cites *Reed v. Gold*, 102 Va. 37, 45 S. E. 868, where it is said: "When the proportion which each delinquent shareholder is to pay has been ascertained, the receiver is directed to institute suit against him at law, upon his refusal to pay it, and in that suit the stockholder may make any defense which involves the validity of his subscription; but we do not understand that it authorizes the court of law to rehear and to review matters which are necessarily adjudicated in the court of chancery."

The statute which was there being construed now appears as section 1103a, p. 519 of Va. Code 1904:

"All suits or motions for the recovery of unpaid subscriptions to the stock of any joint stock company shall be brought in the courts of common law of this commonwealth in the county or corporation where the defendant resides, if he be a resident of this state, or in the case of a joint or partnership subscription then in the county or corporation in this state in which either of the joint subscribers or any member of the partnership subscribing shall reside; and said courts shall have exclusive jurisdiction to hear and determine all questions involving the validity of such subscriptions, but nothing herein contained shall be construed to deprive courts of chancery of their jurisdiction to settle and wind up the affairs of insolvent corporations or to make assessments on unpaid stock subscriptions."

That section, on its face, applies to questions which are to be heard and determined in the chancery courts. For instance, the chancery court ascertains the indebtedness of the corporation, the amount necessary for its liquidation, the percentage which is to be paid by each stockholder, and appoints a receiver to enforce its decree. But the statute in unmistakable terms declares that the courts of law shall have jurisdiction to hear and determine all questions involving the validity of such subscriptions; and the quotation from *Reed v. Gold*, supra, conforms strictly to the terms of the statute.

As a matter of course, all who appear to be stockholders must be brought before the chancery court, and it proceeds upon the assumption that all who appear to have sub-

scribed to stock are bound for its payment; otherwise, it would be impossible for it to ascertain what amount should be collected from each. But the object of the statute was to take away from courts of chancery the power to fix the liability of the stockholder, and to transfer all questions affecting the validity of the subscription for inquiry and adjudication in the courts of common law.

Upon the trial, after the plaintiff had introduced evidence to prove the subscription list upon which the company was organized, and that plaintiff in error had signed his name thereto, subscribing to 10 shares of stock, of the par value of \$100 each, and that the company had been duly organized, its indebtedness, the institution of the chancery suit to wind up its affairs, the appointment of a receiver with direction to collect 14 per cent. of the par value of the stock of each subscriber—in other words, had made out a prima facie case—the defendant introduced a witness who testified that he was a stockholder in the company; that together with one Newkirch they called upon the defendant Elliott, explained to him the plans of the company, and induced him to subscribe for ten shares of the stock; that when the charter was obtained Newkirch was named as secretary and treasurer; that within from three to five days after his subscription, and at least six days before the charter of the company was obtained, Elliott phoned to him that he had decided to take his name off the list; that he told Mr. Elliott to write him a letter to that effect, which he said he would do, and did do, which letter is as follows:

"J. W. Rollison, Esq., City—Dear Sir: A few days since, upon your solicitation, I subscribed ten shares to the capital stock of a company to be organized and chartered and to be known as the Leon Schulz Brewing Company. For certain reasons, which appear to my mind good and sufficient, I now desire to rescind my action in this matter, and request you to erase my name from said subscription papers, and fully cancel my said subscription. Yours truly, J. W. Elliott."

Witness further testified that he never saw the subscription list after that time; that if he had gotten hold of it he would have erased Mr. Elliott's name therefrom, as he felt in honor bound so to do; that he asked Mr. Newkirch to erase Mr. Elliott's name, and Mr. Newkirch promised to do so; that he did not know whether the same had been done or not until he saw the subscription list at the time of the chancery suit; that as far as he knew Mr. Elliott was never considered by the stockholders of the company as a subscriber; and then, being asked by counsel for defendant what he meant by "as far as he knew," said, "Well, that the secretary was notified to strike his name off;" that he understood that Mr. Elliott was not re-

garded as a stockholder, and that Mr. Elliott did not regard himself as a stockholder; that he did not know whether the charter was granted upon the subscription list in evidence or not.

It does not appear that Mr. Elliott ever acted as a stockholder, or participated in any way in the affairs of the company. There was evidence of other stockholders that they understood that Mr. Elliott was a stockholder and regarded him as such.

This being the testimony, the defendant in error (plaintiff in the court below) demurred to the evidence, and the jury found the following verdict: "We, the jury, find for the defendant, subject to the court's opinion upon the demurrer to the evidence; and if upon such demurrer to the evidence the court finds for the plaintiff, then we find for the plaintiff, and assess his damages at \$140.00." Upon this verdict the court rendered a judgment in favor of the plaintiff.

It is unnecessary to discuss the statute which controls in such cases, as it has been so frequently discussed and enforced as to be familiar to all.

In *Stuart v. Valley Railroad Co.*, supra, it is held that, though a contract of subscription to the stock of a company can be released only by the stockholders or by the board of directors duly authorized to do so by the stockholders, "yet such release can be proved, not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the company as binding upon it, and that the subscriber was not regarded by himself or by the company as a stockholder thereof."

Tested by this principle, we are of opinion that the judgment upon the demurrer should have been for the plaintiff in error. The testimony of Rollison was sufficient to warrant the jury in finding that Mr. Elliott's subscription was not regarded, either by himself or by the company, as binding upon him.

The judgment of the corporation court must be reversed, and this court will enter such judgment as it should have rendered.

(104 Va. 723)

HAGAN v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia. Dec. 14, 1905.)

1. NAVIGABLE WATERS—REMOVAL OF OBSTRUCTIONS—FEDERAL POWERS.

Act. Cong. March 3, 1890, c. 425, § 19, 30 Stat. 1154 [U. S. Comp. St. 1901, p. 3546], relating to rivers and harbors, and authorizing the Secretary of War at his discretion to remove obstructions from the navigable waters of the United States, did not invest the Secretary of War with exclusive jurisdiction of the removal of obstructions, but was intended to clothe him with discretionary power, which he might exert or leave to the enforcement of the local authorities; and, if he fails or declines to act, the local authorities may protect their domestic commerce by keeping navigable waters in their jurisdiction unobstructed.

2. SAME—EXPENSE OF REMOVAL—LIABILITY OF OWNER.

Act Cong. March 3, 1899, c. 425, § 19, 30 Stat. 1154 [U. S. Comp. St. 1901, p. 3546], relating to the removal of obstructions from navigable waters, and limiting the liability of the owners of vessels without personal negligence, are paramount; and Code, § 2011, as amended by Acts 1889-90, p. 624, c. 371 [Va. Code 1904, p. 1022], and Richmond City Ordinances, c. 77, § 8, declaring that the board of harbor commissioners and the committee on improvements of James river shall remove any wreck injurious to the harbor at the owner's expense, are invalid, unless the obstruction occurs with the privity or knowledge of the owner.

Error to Circuit Court of City of Richmond.

Action by the city of Richmond against Peter Hagan. From a judgment for plaintiff, defendant brings error. Reversed.

The facts of this case, which are undisputed, and the sections of the Code and charter and ordinances of the city of Richmond relied on to sustain the demand asserted by the city against the plaintiff in error, are set out in the opinion of the judge of the circuit court as follows:

"It appears from the facts developed in this case that defendant's barge, John Hagan, loaded with coal, from Philadelphia, Pa., to Richmond, Va., when nearing Richmond struck a rock, filled with water, and, before it could reach the wharf, sunk in the harbor of Richmond on July 3, 1898, thereby obstructing navigation; that in the same month the council committee of the city of Richmond took the matter up with the owner, Peter Hagan, and endeavored to have him remove the wreck.

"The various proceedings of this committee, the correspondence, and the resolutions adopted are in evidence. It appears therefrom that this sunken barge was a serious menace to navigation as it lay in the harbor; that after it had been there several months, the house on top of it was washed away, and there was nothing to mark it. More than a year elapsed, during which demand after demand was made by the city upon Hagan to remove it, but he still delayed. Then it was that the city took final action, and had the barge blown up and removed from the harbor, at a cost of \$442.75, which sum was demanded from Hagan, but he refused payment. The city instituted this action in October, 1899, to recover the amount expended.

"The whole question of law and fact, a jury having been waived, was submitted to the court.

"The city, to support its action, introduced sections 2011 (as amended by acts 1889-90, p. 624, c. 371), 2012, 2013, and 2014 of Code 1887 [Va. Code 1904, pp. 1022, 1023], section 19, subsec. 6, of the charter of the city of Richmond and chapter 77, § 8, of the City Ordinances.

"Sec. 2011. They [the board of harbor commissioners of Norfolk and Portsmouth]

shall have authority to cause the removal of any wharf, dock, wreck, or other obstruction to navigation, or that may, in their opinion, be injurious to the harbor or that may cause shoaling at any point in the channel of said river, its branches or tributaries, at the expense of the owner or party causing the obstruction; provided, the rights of any owner of a wharf whose lines have been heretofore fixed by authority of law shall in no way be disturbed.

"Sec. 2012. The said board, if in their judgment expedient, may employ the services of a competent engineer at any time, who may make a survey of any waters lying within their jurisdiction, and perform such other duties as the board may require of him.

"Sec. 2013. When any dredging is done in any of the waters aforesaid, the board shall have power to designate the places at which the dredging material shall be dumped.

"Sec. 2014. The said board shall have power to make and enforce such rules and regulations for the preservation of the harbor, its police government, and the better use of the wharf, mooring, and other facilities thereof, as they may from time to time deem proper."

"Section 19, subsec. 6, of the city charter: "The city council shall have power to make such ordinances, by-laws, orders, and regulations as they may deem desirable to carry out the following powers, which are hereby vested in them: To establish, construct, and keep in order, alter or remove, landings, wharves, and docks on lands belonging to the city; and to lay and collect a reasonable duty on vessels coming to and using the same, and to regulate the manner of using other wharves and landings within the corporate limits; to prevent or remove all obstructions in and upon any landings, wharves, or docks. They may also appoint port-wardens for the port of said city, who shall exercise such powers as the council may give them up to the port-warden's lines, as they may be established from time to time by the United States government, and fix their fees and compensation. The said city shall have power to improve and keep in good, safe, and navigable condition the harbor of James river within the corporate limits. The city council of said city shall have all the powers set forth in sections two thousand and eleven, two thousand and thirteen, and two thousand and fourteen of the Code of Virginia, eighteen hundred and eighty-seven, which powers it may delegate to some proper committee of persons satisfactory to said council."

"Chap. 77, § 8, of the City Ordinances: "The committee on improvement of James river shall have power to fix lines along said harbor within which riparian owners may erect wharves, docks and proper struc-

tures and fixtures for commercial and manufacturing purposes.

"They shall have authority to cause the removal of any wharf, dock, wreck, or other obstructions to navigation, or that may, in their opinion, be injurious to the harbor, or that may cause shoaling of said harbor, its branches or tributaries, at the expense of the owners or the party causing the obstruction; provided, the rights of any owner of a wharf whose lines have been heretofore fixed by authority of law shall in no way be disturbed."

"Also, witnesses were introduced to prove the various steps taken by the city in order to have the sunken barge removed.

"It was admitted that the harbor of Richmond was within the corporate limits, and that the James river was wholly within the confines of the state of Virginia.

"The city proved that the sum expended, and for which it brought its action, was a reasonable and necessary expenditure for the public benefit, in order to keep the harbor open for navigation; and, further, that every possible opportunity was given to Hagan to remove the barge before action was taken, even waiting for more than a year, and it only acted in the face of the advance of fall and winter, when navigation would be rendered more dangerous."

The plaintiff in error, Hagan, on the other hand, rests his defense upon the commerce clause of the Constitution of the United States (article 1, § 8, cl. 3), section 19 of the act of Congress of March 3, 1899—the River and Harbor Bill—(30 Stat. 1154, c. 425 [U. S. Comp. St. 1901, p. 3546]), and the limited liability act, section 4283, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2943].

John A. Lamb, Hamilton Rogers, and Ro. H. Talley, for plaintiff in error. H. R. Pollard, City Atty., for defendant in error.

WHITTLE, J. Two questions are submitted upon this writ of error for our determination:

1. It is insisted on behalf of the plaintiff in error, that section 19 of the river and harbor bill (Act March 3, 1899, c. 425, 30 Stat. 1154 [U. S. Comp. St. 1901, p. 3546]), was intended to invest the Secretary of War with exclusive jurisdiction in the matter of removal of obstructions contemplated by the statute from the navigable waters of the United States.

The section is as follows: "That whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, watercraft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft,

raft, or other obstruction shall be subject to be broken up, removed, sold or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same. Provided, that in his discretion, the Secretary of War may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed 'To Whom It May Concern,' in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof; and provided also, that the Secretary of War may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States. Provided, that such bidder shall give satisfactory security to execute the work. Provided, further, that any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph, shall be covered into the treasury of the United States."

It must be allowed that, in the absence of legislation on the subject by Congress, it would be within the competency of the several states, in the interest of their citizens and the reasonable exercise of their police power, to remove obstructions from rivers and harbors and other navigable waters of the United States wholly within their limits. If it were true, as contended, that the mere fact that Congress had legislated on the subject divested the states of all jurisdiction in the premises, it would deprive them of many conceded rights, as to which they exercise concurrent jurisdiction with the United States.

The paramount authority of Congress to assume such absolute and exclusive control over the navigable waters of the United States may be conceded. But it is plain from an examination of section 19 that it has not chosen to exercise that power in the present instance. If it had been the design of Congress to deprive the states of the important and essential right to police the rivers and harbors within their respective limits, it is inconceivable that it would have declared that purpose in language of doubtful import. There is nothing in the phraseology of the section to warrant that construction; but, on the contrary, the object of the enactment was evidently intended to clothe

the Secretary of War with large discretionary powers, which he might exert or leave to the enforcement of local authorities, as his judgment might dictate. The object of the legislation is to keep the navigable waters of the United States clear and unobstructed, and supplemental legislation on the part of the states in furtherance of that design is in aid of commerce, and, where not in conflict with any system adopted by Congress, is universally upheld. The states have no control over the discretion of the Secretary of War, and, if he should fail or decline to act in a given case, it would be most unreasonable to hold that the local authorities are powerless to protect their domestic commerce by keeping navigable waters wholly within their respective limits unobstructed.

The correspondence between an officer of the War Department and the city engineer shows that he so interpreted the act of Congress, because, while he states that an appropriation had been made for the purpose, and he had been authorized to remove the wreck, he interposed no objection to the city authorities removing it, and pointed out the best method to accomplish it.

But we find abundant authority to sustain the concurrent jurisdiction of the federal and state governments in this class of cases.

The doctrine is thus stated by Ray in his work on Negligence of Imposed Duties, at pages 483, 484: "So long as the state legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended, and operates, in fact, to aid commerce, and to expedite instead of hindering the safe transportation of persons and commodities from one commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its power at all."

In Sutherland's Notes on the United States Constitution (Ed. 1904) pp. 102-104, it is said: "The states have concurrent powers with Congress in matters which are local in their operation, or which are mere aids to commerce, or which relate to rights, duties, and liabilities of citizens, although indirectly and remotely affecting operations of commerce, e. g., the regulation of wharves, the establishment of buoys and beacons, the improvement of harbors. * * * When, however, Congress has acted with relation to such matters as these, state laws in conflict with congressional action are void, and, while the commerce clause does not comprehend internal domestic commerce, the power enters the interior of every state whenever the interests of foreign or interstate commerce require."

Again, it is said in Ray on Negligence of Imposed Duties, at page 496: "Within the second class of cases (that is, of what might

be termed concurrent jurisdiction) are embraced laws for the regulation of pilots, quarantine and inspection laws, and the policing of harbors, the improvement of navigable channels, the regulation of wharves, piers, and docks, the construction of dams and bridges across navigable waters, and the establishment of ferries."

The concurrent jurisdiction of the United States and of the several states in supplying local aids and instrumentalities in respect to commerce is fully recognized in the opinion of Chief Justice Taney in the case of *The James Gray v. The John Fraser*, 21 How. 184, 16 L. Ed. 106, where it was held that an ordinance of the city of Charleston prescribing what part of the harbor a vessel should occupy, how long she might remain in port, the character of lights she should display at night, and other similar regulations, was not in conflict with the act of Congress regulating commerce and the general admiralty jurisdiction conferred on the United States courts, and is valid.

In *Faust v. City of Cleveland* (Circuit Court of Appeals, Sixth Circuit), 121 Fed. 810, 58 C. C. A. 194, it was said: "The river Cuyahoga is a navigable river, and, as such, is subject to the control of Congress, and to its regulations and general supervision. But the interest of the state in its own domestic commerce is such that the regulation of Congress is not necessarily exclusive of all control or authority by the state. It has therefore been held that legislation by the state for the purpose of aiding commerce by the improvement of such streams, by providing for the deepening of the channels or the removal of obstructions, does not encroach upon the power of Congress, if not in conflict with any system for their improvement provided by Congress"—citing *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238, in which case Mr. Justice Field, in an able and exhaustive opinion, sustained the validity of an act of the Legislature of Alabama providing for the improvement of the river, bay, and harbor of Mobile, as not conflicting with the power of Congress under the commerce clause of the Constitution.

In the case of *Lake Shore, etc., R. Co. v. State of Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, Mr. Justice Harlan observes that the decisions of that court recognize "the fundamental principle that outside of the field directly occupied by the general government, under the powers granted to it by the Constitution, all questions arising within a state that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the state, and that its legislative enactments relating to these subjects, and which are not inconsistent with the state Constitution, are to be respected and enforced by the courts of the Union, if they do not, by their operation, directly trench upon the authority of the United

States, or violate some right protected by the national Constitution. The power here referred to is, to use the words of Chief Justice Shaw, the power to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same"—citing *Commonwealth v. Alger*, 7 Cush. 53, 85.

Postal Tel. Co. v. Umstadter, 103 Va. 742, 50 S. E. 259, is one of a line of cases in this court to the effect that, although a state statute may incidentally affect interstate commerce, it is not necessarily an obstruction, but may be in aid of commerce, and a valid exercise of the police power of the state. The principle is illustrated by numerous decisions of the Supreme Court of the United States, which sustain the validity of state legislation of the character involved in the first branch of our inquiry. *Gibbons v. Ogden*, 9 Wheat. 196, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. Ed. 678; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243; *Railway Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Brown v. Houston*, 114 U. S. 630, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Lake Shore, etc., Ry. Co. v. State of Ohio*, 165 U. S. 365, 368, 17 Sup. Ct. 357, 41 L. Ed. 747; *Missouri, etc., Ry. Co. v. Haber*, 169 U. S. 618, 18 Sup. Ct. 488, 42 L. Ed. 878; *Cummings v. Chicago*, 188 U. S. 410, 428, 23 Sup. Ct. 472, 47 L. Ed. 525; *Montgomery v. Portland*, 190 U. S. 89, 106, 23 Sup. Ct. 735, 47 L. Ed. 965.

2. The second contention of plaintiff in error is that the circuit court erred in rendering a personal judgment against him for the expense incurred by the city in blowing up and removing the sunken barge John Hagan from its harbor.

In that connection it is insisted that section 19 of the river and harbor bill (Act March 3, 1899, c. 425, 30 Stat. 1154 [U. S. Comp. St. 1901, p. 3546]), and section 4283 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2943], provide that there shall be no personal liability upon the owner of a vessel in a case such as we are considering.

The latter section reads: "The liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction by the master, officers, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending."

This limited liability act is said to be the outgrowth of modern maritime law and codes. The first act of Congress on the subject was passed March 3, 1851, and in the case of *Norwich & N. Y. Trans. Co. v. Wright*, 13 Wall. 104, 20 L. Ed. 585, the policy of the legislation is explained by Mr. Justice Bradley as follows: "The great object of the law was to encourage shipbuilding, and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions, by which they are exempt from personal liability, or from liability except to a limited extent? The public interests require the investment of capital in shipbuilding quite as much as in any of these enterprises. And if there exist good reasons for exempting innocent shipowners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same extent from personal liability in cases of collision. In the one case, as in the other, their property is in the hands of agents whom they are obliged to employ."

We think it quite clear, in light of the foregoing exposition of the limited liability act, that where a vessel is lost without the privity or knowledge of the owner, he is only liable to the extent of his interest in the vessel, and cannot be held personally responsible for expense incurred by local authorities in removing the wrecked vessel from their harbor. *Hughes on Admiralty*, p. 321.

As remarked, that is also the measure of liability fixed by section 19 of the United States river and harbor bill, *supra*, and it follows from the authorities cited that, inasmuch as Congress has outlined a definite policy, limiting the liability of owners of ships and vessels lost without personal negligence on their part, its enactments are paramount, and section 2011 of the Code, as amended by Acts 1889-90, p. 624, c. 371 [Va. Code 1904, p. 1022], and section 8 of chapter 77 of the Ordinances of the City of Richmond, in so far as they declare that the board of harbor commissioners and the committee on improvements of James river

shall have authority to cause the removal of any wreck which in their opinion is injurious to the harbor, "at the expense of the owner," are in conflict with that policy and are invalid, unless the obstruction occurs with the privity or knowledge of such owner, are in conflict with that policy and invalid.

For these reasons, we are of opinion that the circuit court erred in rendering a personal judgment against the plaintiff in error in this instance, and for that error its judgment must be reversed.

(104 Va. 683)

STANDARD OIL CO. v. COMMON-WEALTH.*

(Supreme Court of Appeals of Virginia. Dec. 14, 1905.)

1. CORPORATIONS—FOREIGN CORPORATIONS — IMPOSITION OF FEE FOR TRANSACTING BUSINESS IN STATE—STATUTES—CONSTRUCTION.

Revenue Law, § 37 (Va. Code 1904, p. 2214), imposing on a foreign corporation authorized to exercise the powers of a transportation company a prescribed fee, on its obtaining a certificate of authority to do business in the state, requires a foreign corporation authorized to exercise the powers of a public service corporation to pay the fee in order to carry on any business in the state, though it does not intend to carry on the business of a public service corporation, and though it cannot carry on such business under Const. art. 12, § 163 (Va. Code 1904, p. cclx), prohibiting foreign corporations from exercising the powers of a public service corporation; the test of a foreign corporation's liability for the fee imposed being whether its charter authorizes it to carry on that business.

2. SAME.

A foreign corporation, included in the class designated by Revenue Law, § 37 (Va. Code 1904, p. 2214), imposing a fee on foreign corporations authorized to exercise the powers of a transportation company before obtaining authority to do business in the state, does not belong to the class of corporations named in section 38, imposing a prescribed fee on foreign corporations in order to obtain authority to do business in the state; for it by its express terms excludes corporations included in section 37.

3. SAME.

The rule that, in case of doubt as to the validity of a tax, the doubt must be resolved in favor of the citizen, has no application to the construction of a statute imposing a fee on a foreign corporation as a condition precedent to its obtaining the right to transact business in the state.

Keith, P., and Cardwell, J., dissenting.

Error to State Corporation Commission.

Action by the commonwealth against the Standard Oil Company. Judgment imposing a fine on defendant, and it brings error. Affirmed.

Christian & Christian, for plaintiff in error. Wm. A. Anderson, Atty. Gen., for the Commonwealth.

HARRISON, J. This is an appeal from a judgment of the State Corporation Commission, imposing a fine of \$10 and costs, under section 1105 of the Code of 1904, as amended by the act of May 15, 1903 (Acts 1902-04, p. 360, c. 242), upon the Standard Oil Company

for the alleged offense of transacting business within the state of Virginia without having first obtained from the Corporation Commission the certificate of authority required by law.

It appears from the record that the Standard Oil Company is a foreign corporation, created and organized under the laws of New Jersey, with an authorized capital stock of \$110,000,000. It further appears that the appellant company is authorized by its charter to exercise some of the franchises and powers of a public service corporation.

The solution of the present controversy involves a construction of section 37 of the revenue law of Virginia (Va. Code 1904, p. 2214), which provides as follows: "Every domestic corporation authorized by its charter to exercise the powers of a transportation or transmission company, or to own, lease, construct, maintain and operate a public service line or road of any kind, upon the granting or extension of its charter, and every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company, or to own, lease, construct, maintain and operate a public service line or road of any kind, when it obtains from the State Corporation Commission a certificate of authority to do business in this state, shall pay a fee into the treasury of the state of Virginia to be ascertained and fixed as follows." Then follows a table of the fees to be paid, graded according to the maximum capital stock authorized by the terms of the charter.

According to this table, the fee for the appellant company, having a maximum authorized capital of \$110,000,000, is fixed at \$5,000.

It will not be denied that a state has unlimited power in the matter of prescribing the terms and conditions upon which a foreign corporation shall be permitted to do business within her limits, and that if she chooses such corporations can be excluded entirely. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Lafayette Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972. Therefore the sole question to be determined in this case is, what are the terms and conditions upon which the appellant corporation is permitted to do business in this state?

These are prescribed by section 37 of the revenue law as follows: "Every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company, etc., when it obtains from the State Corporation Commission a certificate of authority to do business in this state, shall pay a fee into the treasury of the state of Virginia to be ascertained and fixed as follows."

It is clear from this language that a foreign corporation which is authorized by its charter to do the business of a public service corporation must, in order to carry on business of any kind in this state, obtain from the State

*Rehearing denied.

Corporation Commission a certificate of authority to do such business, and pay into the state treasury the fee prescribed for such certificate; the test of its liability for such fee being, not whether it can or intends to carry on the business of a public service corporation, but whether its charter authorizes it to carry on that business. No matter which of the numerous businesses authorized by its charter it may be carrying on or proposing to conduct in Virginia, if it is authorized by its charter to carry on the business of a public service corporation, her condition is that the fee prescribed by the section mentioned shall be paid into her treasury.

It is insisted on behalf of the appellant company that the language of section 37 of the revenue law, "to do business in this state," has reference only to doing the business of a public service corporation; that, if appellant was asking for authority to carry on the business of a public service corporation, it would be liable for the fee imposed by section 37, because it is "the business in this state" which is contemplated to be done, or possible for the corporation to do, for which the "certificate of authority" is issued and the fee "ascertained and fixed"; that inasmuch as appellant cannot carry on the business of a public service corporation in Virginia, by reason of the inhibition of section 163, art. 12, of her Constitution (Va. Code 1904, p. cclix), therefore it follows that the Corporation Commission could not have granted it authority to exercise any such powers; that it never could have been the intention of the Legislature of the state to tax the petitioner on a business which it did not ask the privilege of doing, and which the Legislature could not empower it to carry on in the state.

The object of this revenue law was not, in our opinion, to confer upon foreign corporations authority to exercise any particular power granted by their respective charters. The language of section 37 was employed as a means of designating and classifying certain foreign corporations, and fixing the rate of fee that should be paid by such corporations for the certificate of authority to carry on any business in Virginia. The intent of the statute is that corporations, whether created under the laws of Virginia, or coming into the state as foreign corporations, having under their charters extensive powers in connection with the operation of transportation and transmission companies, shall pay a larger fee than ordinary industrial companies. The Legislature might well have enacted that a foreign corporation having powers of this character in its charter should be required to pay more than one not having such powers, although these powers could be exercised in some other state or states, but not in Virginia.

Giving the language of section 37 its literal and natural interpretation, it seems plain that the fee prescribed had no relation

or reference to the character or the amount of business to be transacted by the foreign corporation in this state, but was ascertained and determined, first, by the character of the chartered powers of the corporation in the state of its domicile, and, second, by the maximum amount of its authorized capital. The fact that a foreign company possessed, among others, the great powers of a public service corporation, was doubtless regarded by the Legislature as sufficient evidence of its capacity and importance as a business enterprise, no matter what business it might conduct, to justify its being placed in a higher class than its less pretentious neighbors.

Whether the criterion adopted be arbitrary or not, it is a method of determining the fee to be paid which the General Assembly chose to adopt and had the right to prescribe.

Nor did the business to be carried on by the foreign corporation in this state have any bearing upon the question whether a particular corporation was embraced within the class of corporations mentioned in section 37. That question was to be determined solely by the inquiry whether such corporation had, by virtue of its charter, the powers of a public service corporation. If it had those powers, then it belonged to the class and came within the terms of section 37 and must pay the fee there prescribed.

It is further contended that appellant belongs to the class of corporations named in section 38 of the revenue law, and therefore is only liable to pay a fee of \$600, as prescribed by that section.

It is only necessary to say that, appellant being, as we have held, included in the class designated by section 37, it is, by the express terms of section 38, excluded from that class of corporations there referred to; the language of section 38 being that every foreign corporation other than such as are described in the last preceding section (37) shall pay, etc.

It is suggested that, in case of doubt as to the validity of a tax, the doubt should be solved in favor of the citizen. We recognize the soundness of this principle when applied to the state and her citizens; but it has, we think, no application to this case, where the party complaining is not a citizen of Virginia, but a foreign corporation, merely asking for the privilege of doing business in this state. We have, however, no doubt of the correctness of the construction placed upon section 37 by the State Corporation Commission. If we entertained doubt merely, our hesitation would have to be solved in favor of the state, as the Constitution requires us to regard the action of the Corporation Commission as *prima facie* correct. Const. art. 12, § 156, cl. "f" (Va. Code 1904, p. cciv).

For these reasons, the judgment complained of must be affirmed.

KEITH, P. (dissenting). I am unable to agree with the view expressed by the court, and deem the question involved of sufficient interest to justify me in filing a dissenting opinion.

As the two cases (Standard Oil Co. v. Commonwealth and American Can Co. v. Same) are identical, I shall refer only to the Standard Oil Company.

This is a corporation chartered under the laws of the state of New Jersey, which has very varied and extensive privileges. It appears that by its charter it is authorized to exercise the powers of what is known in the laws of this state as a public service corporation. It further appears, however, that it has not, either in this state or elsewhere, exercised such powers; and the question for consideration is whether it is taxable as a public service corporation, or whether it is taxable under another section of the statute and liable to the payment of a less fee for the exercise of such business as it is actually engaged in within the limits of the state of Virginia.

Section 37 of the revenue law of the state (Va. Code 1904, p. 2214) is as follows: "Every domestic corporation authorized by its charter to exercise the powers of a transportation or transmission company, or to own, lease, construct, maintain and operate a public service line or road of any kind, upon the granting or extension of its charter, and every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company, or to own, lease, construct, maintain and operate a public service line or road of any kind, when it obtains from the State Corporation Commission a certificate of authority to do business in this state, shall pay a fee into the treasury of the state of Virginia, to be ascertained and fixed as follows." Then follows a table fixing the fee in each case according to the maximum capital authorized, and according to which table the fee to be paid by the Standard Oil Company would be \$5,000.

By section 38 of the revenue law it is provided that "every domestic corporation, other than such as are described in the last preceding section, upon the granting or extension of its charter, and every foreign corporation, other than such as are described in the last preceding section, when it obtains from the State Corporation Commission a certificate of authority to do business in this state, shall pay a fee into the treasury of the state of Virginia, to be ascertained and fixed as follows." Then follows a table fixing these fees, which would make the tax on the Standard Oil Company \$600, which amount has already been paid into the treasury of the state.

By section 163, art. 12, of the Constitution of the state (Va. Code 1904, p. cclx), it is provided that "no foreign corporation shall

be authorized to carry on in this state the business, or to exercise any of the powers or franchises of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this state where the same can be made applicable to such foreign corporation without discriminating against it. But this section shall not affect any public service corporation whose line or route extends across the boundary of this commonwealth, nor prevent any foreign corporation from continuing any such lawful business as it may be engaged in in this state when this Constitution goes into effect. But any such foreign public service corporation so engaged shall not, without first becoming incorporated under the laws of this state, be authorized to acquire, lease, use or operate within this state any public or municipal franchise or franchises in addition to such as it may own, lease, use or operate when this Constitution goes into effect."

The contention on the part of the commonwealth is that the Standard Oil Company is within the letter of section 37, which imposes a fee upon every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company; that these words are descriptive of a class upon which the higher rate of fee, or taxation (by whichever term it may be called), is to be imposed; that inasmuch as the Standard Oil Company is, by its charter, authorized to exercise the powers of a transportation or transmission company, it is taxable as such, though it is conceded that it has never exercised, and that by section 163 of the Constitution, which has been quoted, it is prohibited from exercising, any such powers.

To me it seems plain that to adopt this construction is, with all respect to the majority of the court, to "stick in the bark"; that the section is to be read as a whole, and not in disjointed parts; and that the language relied upon to justify the imposition of the fee which has been demanded is qualified by that which follows, to wit, "when it obtains from the State Corporation Commission a certificate of authority to do business in this state, shall pay a fee into the treasury of the state of Virginia, to be ascertained and fixed as follows."

It is inconceivable to me that the state of Virginia is to be put in the attitude of exacting a fee for "a certificate of authority to do business in this state," when by the terms of its own organic law it has solemnly declared that "no foreign corporation shall be authorized to carry on in this state the business, or to exercise any of the powers or franchises of a public service corporation," unless it comes within the exceptions

to section 163 of the Constitution, which it is not pretended is the case here.

But it is said that, unless the effect attributed by the opinion of the court to this section be the true one, the language of the act, which imposes a tax upon every foreign corporation authorized by its charter to exercise the powers of a transportation or transmission company, would be inoperative; but that I apprehend not to be the case. There are foreign corporations, authorized to carry on the business of public service corporations in this state, which are liable to the payment of the fees prescribed by section 37, because they come within that clause of section 163 of the Constitution which provides that "this section shall not affect any public service corporation whose line or route extends across the boundary of this commonwealth, nor prevent any foreign corporation from continuing any such lawful business as it may be engaged in in this state when this Constitution goes into effect." To illustrate, the Baltimore & Ohio Railroad Company and the Louisville & Nashville Railroad Company could with propriety be assessed under section 37 of the law.

The Standard Oil Company, not having been engaged, either before or since the adoption of the Constitution, in the business of a public service corporation within this state, will not be allowed, under section 163 of the Constitution, to do such business, unless it goes before the State Corporation Commission and becomes incorporated under the laws of this state; and such a charter having been granted constitutes it a domestic corporation, and it would, of course, be entitled to exercise all the powers and functions conferred by its charter, including those of a public service corporation, and would then be within the terms of section 37, and be properly charged with the fees which it prescribes.

It is not contemplated by the law that this extraordinary fee under section 37 shall be levied but once. Having been once levied and paid, the law with respect to the corporation so paying it is satisfied. But if, under the view of the law presented by the majority opinion, the Standard Oil Company be required to pay a fee under section 37 in order to obtain a certificate of authority to do business in this state, it will be prohibited by the Constitution from doing the very business upon the basis of which the fee is charged, and, if it should then come forward and ask to have issued to it a domestic charter, would come squarely within the terms of section 37, and be required to pay the fee a second time.

It is axiomatic that before an imposition by the government can be enforced upon the citizen, the will of the sovereign which imposes the burden must be clearly and exactly declared. It has been said that in such

a case to doubt is to deny the authority, and it does seem to me that, if the construction of the majority of the court is what was intended by the Legislature, it should have been clothed in less ambiguous terms.

CARDWELL, J., concurs.

(104 Va. 633)

AMERICAN CAN CO. v. COMMON-WEALTH.*

(Supreme Court of Appeals of Virginia. Dec. 14, 1905.)

Error to State Corporation Commission.

Action by the commonwealth against the American Can Company. Judgment for the commonwealth, and defendant brings error. Affirmed.

Christian & Christian, for appellant. Wm. A. Anderson, Atty. Gen., for the Commonwealth.

HARRISON, J. This appeal from the State Corporation Commission involves the precise question decided to-day in the case of Standard Oil Company v. Commonwealth, 52 S. E. 390; and for the reasons there given, and filed with the record, the judgment here complained of must be affirmed.

KEITH, P., and CARDWELL, J., dissent.

(58 W. Va. 380)

STATE v. PEYTON.

(Supreme Court of Appeals of West Virginia. Nov. 28, 1905.)

1. CRIMINAL LAW—WRIT OF ERROR BY STATE—IMPROVIDENT ALLOWANCE.

A writ of error does not lie from this court, at the instance of the state, to an order of a circuit court overruling a motion by the state to set aside a verdict of "not guilty" by a jury in a criminal case for the violation of a law relating to the revenue, when there has been no final judgment on the verdict.

2. SAME—DISMISSAL.

In such case the writ of error allowed will be dismissed as improvidently awarded.

(Syllabus by the Court.)

Error to Circuit Court, Tucker County.

Charles Peyton was found not guilty of selling liquor on Sunday, and the state brings error. Dismissed.

Frank Lively, Atty. Gen., for the State. Cunningham & Stallings, for defendant in error.

COX, J. Charles Peyton was indicted, tried, and found "not guilty" by a jury, in the circuit court of Tucker county, upon a charge of selling intoxicating drink on a Sunday; he having a state license to sell spirituous liquors, etc. A writ of error was allowed the state by this court.

The record discloses that there was a motion by the state to set aside the verdict, and that the motion was overruled, but does

*Rehearing denied.

not disclose that there was any judgment on the verdict. Section 3, c. 160, Code 1899, provides: "A writ of error shall lie in a criminal case, to the judgment of a circuit court, from the Supreme Court of Appeals. It shall lie in any case for the accused, and if the case be for the violation of a law relating to the revenue, it shall lie also for the state." This provision is constitutional and allows a writ of error for the state to a judgment of acquittal by the circuit court in a criminal case for the violation of a law relating to the revenue. *State v. Allen*, 8 W. Va. 680; *State v. Fitzpatrick*, Id. 707; *State v. Cooper*, 28 W. Va. 338; *State v. Thompson*, Id. 149. The law does not authorize a writ of error at the instance of the state to an order of the circuit court overruling a motion to set aside a verdict of a jury in a case for the violation of a law relating to the revenue, when there has been no judgment on the verdict. Judge Dent, speaking for the court, in the case of *State v. Bluefield Drug Co.*, 41 W. Va. 638, 24 S. E. 649, in relation to this section of the statute, says: "This section only applies to cases tried in the circuit court where there is a final judgment of conviction or acquittal." It is clear that a writ of error does not lie in this case to the order overruling the motion to set aside the verdict.

We cannot, in the absence of a final judgment on the verdict, review the errors assigned, but must dismiss the writ as improvidently awarded.

(37 W. Va. 514)

MORRISON v. McWHORTER.*

(Special Court, Twelfth Judicial Circuit of West Virginia. June 2, 1905.)

1. ELECTIONS—SPECIAL COURT—JURISDICTION.

A special court, constituted and convened under the provisions of chapter 6, Code 1899, has a limited jurisdiction; but such jurisdiction necessarily draws to it the right to hear and determine all questions touching the regularity and sufficiency of the pleadings in a contest for a judicial office, including the legal sufficiency of the notice of contest, as well as all other pleadings and notices.

2. SAME—NOTICE OF CONTEST.

A notice of contest for a judicial office is a pleading, or is in the nature of a pleading, and its purpose is not only to institute the proceeding of contest and to bring the respondent or contestee into court, but also fully and plainly to inform him of the character and cause of the ground of contest.

3. SAME—SUFFICIENCY.

Notice of contest, which on its face discloses no ground upon which an office may be contested for, is fatally defective.

4. SAME—QUESTION FOR COURT.

The sufficiency of the pleadings in a contest for a judicial office, as a question of law, is for the consideration and determination of the court.

5. SAME—OBJECTIONS TO PLEADINGS.

The sufficiency of the pleadings in such case, such as the notice, petition, or other pleading, may be conveniently raised and brought on for adjudication, by motion to quash, by demurrer, or by mere objection or suggestion; and

*This opinion is here reported because appearing in official volume.

where, in such case, the pleadings do not disclose on their face a ground of contest, it is the duty of the court sua sponte to notice fatal defects and abate the proceedings.

6. SAME—GROUND OF CONTEST—BRIBERY.

Before bribery in an election can be used as a basis of contest for a judicial office, or removal therefrom, the accused party must have been convicted of bribery at the election, upon an indictment by a grand jury and a regular trial before a court and petit jury.

(Syllabus by the Court.)

1. COURTS—SPECIAL TRIBUNAL.

A special tribunal, constituted under authority of section 15 of chapter 6, of the Code of 1899, is a subordinate legislative tribunal, and not a part of the judicial department of the state.

2. BRIBERY—DEFINITION.

McWhorter v. Dorr, 50 S. E. 838. Bribery is an offense at common law; and the common-law offense of bribery has never been abrogated by the Constitution or any statute in the state of West Virginia, in so far as the same applies to the conduct of elections.

3. ELECTION—EFFECT OF BRIBERY.

It is a well established principle of law, both in England and the United States, that bribery in an election committed by a person claiming to be elected, or by any agent of his, with or without his knowledge or direction, renders his election void.

4. SAME.

At common law a person guilty of bribery in an election need not be indicted, tried, and convicted before declaring his election void. Bribery in an election by the party claiming to be elected renders his election void, regardless of the fact whether he has been indicted, tried, and convicted.

Per Dorr, J., dissenting.

Election contest between J. B. Morrison and J. C. McWhorter. Dismissed.

See 50 S. E. 838.

JACOBS, P. J. C. McWhorter and J. B. Morrison were rival candidates for the office of judge of the Twelfth judicial circuit at the general election held on the 8th day of November, 1904. On the canvass of the returns from the several counties of the circuit, McWhorter was declared elected, was commissioned by the Governor, qualified, and entered upon the discharge of his duties. Within the period prescribed by law, Morrison served on McWhorter notice of contest, which he then filed with Gov. White, and by the same document nominated C. P. Dorr, of Webster county, a member of the contest court. McWhorter served a return or counter notice upon Morrison, and nominated C. W. Dalley, of Randolph county, as a member of said court. Gov. White then appointed Thos. P. Jacobs, of Wetzel county, president of the court, and by proclamation convened the court for the purpose of hearing and determining said contest. Voluminous evidence was taken in the form of depositions, and the controversy submitted to the court.

Upon the hearing the contestee objected to the sufficiency of the notice of contest by way of demurrer or motion to quash. The contestant protested against any consideration of any form of objections to the sufficiency of the notice, and insisted that

the court should decide the case upon the whole record, regardless of the character of the notice. The contestee insisted that it was competent to question the sufficiency of the notice and other pleadings in the case in some manner, and, if the same were not sufficient and did not make out and state a case on their face, they should be quashed and abated. In other words, the first duty of the court was to determine whether the court had a case before it on the pleadings on which to act, and whether the pleadings, whatever their form, make out on their face a case upon which the judgment of the court can be properly invoked on the merits. We think the notice of contest, the petition, or any other paper which serves to bring on the contest—the issue—whatever be its form or name, is a pleading, or in the nature of a pleading; that it serves, or is intended to serve, a vital and essential purpose; and that it is impossible to conduct a contest without some pleadings defining the issue and the scope of the inquiry. The law provides for a notice and specification (Code 1899, c. 6, § 13), and contemplates a petition (Code 1899, c. 6, § 15). The notice, specifications of contest, and petition, if any, are intended to subserve a substantial purpose. They are analogous to the declaration at law or the bill in equity. They serve a double purpose: First, to bring the contestee into court; and, second, to inform him of the grounds of contest. Without a sufficient notice of contest, there can be no contest. Therefore the conclusion is self-evident, unless the notice of contest and specifications on their face state some legal ground of contest, there can be no contest—there can be no case in court. At the threshold this is a question for the judgment of the court. If raised in any proper manner, it must be decided. Indeed, if no case is made on the pleadings, the court *sua sponte* must so find and hold, even although neither party raises the question. The pleadings are to guide the court, as well as the parties, and without some form of pleadings, sufficiently setting forth on their face a *prima facie* case, the court has no foundation on which to base its judgment on the merits. This is elementary. As long as the sufficiency of the pleadings is a question for the court, it is immaterial how the question is raised. Such sufficiency may be conveniently raised in this case by a motion to quash, by demurrer, or by mere suggestion to the court. The form is wholly immaterial. We hold it competent, therefore, to demur, move to quash, or make a mere suggestion, and we entertain the demurrer or motion to quash, and proceed to consider the sufficiency of the notice of contest, specifications, etc.

Are the notice of contest, specifications, etc., sufficient under the law? Do they present a case on their face? This is the one question on the demurrer or motion to quash.

We are not unmindful of the gravity and importance of the question and the necessity of a correct decision. There is no appeal in case of error, and this circumstance has induced more than ordinary care and caution in an effort to reach a correct solution. The case made out on the face of the notice of contest is simply this: There are 21 specifications of grounds of contest contained in the notice. It charges that the ground of contest is that the contestee, at the time of election, was not qualified to hold the office of judge of the Twelfth judicial circuit. The 21 specifications profess to set forth the facts relied on to substantiate said grounds. The first specification alleges an offer to pay money for a vote and influence; the second is to the same effect; the third alleges a payment or agreement to pay for vote and influence; the fourth, to same effect; the fifth and sixth, offer to pay for vote and influence; the seventh alleges a payment of money for a vote and influence; the eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth specifications allege that contestee, or his agents, paid various sums of money to divers persons for their respective votes and for their influence to secure other votes; the seventeenth alleges the use of money with other and unknown voters in the circuit; the eighteenth and nineteenth specifications allege payment by contestee, or his agents, for votes and to secure other votes; the twentieth alleges payment to commissioners and poll clerks, without naming them, in Upshur county, to secure the votes and influence; the twenty-first and last alleges the use of \$5,000 by contestee's law partner for the purpose of securing the votes of citizens in the circuit. How used or when, where or with whom, is not said. The notice then includes a summation as follows: "That by the use of said money and means aforesaid, for the purpose of corrupting and influencing the voters of said circuit at said election, you have disqualified yourself to hold said office." The petition in more general terms alleges the use of money in said election.

The contest proceeds upon the theory of the bribery and corruption of the general electorate, without descending into particulars. No attempt is made to challenge and reject any single vote, with a view of changing the general result as certified by the canvassing boards; but the contest goes upon the theory that, if contestee used money to procure votes of some and their influence to secure other votes, then the contestee disqualified himself, and the court can oust him. It is difficult to imagine any notice of contest more vague, indefinite, and uncertain than the one under consideration. The charges are tantamount to an allegation of bribery, or, rather, they charge in some instances a bribery, or attempt to bribe, by the contestee, or his agents. Some of them charge "him or his agents," and some charge

his agents. The contest goes upon the theory that contestee secured his election by bribery and thus disqualified himself to hold the office of judge; and such charges are so vague and indefinite as to be wholly insufficient to put contestee upon notice of any kind of defense. Contestant does not claim to have been elected. The one vital question, then, is: Does bribery, if sufficiently charged and fully proved, disqualify the contestee?

We are now considering the notice and petition on the motion to quash or demur, and, though the facts relied on are not well pleaded, yet we regard them so for the purpose of deciding the legal question whether bribery at an election disqualifies. The court is of opinion that bribery at an election does disqualify the guilty party to hold office. But on the question when the bribery disqualifies the court is not unanimous. The majority of the court is of opinion that, before bribery works disqualification, the accused party must have been indicted by a grand jury and convicted upon the indictment after regular and formal trial. If this be the law, then notice and specifications simply charging that the contestee committed bribery at the election, without further specifying and alleging that he had been indicted and convicted therefor, are radically and fatally defective. The Constitution provides that all male citizens of the state shall be entitled to vote, except minors or persons of unsound mind, paupers, and persons "under conviction of treason, felony, or bribery in an election." The same article provides that no person, except citizens entitled to vote, shall be elected or appointed to any office. This, in the absence of further qualifications prescribed by the Legislature, is equivalent to saying that any citizen entitled to vote shall be eligible to election or appointment to any office, subject to the age requirement as to judges and some other officers. Qualification to vote and qualification to hold office are coincident, therefore, with the exception of the age qualification. What disqualifies the voter disqualifies the office holder, and vice versa. The Constitution in plain terms provides that there must be a conviction before disqualification arises. The only evidence of the disqualification is the previous conviction. To the same effect is section 4 of chapter 7 of the Code of 1899, enacted in pursuance of the Constitution.

The only offense against the election law which seems to work disqualification, so as to authorize removal from office without a previous conviction, is the offense of offering to, giving, or distributing among voters, on election day, by or on behalf of the candidate, any intoxicating drinks, in which event, on "proof of the fact," the candidate shall be "removed" from office. Code 1899, c. 5, § 10. Even under this section it may well be doubted whether a contest court could

exercise this power, and whether such removal should not take place in a direct proceeding to remove the officer upon formal complaint and "proof of the fact." At any rate this court certainly has no power to remove from office on a charge of bribery previous to a conviction. A careful search of the Constitution and statutes will disclose no other instance where a contest court, on mere "proof" of the fact, in advance of conviction, is authorized to act. It may well be, and we believe it to be true, that, on a proper contest, proof that a candidate has purchased a vote would work the rejection of that vote, though there seems to be no specific statute on the subject. But, if a contest goes upon that theory, a list of the votes so contested must be given the contestee. This contest goes upon no such theory. No list of votes challenged and objected to on the ground of bribery is either given or relied on. The evident belief of the contestant and his counsel was that, if they could show bribery, it would disqualify and oust the successful candidate. We hold this is not the law. There must be a conviction to disqualify. Even in that case we doubt whether this court would have jurisdiction to oust.

We suggest, because it is not necessary to decide, that, even after conviction, the removal from office could take place only in some direct proceeding instituted for the purpose and based upon the unreversed conviction of the offending party. Having reached the conclusion that there is no ground upon which the office of judge of the Twelfth judicial circuit can be contested for, set up and disclosed on the face of the notice and specifications, or any other pleading in the case, we sustain the demurrer or motion to quash, and quash and dismiss said notice and specifications, and wholly dismiss this proceeding, and the contestee is directed to go thereof without day. This disposition of the case renders it unnecessary to enter upon a discussion of the case upon its merits.

It is not out of place, however, and we think it entirely proper, in view of the fact that neither party has the right, under the law, to review the action of this court, to say that, besides the questions raised and discussed upon the demurrer, Judge McWhorter, the contestee, by proper and appropriate pleading put in issue the allegations of bribery, fraud, and corruption alleged in the notice of contest against him. Such denial was prompt, emphatic, and unequivocal. Looking to the merits of the case, as disclosed by the depositions taken, it must be apparent to the candid mind, upon a careful review of the evidence, that it wholly fails to establish the charges of bribery, corruption, and fraud—all or any of them. There is no evidence which, measured by any known rule of law, supports any of the charges and specifications.

The candid and unbiased mind may well go further and easily conclude there is no evidence which tends to raise even a respectable suspicion of the truth of such charges. In this case the evidence fails on the merits to make out any kind of a case for the contestant.

DAILEY, J. (concurring). I concur fully in the views expressed and in the conclusions reached by JACOBS, P., on the demurrer or motion to quash, and in the dismissal of the proceedings. I can neither concur in nor dissent from his observations on the facts, for I have not read the evidence or any part thereof.

DORR, J. (dissenting). This court, being a subordinate legislative tribunal, could only consider the contest upon the notice and petition of contestant, the answer of contestee, with the specifications of each, and the evidence taken and filed by the parties interested. No pleadings could be considered by way of demurrer or motion to quash. Who ever heard of a demurrer or motion to quash in a proceeding before a legislative body? Nothing in my opinion could be legally considered on the hearing except the notice of contest and the specifications thereof, the answer thereto, and the evidence. Specification 1 of the contestant charges the contestee with offering to pay Chas. B. Mayo, of Curtin, Nicholas county, W. Va., \$1,000 if he would vote for contestee and use his influence to secure his election to the office of judge of the Twelfth judicial circuit. Specification 2 charges the contestee with offering to pay R. L. Mace, of Hackers Valley, Webster county, \$2,500 for the same purpose. Specification 3 charges the contestee with paying to Marion Mick \$500 for his influence in securing his election. The other specifications charge the contestee, either by himself or his agent, with paying to various persons, naming them, or offering to pay said parties, certain specific sums of money, named in the specification; and the specifications close with the allegation, as to contestee, that "by the use of said money and means aforesaid, for the purpose of corrupting and influencing the voters of said circuit at said election, you have disqualified yourself to hold said office." The contestee in his reply does not deny the use of money, either by himself or his agent, in securing his election, but simply traverses each specification by way of denial. He admits paying to L. H. Kelly \$500, the amount assessed by the campaign committee of Braxton county against him. If he could pay this campaign committee \$500 in Braxton county with which to secure his election, why could he not pay all his campaign committees in his circuit \$5,000 each, or any sum necessary to corrupt the voters of the entire circuit? To say that these specifications do not give the contestee notice of the charges against him

seems to me to be a travesty on the English language.

At common law bribery by the candidate or his agents to secure his election disqualified him from holding office. 6 American and English Encyclopedia of Law (1st Ed.) p. 364, and cases there cited; Donnelly v. Washburn, Cong. Dig. Elect. Cas. 355; Page v. Pierce, Id. 419; Mitchell v. Walsh, Id. 521. Contestee's counsel in their argument admit that at common law bribery disqualified a candidate from holding the office. Does the common law exist in West Virginia? I think it does. The Constitution of the state (section 21, art. 8) is as follows: "Such parts of the common law, and of the laws of this state as are in force when this article goes into operation and are not repugnant thereto, shall be and continue the law of the state until altered or repealed by the Legislature." At common law the candidate, being guilty of bribery in another election, was not disqualified from holding office. Section 4 of chapter 7 of the Code of 1899 was passed to correct this, and is as follows: "No person convicted of treason, felony or bribery in an election, before any court in or out of this state, shall, while such conviction remains unreversed, be elected or appointed to any office, under the laws of this state; and if any person while holding such office, be so convicted, the office shall be thereby vacated." Section 10 of chapter 5 is as follows: "If any person who is a candidate for any office under the Constitution and laws of this state, shall, by himself or another, offer to give or distribute among the voters any intoxicating drinks, on the day of election, he shall, if elected, forfeit his office and on proof of the fact be removed therefrom, and if any person, whether a candidate or not, offer to give or distribute any intoxicating drinks to any voter on the day of an election, he shall forfeit not less than \$10 nor more than \$50." These sections must be strictly construed, as they are in derogation of the common law. 23 American and English Encyclopedia of Law (1st Ed.) p. 387, cases there cited; 1 Kent's Commentaries, p. 464; Harrison v. Leach, 4 W. Va. 383. The Legislature knew that at common law a candidate or his agents using bribery to secure his election disqualified him from holding office, and therefore left the common law just as it was. At common law the use of intoxicating drinks on the day of the election did not disqualify. These statutes simply enlarge the common law, making that which was not a disqualification at common law a disqualification, and leaving the common law as it stood as to bribery by the candidate to secure his election. There is no such thing as repealing the common law by implication, as the Constitution forbids it to be done in any other way than by an act of the Legislature.

It is the policy of this state that all elections should be fair. The use of money by

either candidate for an office prevents a fair election. The use of money by a candidate against his opponent is a fraud upon him. Fraud vitiates all things—wills, deeds, judgments, decrees, and elections. No one should be permitted to hold office in this state who has obtained the same by fraud. So far as bribery is concerned, as shown above, a candidate who uses bribery in his election is disqualified from holding office. My conclusions are that the specifications are sufficient, and that they are supported by the law applicable to this case.

In the opinion of the majority of the court, Judge JACOBS undertakes to say what the evidence filed in the case proves. This is clearly voluntary on his part, and is wholly out of place, as the contest was decided upon the demurrer and motion to quash, offered by the contestee. The testimony was not read upon the hearing of the contest. In view of the specifications of contestant and the answer and admissions of contestee, and the fact that the contestee did not go upon the witness stand to deny any of the charges or the facts alleged against him, and the fact that the contestant did go on the stand, I am unable to see how Judge JACOBS can draw his conclusions announced by him upon the merits of the case, which I decline to discuss in this opinion.

(58 W. Va. 366)

LOGAN'S HEIRS v. WARD et al.
(Supreme Court of Appeals of West Virginia.
Nov. 21, 1905.)

1. EJECTMENT—WHEN MAINTAINABLE.

An owner of land in actual possession, who is entered upon by an adverse claimant, may, both by common law and chapter 90 of the Code of 1899, maintain ejectment against the intruder, and cannot sustain a bill in equity to remove cloud over his title.

2. QUIETING TITLE—REMOVAL OF CLOUD.

Equity will entertain a suit to remove cloud over the title to land by one in actual possession against an adverse claimant not in actual possession who sets up an adverse title.

3. SAME—TITLE TO MAINTAIN.

A bill to remove cloud over the title to land cannot be maintained, unless the plaintiff has both title and actual possession. He cannot rely on weakness of the title of his adversary.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, §§ 8, 36.]

4. SAME—EVIDENCE.

When a patent or deed includes within the exterior bounds of the lands thereby conveyed lands which are excepted by such grant or deed from its operation, a plaintiff in equity, suing to remove cloud from his title, must show that the land he claims against the defendant is not the land so excepted.

5. JOINT TENANCY—ADVERSE POSSESSION—PRESUMPTION OF GRANT.

The law will not presume a grant of his undivided share from one joint tenant to another simply from mere silent possession by one for a long time.

6. ADVERSE POSSESSION—PRESUMPTION OF GRANT.

A presumption of a grant from lapse of time with possession never arises where all

the circumstances are consistent with the non-existence of such grant.

Poffenbarger, J., dissenting.
(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by James H. Logan against Wirt C. Ward and Elihu Hutton. Decree for defendants, and the heirs of said plaintiff appeal. Affirmed.

C. H. Scott and Mollohan, McClintic & Mathews, for appellants. Baker & Strader, Harding & Harding, M. H. Dent, and Linn, Byrne & Cato, for appellees.

BRANNON, P. James H. Logan brought a chancery suit against Wirt C. Ward and Elihu Hutton to remove a cloud over Logan's title to land, and upon the hearing Logan's suit was dismissed, and his heirs appealed.

I state Logan's claim thus: By patent dated 13th February, 1798, the state of Virginia granted to William Bowyer, William Breckenridge, Hugh Paul, and Edward Bryan a tract of 50,000 acres of land in Randolph county. William Logan obtained the conveyance of the Breckenridge and Paul shares in said tract, and was thus owner of half of it. James H. Logan claims that his father, William Logan, had deeds for the other interests in the tract, but does not show them. William Logan, by deed dated 15th May, 1851, conveyed to his sons, James H. and Joseph M. Logan, that portion of said tract, which is commonly called the "Breckenridge Survey," west of Elk Water run to a certain line running N., 70° W.; and Joseph M. and James H. Logan afterwards, by deed, 1st August, 1899, made a division between them of said portion of the Breckenridge survey, whereby that part of it covering the land in dispute became the sole property of James H. Logan. Thus James H. Logan claims under the Breckenridge survey. It is the only title set up by his bill. The bill states that the Breckenridge tract was sold by the United States in 1815 for direct taxes, and was purchased by Jinks, and conveyed by him to See, who conveyed part of it, said to include the land in controversy in this case, to William Logan by deed dated 20th November, 1851. This seems to be the same part of said survey before conveyed by William Logan to James H. and Joseph M. Logan.

The grant from Virginia to Bowyer and others for the 50,000 acres is what is called an "inclusive grant"; that is, lands are included within its bounds which were excepted from the operation of the patent. This patent excluded 13,690 acres for prior claims. The deed from Jinks to See also excluded the same lands covered by prior claims which were excepted in the said patent, as also several thousand acres which Jinks had disposed of before he conveyed to William Logan. The deed of Jinks may be thus called an "inclusive deed." The deed from William

Logan to James H. and Joseph M. Logan is a quitclaim deed. James H. Logan and Joseph M. Logan also obtained a grant from Virginia, dated 30th November, 1850, for 815 acres of land claimed to be within the bounds of the Breckenridge grant. James H. Logan and his father long before him had actual possession within the bounds of what he claims to be the Breckenridge survey, and he continued that possession at the date of the commencement of this suit. Neither side had actual possession of the land in controversy in this case, but Logan claims constructive actual possession by reason of his possession inside of the Breckenridge survey. Logan asserts that the land claimed by the defendants is inside his part of the Breckenridge grant. The claim of the defendants is under a grant from the state of Virginia to J. M. Bennett and John S. Hoffman for 990 acres, dated 1st February, 1854, which came by conveyance to defendant Wirt C. Ward, with whom Elihu Hutton had an interest. The defendants also set up a claim under a grant of 105,000 acres, known as the "Welsh Survey", which Hutton claims. The bill avers that under these grants to Bennett and Hoffman and Welsh the defendants Ward and Hutton set up a claim adverse to Logan, but averred no actual possession in them.

Counsel for Logan devotes effort to sustain equity jurisdiction in this case, seeming to doubt it because of the well-known rule that equity will not try title to land. It is true that this is practically an ejectment in equity, because it is only a battle between distinct and adversary titles; but the case falls under the head of equity jurisdiction to dispel cloud over title to land arising from adverse claim. There is some evidence in the case tending to show that the defendants were in possession of the disputed land, and if that were in fact so I do not think a suit in equity could be sustained, since by common law I think it is clear that where one man is in actual possession, and another enters upon him under adverse claim, the true owner may by common law, regardless of our ejectment statute, sustain ejectment. The intruder's entry is a disseisin or ouster, but only a partial one, to the extent of his inclosure; his adversary still retaining his former possession. *Taylor v. Burnside*, 1 Grat. 165; *Core v. Faupel*, 24 W. Va. 246. The true owner, still remaining in possession, may treat his enemy's entry as an ouster and sue in ejectment. "The plaintiff, in possession of a portion of the premises, may bring ejectment for the remainder in the defendant's possession." 1 Am. & Eng. Ency. L. (2d Ed.) 526; *Tapscott v. Cobbs*, 11 Grat. 172; *Witten v. St. Clair*, 27 W. Va. 771; *Stuart v. Coalter*, 4 Rand. 74, 15 Am. Dec. 731. Therefore, if in fact defendants were in possession when suit was begun, I think there could be no jurisdiction in equity, because, before our present ejectment statute,

ejectment would lie. Equity long ago assumed jurisdiction to remove cloud, but only in favor of one in possession, because he could not sue in ejectment; but where both are in possession he can sue by common law. *Va. Coal & Iron Co. v. Kelly* (Va.) 24 S. E. 1020. But the evidence shows that the defendants were not in possession actual when this suit began, and counsel for defendants do not base any stand on that theory. The bill states only hostile claim, not possession. The evidence shows that William Logan and his sons under him had possession many, many years before this suit, 75 or 80 years, and James H. Logan continued in possession actual. Some evidence goes to show that some years before the suit was brought a cabin, or rather a shanty, was built on the land in a trackless wilderness, and during one summer one Salisbury one night in the week slept in it; his actual residence with his family being elsewhere. There was no inclosure or cultivation. It was mere nominal transient possession of nights. It was no open, notorious, continuous occupation. It was not possession actual in the eye of the law. *Hutchison, Land Titles*, § 365; *Anderson v. Harvey*, 10 Grat. 386. Therefore there is jurisdiction in equity for this suit, and we pass to a consideration of its merits.

This is an ejectment in equity, because a contest between hostile titles, and in it we must apply the rule in ejectment that a plaintiff must recover upon the strength of his own title, no matter how weak his opponent's title may be. Those only who have a clear title connected with actual possession have a right to claim the interference of equity to dispel a cloud over their title. *Mills v. Henry Oil Co.*, 57 W. Va. 255, 50 S. E. 157; *Hitchcock v. Morrison*, 47 W. Va. 206, 34 S. E. 993; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682; *Hogg, Eq. Princip.* 83; *Helden v. Hellen* (Md.) 31 Atl. 506, 45 Am. St. Rep. 371; *Dewing v. Woods*, 111 Fed. 575, 49 C. O. A. 443, and citations in Judge Goff's opinion. The plaintiff cannot recover unless he fixes on the ground his exterior boundaries by lines and corners. *Coal Co. v. Howell*, 36 W. Va. 490, 15 S. E. 214. The plaintiff cannot meet this requirement. He claims under the Breckenridge survey. He has not identified it. He claims that the defendants' land lies within that survey. The defendants deny it. Not a corner or a line of that survey is proven. No man proves that he ever saw a corner or a line of it. No reputation thereof is given. Marsteller's evidence is relied on by the plaintiff. He is a young man of only 42. He does not state that he ever saw what he knew to be an original corner or line to this old survey, made away back in 1798. He tested no corners or lines. It is proven that clearing and fire breaks have destroyed them, if ever they existed. Marsteller says he never made a survey of the lines of the Breckenridge survey, but simply be-

Heves that a plat, made by the attorney for the purpose of this case, truly represents that survey; or rather he says that, if the plat made by counsel to show Logan's claim is correct, it would cover the controverted land, but he does not say it is correct. It is only fair to Marsteller to say that he repudiates speaking from actual knowledge. He says, as a sample of his evidence, "No, sir; of my own knowledge I don't know this." Taking his whole evidence, it is manifest that he knows nothing of the actual location of the survey, and simply has an opinion as to its location, standing on no basis. The same may be said of Tallman's evidence. He is 56 years of age. He says he knows of the survey only in a general way. When asked if he knew the Breckenridge survey, he replies, "I know of it in a general way." He never ran or tested any of its known lines. Though asked if he had seen any of the original corners or marked lines, he could not say that he had. He said he did not give much attention to marks when he was running a line or two at the request of the plaintiff's attorney in this case. He said he was not definite about the lines.

Next take the evidence of James H. Logan, himself a surveyor. I can safely say that, if any living man could be brought to identify this survey, it would be Logan. He says he was born in 1816, and with his father moved from Rockbridge county, Va., to this survey, in 1827. His father claimed it, and resided, as claimed, within the survey. James H. Logan and his brother claimed it for years. He knew it when a young, active man, when the marked trees constituting its lines and corners were yet probably standing. He was a practical surveyor, deputy of the county surveyor. In all his surveying, in all the surveying of those old surveys, he does not tell us on the witness stand that he saw or knew a marked corner or line tree of this old survey, or had one shown him by an ancient. He said distinctly, "I have never made a survey of these lines of the Breckenridge survey, but believe it is correct as laid down in the map." He refers to the map or plat used in the present case. He does not claim to know a corner or line, except from mere hearsay—not that even. His evidence is wholly insufficient to identify and establish this survey. The great point of controversy in this case is the location of the western line of the Breckenridge survey, as James H. Logan claims a part of it lying between Elk Water run and the western line of the survey. Is the land in controversy inside of the western line as claimed by Logan, or outside of it as claimed by the defendants? The evidence does not answer this question, unless it answers it for defendants. The burden is on the plaintiff to show that the land he claims is inside the line. Logan says himself, as a witness: "I do not know exactly where the western boundary line of the

Breckenridge survey is located. I never ran it." His own action and declarations in the past strongly war against his claim in this case. He was a surveyor, and in 1846 as deputy surveyor of Randolph county he made a survey for an entry of 430 acres for himself and his brother, and in it he makes its lines call for a Breckenridge line. That would make the Breckenridge line have a location far from the line he claims now to be its western line in this suit, and would locate it as the defendants claim it, and throw the land contested in this case outside the Breckenridge survey. Now this is strong evidence against Logan. When he was a young man of 30 years, living right in the Breckenridge survey, as he claims, while yet its corner and line trees were likely standing and ascertainable, he fixed that line in a different place from where he now claims it. He would be then likely to know the corners and the lines; but, if he did know them, he does not tell us so now as a witness. If he cannot locate them, who can? But he says he cannot do so. He does not do so. Away back many years he told several persons, who are witnesses in this case, that the western line of the Breckenridge survey was along the 430 acres, or where the defendants would locate it, not where Logan now claims it to be. He admitted that the Bennett-Hoffman did not conflict with his land. I would not cast aspersions upon the memory of Mr. Logan, and I think this is to be explained by the fact, manifested by his whole deposition, that he did not know the location of this line. We are referred to this particular portion of his evidence: He was asked, "Do you know where the beginning corner of the Breckenridge survey is?" and answered, "Yes; I know. It is the south corner of the old Jacob Ward place." He said so simply because the patent called for "a corner to lands of Jacob Ward." It was mere opinion, a "take for granted," because he did not say that he ever saw the corner, or saw a man who saw it, or had been told by any one who knew it. He says he did not of his own knowledge know a corner. Shall we fix the corner from the Jacob Ward land? That is not located. If one tract is to be located by another, that other must itself be located. We must take his entire deposition to get its meaning.

Stress is laid upon evidence of Tallman. He surveyed what is said to be the western line of the Breckenridge tract. That is the line on which the controversy in this case hangs. If here, the plaintiff's claim covers the land in controversy; if not here, it does not. He ran the line as Logan pointed it out. Logan did not know it—never saw a tree of it. He said frankly: "I do not know exactly where the western boundary line of the Breckenridge survey is located. I never ran it." Well, Tallman ran this line for miles, and not an old line tree did he find. He says

so. On another line he saw two marked trees, but could not say they were corners. He had no ax, did not block any. He said of these trees, "Don't know whether they were original corners or not." Not one tree does he prove to be a corner or line tree. Not a witness says he ever looked upon a corner or line tree of this old survey. Logan was on the ground from 1827 near the beginning corner, but never saw it or any other corner or line tree. He does not, nor does any witness, say that any old man pointed out or said that any tree belonged to the survey. Not even the slightest reputation of any tree's belonging to the survey is shown. *Harriman v. Brown*, 8 Leigh, 697, allows proof of declarations to prove identity of a corner by a person deceased having peculiar means of knowledge, as a surveyor or chain carrier on the original survey, or the owner of the tract or adjoining tract of same boundary, or tenants and others whose duty or interest would lead to diligent and accurate information, always excluding declarations liable to suspicion of bias from interest. No evidence of this kind even was offered. There is a total want of evidence to identify the Breckenridge survey, or to show that its western line covers the disputed land. Logan proves no title to it. I think that not only does the evidence of plaintiff fail to prove that the Breckenridge survey covers the land in dispute, but proves that it does not do so.

As to any claim under the See deed, that is liable to the same objection just stated. It is not located; for the See land is the Breckenridge land. Besides, the deed from See to Logan being a quitclaim deed, dating after the conveyance from William Logan to James H. Logan and Joseph M. Logan, they could derive no title from it. Such a deed does not pass after-acquired land. Such title as William Logan had to it went to his heirs, and they are not joined in this suit, as they must be to recover; they being parceners. *Newell on Eject.* 64; 7 *Ency. Pl. & Prac.* 317; *Marshall v. Palmer*, 91 Va. 344, 21 S. E. 672, 50 Am. St. Rep. 838; *Nye v. Lovitt* (Va.) 24 S. E. 345. This is another bar against Logan's recovery in this suit. The bill alleges that the Breckenridge tract was sold for direct taxes, purchased by Jinks, and by him conveyed to See, and by him conveyed in part to William Logan. The bill does not assail this tax title, but, on the contrary, puts it forward as a good title. It is vested in William Logan's heirs, of whom we know there were several. Is it not an outstanding title?

I see another reason against Logan's success in this suit. Logan presents deeds to his father for only two of the four shares of the patentees under the Breckenridge patent; but for want of deeds from the other two patentees under the Breckenridge patent he summons the doctrine that from long possession the law will presume conveyances from them to his father or to him. There is a salutary principle that from long possession the law

sometimes presumes a grant, in order to quiet possession and make it consistent with rightful title. The tooth of time may have destroyed the deeds. Under this rule this court raised a presumption that Lord Fairfax had granted to Virginia the famous Berkeley Springs property now owned by this state. Virginia and this state had held long, long possession, but showed no grant. One was presumed. *Smith v. Cornelius*, 41 W. Va. 59, 28 S. E. 599, 30 L. R. A. 747. It is established that grants from the state will be so presumed. *Matthews v. Burton*, 17 Gr. 312; 1 *Greenl. Ev.* § 45. A deed from a vendor to a vendee may be presumed to save land from forfeiture. *Hale v. Marshall*, 14 Gr. 489. Valuable discussion of this interesting subject will be found in *University v. Reynolds*, 23 Am. Dec. 234; 1 *Jones, Ev.* §§ 72, 73, 74. But this presumption is raised to protect a title apparently good, but wanting a formal grant. It is only where, but for such grant, possession would be wrongful. 1 *Greenl. Ev.* § 46. But this presumption cannot be raised to prove an ouster by one joint tenant, parcener, or tenant in common of another, or to prove a grant from one to another. In this state the law is confirmed by numerous cases that the possession of one such person is the possession of the others, and there can be no adverse claim or title, unless there is actual ouster and notice or knowledge of hostile claim brought home to the other party. Mere silent possession by one, no matter how long continued, does not destroy the right of another, unless there be ouster, or adverse claim with notice to the other of adverse claim. *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102; *Cochran v. Cochran*, 55 W. Va. 178, 46 S. E. 924; *Cooey v. Porter*, 22 W. Va. 121; *Bogges v. Meredith*, 16 W. Va. 1. "Where the possession of one is entirely consistent with title in another, it cannot give rise to a presumption of a conveyance from the latter." 22 *Am. & Eng. Ency. L.* (2d Ed.) 1290. *Ricard v. Williams*, 7 *Wheat.* 59, 5 L. Ed. 898, says that this presumption can never arise "where all the circumstances are perfectly consistent with the nonexistence of a grant." As the possession of one joint tenant is consistent with that of another—is in fact his possession—the law raises no presumption that the other has conveyed his title to the one in possession. No presumption is raised that two of the patentees conveyed their shares to William Logan, or that James H. Logan's heirs conveyed their right under the See deed to James H. Logan. Their rights are outstanding.

There is another insuperable obstacle in the way of the plaintiffs' success. The Breckenridge grant and the Jinks deed being an inclusive grant and deed—that is, excluding from their operation certain lands and passing no title to the excepted land—Logan must show that the land he seeks to assert title to in this case is not the land so excepted. The reason for this will be found

stated in *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531. I cannot add anything to what is there said, except to add to the authorities there cited the case of *Reusens v. Lawson*, 91 Va. 227, 21 S. E. 347. That case again overrules the case of *Hopkins v. Ward*, 6 Munt. 38, and holds that where the title papers of the plaintiff disclose the fact that the exterior boundaries of the survey upon which a grant or deed to one under whom he claims is founded include lands which have been excepted from the operation of the grant, or lands which have been aliened since the grant was issued or the deed made, and which have been excepted from the operation of the deed of his grantor, it is incumbent on the plaintiff to show that the lands in controversy are not within the excepted lands; also later case of *Va. Coal Co. v. Keystone Co. (Va.)* 45 S. E. 291. Does not *Kenna v. Quarrier*, 3 W. Va. 210, hold the same? There is not a particle of evidence in this case to meet the requirement of the law; none to show that the land involved in this suit is not the land excepted in the Breckenridge patent and See deed from Jinks.

There is another bar against Logan's recovery. The land he claims from the defendants is forfeited for omission to charge it for taxes. The Breckenridge was on the books down to 1851. In 1852 William Logan was charged with 6,000 acres, transferred to him from C. C. See. He abandoned all the land save that part conveyed by See by omitting from tax books. The 6,000 acres continued on until 1856. In 1857 Logan is charged with 4,750 acres, in lieu of 6,000, and was charged with 4,750 acres down to 1860, and it was never afterwards on the books. That is the last charge to William Logan. Never was any of this land under the Breckenridge title charged to James H. and Joseph M. Logan, because the quitclaim deed to them from their father, dated 15th May, 1851, never was on record until August 5, 1899. Anyhow, it was not on the books to them. So we say that the Breckenridge was not, in the whole or part, on the books after 1860. That forfeits it for non-entry under article 13, § 6, Const. It is true that Logan and his brother, Joseph, owned three tracts of 815, 1,000, and 1,000 acres, and they, in one or another name, have been on the tax books, one from 1851, one from 1852, one from 1854; but their title to the 815 acres came from a grant, 30th November, 1850, to James H. and Joseph M. Logan, under a deed from J. M. Crouch, 26th April, 1852, for 1,000 acres, and a deed from Adam See for 1,000 acres, 31st December, 1851. These titles were not under their father's title, but hostile and different. These were distinct tracts, of prescribed boundary, not covering the land in dispute, not claimed to do so, clearly proven not to do so. Their taxation could not save the balance of the Breckenridge land from forfeiture. There is no identity between the title under that grant and those deeds and that under Wil-

liam Logan; no identity between the lands so charged and that in dispute. Though inside the Breckenridge bounds, the taxation of tracts of specific bounds would not save from forfeiture lands outside the bounds of those three tracts. The taxation of 2,815 acres of specific limits would not save the whole 50,000 acres. I repeat that the three tracts so taxed do not include the disputed land. Any right to that under the Logan claim is outstanding in the state, not in Logan.

We see no reason to differ with the finding of the circuit court, and therefore affirm its decree.

POFFENBARGER, J. (dissenting). The decree in this cause, which the court now affirms, does not merely dismiss the bill because plaintiffs fail to show their title to the land covered by the patent which they wish to cancel, and thus remove a cloud from their title, but determines that the plaintiffs have no title and that the defendants have. The decree reads as follows: "It is therefore adjudged, ordered, and decreed that the plaintiffs take nothing by their said bill and suit, that the same be wholly dismissed, and that the said defendants," etc. Believing, as I do, that under our practice—the ordinary equity jurisdiction, unaided by statute—there can be no such thing as an ejectment in equity, I cannot concur in that part of the decision which affirms the adjudication against the plaintiffs as upon the merits. I think the bill should have been dismissed in such manner as not to prejudice any rights which they might assert in any other proper proceeding either at law or in equity. The theory of a bill to remove a cloud is clearly and well stated by the Supreme Court of Mississippi in *Phelps v. Harris*, 51 Miss. 789, as follows: "This jurisdiction of equity cannot properly be invoked to adjudicate upon the conflicting title of parties to real estate. That would be to draw into a court of equity from the courts of law the trial of ejectments. He who comes into a court of equity to get rid of a legal title, which is allowed to cast a shadow on his own title, must show clearly the validity of his own title and the invalidity of his opponent's." This was quoted with approval by the Supreme Court of the United States in the same case on appeal. 101 U. S. 370, 375, 25 L. Ed. 855. In *Orton v. Smith*, 18 How. 263, 15 L. Ed. 393, Mr. Justice Grier said: "Those only who have a clear legal and equitable title to land connected with possession have any right to claim the interference of a court of equity to give them peace and dissipate a cloud upon the title." This court asserts the same principle and rule in *Harr v. Shaffer*, 45 W. Va. 709, 31 S. E. 905, in the following language: "A party who files a bill to remove a cloud from his title to a tract of land, who show

on the face of his bill that he has no title to the land himself, and no right to interfere with others who appear to have good title thereto, is not entitled to be heard in a court of equity, and his bill will be dismissed." See Hogg's Equity Principles, § 46. The principle is strikingly illustrated in *McRee v. Gardner*, 131 Mo. 599, 33 S. W. 166, in which the court held as follows: "Where a bill to remove a cloud on the title to land is dismissed because plaintiff is not in possession, the judgment should not be so absolute as to constitute a bar to the maintenance by plaintiff of another form of action he may have to the land." Originally, equity jurisdiction to quiet title did not arise until after one or more trials in ejectment. *Stark v. Starrs*, 6 Wall. 402, 18 L. Ed. 925. Mr. Justice Field said: "The equity asserted in such cases had its origin in the prolonged litigation which the action of ejectment permitted. That action being founded upon a fictitious demise between fictitious parties, a recovery therein constituted no bar to a second similar action, or to any number of similar actions for the same premises. With slight changes in these fictions a new action might be instituted and conducted as though no previous action had ever been commenced. Thus the party in possession, though successful in every case, might be harassed, if not ruined, by the continued litigation. To prevent such litigation after one or more trials, and to secure peace to the party in possession, courts of equity interposed upon proper application and terminated the controversy." This jurisdiction to quiet title differs from the jurisdiction to remove a cloud, but it falls short of an ejectment. It proceeds upon the assumption of a perfect title in the plaintiff, ascertained and determined in a court of law, and does not open the doors of the equity court to a retrial of the matters which have been determined in the law court. It has jurisdiction to restrain one of the parties from vexatiously relitigating questions of title which have already been settled in the legal forum. In order to invoke such jurisdiction, the plaintiff must show his possession and his perfect title. Thus he may call in a paper under which his adversary claims and cause it to be canceled, to the end that it may no longer be the means of annoyance to him. So a bill to remove a cloud invokes a jurisdiction which goes only against the paper title of the adversary, to cancel it because of its invalidity in some respect, so that no vexatious litigation may be predicated upon it. The plaintiff cannot call for the exercise of that jurisdiction until he shows title in himself and possession of the property. If he fails to do this, he is not in a position to invoke the jurisdiction of the court, and his bill should merely be dismissed, not because the defendant has superior title, but because the court cannot adjudicate anything, as between them,

except that the plaintiff is not in a position to demand cancellation of the defendant's title papers. Equity cannot try questions of title, unless jurisdiction be obtained upon some equity in the party. *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895. In this class of cases, the plaintiff shows no equity, and can show none, until he has established his title and possession. When he fails to do this, he fails to bring himself and his adversary within the jurisdiction of the court, and want of jurisdiction is all the court can declare or adjudicate.

(58 W. Va. 408)

BAKER v. MONUMENTAL SAVINGS & LOAN ASS'N et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1905.)

1. INSURANCE — PAYMENT TO MORTGAGEE — SUBROGATION.

Where a cestui que trust purchases insurance on the trust property for the security of his debt, secured by the deed of trust, and a loss from fire occurs, and the insurance company pays the whole debt secured, it is entitled to take an assignment from the trust creditor of the debt so secured and paid, and to recover the same in the same manner as its assignor could do.

2. SAME.

Where the owner of real estate, which is subject to a deed of trust executed thereon to secure a debt by his vendor, sells and conveys the same, reserving his vendor's lien thereon for the purchase money, such conveyance being subject to such deed of trust, and the trust creditor purchases insurance in said owner's name without notice or knowledge that he has conveyed his title thereto, and a fire occurs, and the insurance company, in settlement of the loss, pays the whole trust debt, it is entitled to an assignment thereof and to be subrogated to the rights of the trust creditor.

3. SAME—INSURABLE INTEREST.

In such case, after such conveyance, such grantor has no interest in such real estate, except as to his vendor's lien, and he has no other insurable interest therein.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County.
Bill by B. Baker against the Monumental Savings & Loan Association and others. Decree for plaintiff, and defendant Scottish Union & National Insurance Company appeals. Reversed.

Cunningham & Stallings, for appellant.
R. H. Allen, for appellee.

McWHORTER, J. The Vincents owned lot No. 37 (sometimes in the record designated "No. 27") in the town of Thomas, Tucker county, and borrowed from the Monumental Savings & Loan Association \$600 in two sums—\$300 the 25th of August, 1896, and \$300 the 20th of January, 1897—and executed two deeds of trust at the dates mentioned upon the said lot and premises to secure the same. In 1897 Joseph Vincent, one of the parties, became the sole owner of the said lot and conveyed the same to R. Baker; the said Baker assuming the debts

aforesaid. In 1898 Baker conveyed the same to Chester Brumbaugh for \$1,170, taking a check as the cash payment of \$390 from said Brumbaugh, and his two notes, at 6 and 12 months, for \$390 each, reserving a vendor's lien to secure the purchase money. The check was not paid. At April rules, 1901, Baker brought his suit in the circuit court of Tucker county against Clayton Brumbaugh, administrator of Chester Brumbaugh, who had died, ——— Brumbaugh, father and heir at law of Chester Brumbaugh, and the Monumental Savings & Loan Association, defendants, for the purpose of enforcing his vendor's lien; and at the October rules, 1901, said Baker filed an amended bill, alleging that the payments made by the Vincents and by himself upon the association's debt had entirely paid up the said debt, and making J. R. Collett, who had filed a mechanic's lien against Baker, a party to his suit, and also making H. J. Wagoner and E. J. Bond, trustees in the said deeds of trust, parties to the suit. The cause was referred to a commissioner to state an account, ascertaining the lands owned by Chester Brumbaugh, deceased, the nature and condition of the title thereto, the liens thereon, their amounts and priorities, and to whom owing. The commissioner reported that the said Brumbaugh had died seised of lot No. 37 in the town of Thomas; that the debt due the Monumental Savings & Loan Association, amounting to \$366.50, with interest from March 5, 1902, was the first lien on said lot, and the debt due B. Baker, \$1,371.44, with interest from said 5th day of March, 1902, was the second lien on said property; that the amount due John R. Collett was \$75.57, to be paid out of the lien of Baker when collected. This report, not being excepted to, was confirmed on the 7th day of March, 1902, and a decree then entered to sell the said property to pay the said liens. The property was sold on the 5th day of March, 1903, by the commissioner appointed therefor, and purchased by the plaintiff, B. Baker, for \$501, of which one-third, \$167, was paid by him in cash, and he executed to the commissioner his two notes of like sums of \$167 each, payable in three and six months, according to the terms of the decree. The sale was confirmed, without exception to said report, by decree entered March 10, 1903, and the commissioner ordered to pay out of the cash payment the costs of the suit and sale, and the remainder to be applied by him to the payment of the debts as ascertained and decreed, and that he withdraw the notes and collect the deferred payments, and "when collected pay the same on the debts remaining unpaid in the priority as specified in the decree of sale entered in this cause on the 7th day of March, 1902." On the 26th day of June, 1902, the Monumental Savings & Loan Association, in writing, by two assignments of \$183.25 each,

making together \$366.50, the amount of the lien of the said loan association, assigned all its right, title, and interest in and to the two deeds of trust securing the said loans of \$300 each, to the Scottish Union & National Insurance Company in satisfaction and settlement of the loss sustained by the Monumental Savings & Loan Association under insurance policies, numbered respectively 2,455,593 and 2,652,177, issued by said insurance company in the name of B. Baker of Parsons, W. Va., containing the usual mortgage clause in favor of said association; the building on said lot No. 37 having been destroyed by fire on the 12th day of November, 1901.

At the May rules, 1903, Baker filed his bill in the circuit court of Tucker county against Clayton Brumbaugh, administrator of Chester Brumbaugh, the Monumental Savings & Loan Association, the Scottish Union & National Insurance Company, and J. P. Scott, special commissioner, enjoining and restraining them from collecting the two notes of \$167 each, and that the commissioner be required to retain all of said money then in his hands or to come into his hands from said notes, and that he be in the end directed to pay such cash then in his hands and the notes to be collected to the plaintiff, and that any further claim of the Monumental Savings & Loan Association or the Scottish Union & National Insurance Company be held to be void as against said special commissioner, and for general relief. The injunction was granted as prayed for. The Scottish Union & National Insurance Company filed its demurrer and answer, which demurrer was overruled by the court. Depositions were taken, and the cause came on to be heard on the 25th day of March, 1903, upon the bill and answer of the Scottish Union & National Insurance Company and exhibits filed therewith, and the general replication thereto, former orders and decrees, and the depositions duly taken and filed on behalf of the plaintiff, when the court held that the lien of the Monumental Savings & Loan Association on lot No. 37 was discharged by the payment to said association of the amount due it by the Scottish Union & National Insurance Company under the said policies of insurance, and the said defendant Scott, special commissioner, was restrained and enjoined from paying to the Scottish Union & National Insurance Company or the Monumental Savings & Loan Association, their agents or assigns, the money arising from the sale of the real estate in this cause; and it was decreed that said commissioner pay the money in his hands, or to come into his hands by virtue of the notes executed for the deferred payment of the purchase money as mentioned in the bill, to plaintiff, Baker, except that he pay to John R. Collett the sum of \$75.57 by virtue of his mechanic's lien, and decreed plaintiff costs in this suit against the Scot-

tish Union & National Insurance Company, from which decree the Scottish Union & National Insurance Company appealed and assigned many grounds of error.

The only question really involved in the cause is whether the appellant insurance company had a right to purchase from the Monumental Savings & Loan Association its lien for \$366.50, which had been reported by the commissioner as the first lien upon the lot No. 37 and so decreed to said association, and to be subrogated to the rights of said association under said decree, or whether the payment of said sum to the association was a discharge of the lien. It is contended by counsel for appellant that the decree of March 7, 1902, fixing the priorities of the liens and making the amount in question the first lien and directing its payment in that order, was *res adjudicata*, and it was too late to change the priorities and to disturb its relation. It is not a question of *res adjudicata*, as it would be if the purpose was to change its relation as a lien, but a question of the subsequent payment of the decree by the appellant company. Plaintiff, Baker, conveyed the lot No. 37 to Chester Brumbaugh by deed dated December 10, 1898, reserving his vendor's lien for the purchase money, from which time he ceased to own the lot, or have any other or further interest in it than his vendor's lien upon it. It is true he had an insurable interest in the property for the further security of his lien, but he took out no insurance upon it. After the policies first taken out by the Vincents expired, on the 27th day of January, 1900, and the 4th day of September, 1900, the Monumental Association, without the knowledge that Baker had conveyed the property more than a year prior thereto to Chester Brumbaugh, took out two policies of insurance of \$300 each in the name of B. Baker in the appellant company, loss, if any, payable to the said Monumental Association, as a further security for their said two loans. This the association had an unquestioned right to do for its own benefit. The fire which destroyed the property insured occurred November 12, 1901, and, although the policies provided that if fire occur the insured should give immediate notice of any loss thereby in writing to the insurance company and make full proofs of loss within 60 days after the fire, plaintiff, Baker, complied with none of the requirements of said policies, never pretended to make any claim on account of said policies until after he had purchased the lot at judicial sale in March, 1903, nor until he filed his bill of injunction at May rules, 1903, 18 months after the fire occurred. Indeed, it very clearly appears from the testimony of Baker that he knew nothing about the existence of the insurance policies upon which the money was paid by the appellant company for the decree assigned to it by the Monumental Savings & Loan Association.

While he says in his examination in chief that he paid insurance premiums, on his cross-examination it is made to appear that what he paid on account of insurance premiums was on the insurance taken by Vincent, during which time the first fire occurred, and he got \$200 out of it, and he knew nothing of any insurance afterwards. He says he does not know that it was afterwards insured. If it was, it was by his attorneys. It is very certain that his attorneys did not take out the insurance in question in the appellant company.

The debt of the Monumental Association was paid in full, or, rather, the appellant company paid for it the full amount of the debt. In *Carpenter v. Insurance Co.*, 16 Pet. (U. S.) 495, 10 L. Ed. 1044, it is held by the court: "No doubt can exist that the mortgagor and the mortgagee may each separately insure his own distinct interest in property against loss by fire. But there is this important distinction between the cases: That, where the mortgagee insures solely on his own account, it is but an insurance of his debt, and, if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and, even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby, neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. Upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same from the mortgagor. The payment of the insurance is not a discharge of the debt, but only changes the creditor." See 27 A. & E. E. L. 263, and cases cited; *Dunbrack v. Neall*, 55 W. Va. 565, 47 S. E. 303; *Insurance Co. v. Bank*, 85 Va. 765, 8 S. E. 719, 2 L. R. A. 667, 17 Am. St. Rep. 101; *Hogg's Eq. Prin.*, § 415.

For the reasons herein given, the decree of the circuit court of Tucker county is reversed and set aside, the injunction dissolved, and the plaintiff's bill dismissed.

(38 W. Va. 418)

LAIDLEY et al. v. REYNOLDS et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1905.)

1. FRAUDULENT CONVEYANCE—SETTING ASIDE—PLEADING LIMITATIONS.

A bill to subject land of a wife to pay a debt of her husband, on the claim that it was paid for by the husband's money and conveyed to the wife with intent to defraud creditors on the part of the husband, must charge notice on the part of the wife of the husband's fraudulent intent, in order to make it a bill for relief on the claim of fraud in fact; otherwise, it is to be regarded a bill to annul a voluntary

conveyance, and the statute limiting suits to set aside a voluntary conveyance to five years applies.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 779.]

2. JUDGMENT—LIEN.

The lien of a judgment exists, though execution be suspended by the death of the creditor, and may be enforced in equity without revival.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1425.]

3. SAME—ENFORCEMENT IN EQUITY.

When a suit in equity is brought in one county to enforce a judgment upon real estate in that county and also on land in another county, jurisdiction as to the land in such other county is not lost because, on the facts, the court finds that the land in the county of the suit is not liable, but it may proceed against the land in that other county.

(Syllabus by the Court.)

Appeal from Circuit Court, Kanawha County.

Bill by James M. Laidley, administrator, and others, against William C. Reynolds and others. Decree for plaintiffs. Defendants appeal. Reversed.

W. S. Laidley, for appellants. J. M. Payne and C. M. Alderson, for appellees.

BRANNON, P. James M. Laidley recovered a judgment in 1874 in the county court of Kanawha county against William C. Reynolds. Laidley brought a chancery suit in 1896 in the circuit court of Kanawha county, stating in his bill that by deed dated 25th January, 1892, Mary D. McClung and her husband had conveyed to Annie L. Reynolds, wife of William C. Reynolds, two lots of land in the town of Ruffner for the consideration of \$800, as recited in the deed, and that by deed dated 30th December, 1884, Julia Hopkins and others had conveyed to Annie L. Reynolds a tract of 340 acres of land lying in Boone county, and charging that William C. Reynolds had purchased and paid for both of said properties with his own money, and that his wife had paid none of the considerations therefor, and that Reynolds had procured the conveyances to be made to his wife with intent to defraud his creditors. Reynolds and wife filed answers denying all the charges of fraud, and pleading the statute of limitation of five years and laches in bar of the suit. The case was heard upon the bill, answers, and depositions, and a decree was made exonerating the Ruffner lots from liability, but subjecting the Boone county land to sale to pay the judgment; and Reynolds and wife appealed because the decree subjected the Boone county land to sale, and the plaintiffs cross-assigned error because the decree did not hold the Ruffner lots liable to the judgment.

The plaintiffs' bill is defective in failing to allege that Annie L. Reynolds had notice of the fraudulent intent of her husband in procuring the deeds to be made to her, according to the principles laid down in *Scraggs v. Hill*, 43 W. Va. 162, 27 S. E. 310, holding

that, "a creditor cannot set aside a voluntary conveyance, after five years from the making thereof, without proof of actual fraud participated in by the parties to the transaction." The syllabus includes both parties as participating in the fraud to take it out of the statute. The opinion pointedly says so. The question depends upon the construction of sections 1 and 2, c. 74, Code 1899, and section 14, c. 104. One construction is that section 1, c. 74, annuls a transfer made with intent to defraud creditors, whether voluntary or on valuable consideration, saving only purchasers for value without notice. Taken alone, that section would avoid every fraudulent deed not on consideration valuable in law. The law (outside of section 14) is surely as laid down in *Bump on Fraudulent Conveyances*, § 239: "The validity of a voluntary conveyance depends upon the intent of the party making it, and not on the motive with which it is received. The proviso at the end of the statute only extends to transfers made upon a good consideration, and the only consideration which is good within the meaning of the statute is a valuable consideration. It is the innocent purchaser, and not the innocent donee, that is protected. It is the motive of the giver, and not the knowledge of the acceptor, that is to determine the validity of the transfer. If any evidence of the grantee's participation in the fraudulent intent of the grantor were necessary, the mere acceptance of the transfer would be sufficient; for the law would presume such participation from this fact alone. A donee, who sets up a voluntary conveyance when it would, if established, defeat creditors, participates in and carries out the intent of the donor." To the same effect is *Wait on Fraudulent Conveyances*, §§ 200, 208. Thus it matters not whether the grantee in a voluntary conveyance has or has not notice of the grantor's evil intent, because he has paid nothing, and the law gives preference to creditors over him for that reason. Section 1 is sweeping, since it declares all fraudulent transfers void, excepting only innocent purchasers. Grantees in voluntary conveyances are left under the sweep of the broad language of section 1. The fraud of the grantor alone taints the act, and his fraud is by law attributed to the grantee, as if he had notice of it. He is in no better plight than the grantor because he has paid nothing. *McCue v. McCue*, 41 W. Va. 156, 23 S. E. 689. Under this theory the first section deals only with certain transfers, namely, those infected with fraudulent intent, whether that intent is only in the mind of the grantor or in the minds of both grantor and grantee. Under this theory notice by the grantee of the grantor's fraudulent intent is immaterial, and therefore need not be alleged or proven.

But those who contest this theory might answer with the question, What about section 14, c. 104, saying that "no gift, conveyance, assignment, transfer or charge, which is not

on consideration deemed valuable in law, shall be avoided, either in whole or in part, for that cause only, unless within five years after it is made suit be brought for that purpose"? Those who advocate the construction just stated might respond to the question that section 2, c. 74, declares that "every transfer or charge which is not upon consideration deemed valuable in law shall be void as to creditors whose debts shall have been contracted at the time it was made." They may say that section 2 deals with a different class of transfers from those dealt with by section 1; that section 2 brands as void only those transfers that are simply voluntary and condemns them only because voluntary; that it refers only to those transfers not tainted by fraudulent intent either in grantor or grantee, but those made in innocence on the part of both parties. They might say that section 1 has one office to perform, and section 2 a different office. The one condemns all fraudulent deeds, including voluntary deeds, though the fraudulent intent move only the grantor. The other condemns deeds wholly free from fraudulent intent on the part of both parties. They might argue that, when section 14 of chapter 104 gives the limitation to suits to set aside a transfer not on consideration deemed valuable in law, it means those transfers mentioned in section 2, c. 74, and that this is shown, not only by the description of the transfer as being "not upon consideration deemed valuable in law," found in both sections, but also because section 14 declares that no conveyance "which is not on consideration deemed valuable in law shall be avoided * * * for that cause only, unless within five years." Those words "for that cause only"—that is, because on consideration not valuable—show that the limitation is intended to apply only to deeds avoided by the statute simply and only because voluntary.

The other theory or construction is that section 1 applies to or includes a voluntary conveyance made with fraudulent intent on the part of the grantor, and that section 14 gives a limitation of five years protecting every voluntary conveyance, fraudulent or not fraudulent. It says that a transfer by a grantor intending fraud, where there is no valuable consideration, is just as much a voluntary conveyance as where both parties are innocent of fraud, and that this statute of limitation was meant to protect the innocent grantee, and him alone, and could not have been intended to protect the fraudulent grantor, because he has nothing to be protected. It says that it is this section 14 that rules, and operates to deny the application of the principles laid down in the quotation above from Bump. What difference whether there is or is not notice of fraud? Upon mature consideration I think the first construction is sound, and so think some other members of the court; but Scraggs v. Hill, 43 W. Va. 162, 27 S. E. 310, has

given a different construction to the statute, and, this construction having stood for years without legislative intervention, we will adhere to it. *McCue v. McCue*, 41 W. Va. 151, 23 S. E. 689, holds the same as the *Scraggs* Case. It admits (on page 156 of 41 W. Va., page 690 of 23 S. E.) that the voluntary conveyance is, under section 2, conclusively fraudulent, whether the grantee had notice or not; that means for five years. After five years, the syllabus says, there must be fraud in fact; that is, in both parties, because the opinion (page 159 of 41 W. Va., page 692 of 23 S. E.) says: "Unless notice of the debtor's actual fraudulent intent, if any, of his dishonest intention, or complicity therein, be in some way brought home to the wife, the creditor may no longer go against this land of the wife. The lawmakers give the creditor a plain and sure remedy, but upon the express condition that he brings his suit within five years before the grantee became a quasi purchaser for value." To hold otherwise than as we do, we must overrule both the *Scraggs* and the *McCue* Cases, which we hesitate to do, especially as the court is divided three to two.

The argument is made that as the judgment creditor died after judgment, and it does not appear to have been revived in the name of his administrator, its lien has ceased. It is not necessary to hold that this is a lien for the purposes of this case. A general debt would do just as well. But very plainly a judgment lien on land does not cease to be such because of the death of its owner, because section 5, c. 139, Code 1899, makes it an absolute lien. The judgment is a lien by mere force of the statute. When once it fastens on the land, it sticks to it notwithstanding the death of either party, and may be enforced in equity without revival; revival being necessary only for the purpose of issuing execution. The lien does not come from an execution. It is not a part of the action in which the judgment was rendered. It comes from the statute, and may be enforced always in equity under section 7. *Maxwell v. Leeson*, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875; *Burbridge v. Higgins*, 6 Grat. 120; *Taylor v. Spindle*, 2 Grat. 44; *James v. Life*, 92 Va. 702, 24 S. E. 275; *Black on Judgments*, § 467.

The point is made that, when the circuit court found that the Ruffner lots were not liable, that instant the Kanawha circuit court lost jurisdiction and could not decree against the Boone land. This is rested on chapter 123, § 1, Code 1899, saying that a suit to subject land to a debt must be brought in the county where the land is. Plainly there is nothing in this point. The bill proceeds against both tracts. They both are parts of the subject-matter of the suit, both enter into the jurisdiction, one being in Kanawha county, thus giving lawful jurisdiction in that county, and the fact that one

property could not, because of want of evidence, be made liable, did not oust the jurisdiction once acquired. Having jurisdiction for one purpose, the court gives full relief upon all matter of the suit. Besides, having jurisdiction, it has power to sell land in any county by the letter of section 1, c. 132. For the reason that the suit was not begun within five years after the deed for the Boone land, and is barred as a suit to set aside a deed merely voluntary, we cannot hold it liable, for want of allegation and evidence of notice by Mrs. Reynolds of the alleged fraudulent intent of her husband. This prevents charging the land on the ground of actual fraudulent intent. As to the Ruffner lots, upon the evidence we conclude that they were not purchased with the means of the husband.

We are asked to remand the case to allow amendment of the bill. To allow this it must appear from the proof that a case exists which, on a bill charging Mrs. Reynolds with knowledge or participation in the fraud, could be sustained. *Lamb v. Cecil*, 25 W. Va. 288. But the proof does not show that Mrs. Reynolds knew of her husband's indebtedness to the plaintiff—does not fix guilt upon her. We cannot guess that such evidence exists, so that upon amendment of the bill it would be sustained by evidence. We cannot remand to let the plaintiff hunt up new evidence.

Therefore we reverse the decree and dismiss the bill.

(189 N. C. 643)

STATE v. HOLLOMAN.

(Supreme Court of North Carolina. Dec. 12, 1905.)

1. HIGHWAYS—USE—REGULATION—NOTICE.

Laws 1905, p. 292, c. 259, requires persons desiring to use the highways of certain towns for heavy hauling to procure a license on payment of \$15 per wagon; and section 23 (page 298) provides that section 17 (page 297), making it a crime for any person to use the roads for heavy hauling without such license, shall not be enforced in any township, unless a majority of the members of the board of supervisors of the township shall vote to enforce the same. *Held* that, where the board of supervisors of a township voted to enforce the provisions of the act, it was no defense to a prosecution against a person for violating the same that no written notice of the action of the board had been served on him.

2. SAME—STATUTES—VALIDITY.

Laws 1905, p. 292, c. 259, provides that persons desiring to use a public road for heavy hauling shall procure a license and pay an annual vehicle license fee of \$15, which should be placed to the credit of the board of supervisors of the township, to be used as other funds of the township, and declares that any person violating the same shall be guilty of a crime, the penalties for which shall be used for the benefit of the road fund of the township. Section 12 authorizes the levy of a county tax for road purposes to be used in the township from which it is derived, and section 17 declares that the act shall not be enforced in any township, unless a majority of the members of the board of

supervisors shall vote to enforce the same. *Held*, that such act was a valid exercise of the power of the Legislature to prescribe by what methods the roads should be used, worked, and kept in repair.

Appeal from Superior Court, Hertford County; Peebles, Judge.

Luther Holloman was charged with violating Laws 1905, p. 292, c. 259, regulating the use of public roads, and from an order adjudging him not guilty the state appeals. Reversed.

The Attorney General, for the State.

OLARK, C. J. The General Assembly (Laws 1905, p. 292, c. 259) prescribed a carefully drawn method for working the public roads in Hertford county. Section 17 (page 297) thereof provides "that any person, firm or corporation desiring to use any of the public roads of a township for carrying on his or its business of hauling mill logs or timber or other heavy material with log wagons, log carts or other heavy vehicles shall first obtain a license for this purpose from the board of supervisors of the township in which he or they may desire to operate and make use of the roads by paying an annual license tax of fifteen dollars for each wagon or cart or vehicle of the kind above described to be used, which tax shall be paid to the treasurer of the board fund and placed to the credit of the board of supervisors of the township, to be used by the board as other funds for said township. Any person violating this section shall be guilty of a crime and liable to a penalty of fifty dollars to be recovered in an action by the board of supervisors of roads of the township where the offense took place, for the benefit of the road fund of that township." And section 23 (page 298) provides "that section 17 of this act shall not be enforced in any township unless a majority of the members of the board of supervisors of that township shall vote to enforce the same." Section 12 (page 296) authorizes the levy by the county commissioners of a county tax on property for road purposes, such tax to be used in the township from which it is derived; and section 24 (page 298) provides that one-half the net proceeds of all dispensaries for the sale of liquor in the county shall be apportioned per capita among the several townships and used by the board of road supervisors of each township, to be used solely for repairing the public roads therein.

The special verdict finds that the majority of the justices of Murfreesboro township, on June 3, 1905, under authority of section 23 of said act, adopted the provisions of section 17 above set out, and imposed the license tax of \$15 upon all persons or corporations using the roads of said township for carrying on their business of hauling mill logs or timber or other heavy material with log wagons, log carts, and other heavy vehicles, and that the defendant had verbal notice, both from

a justice of the peace and member of the board of road supervisors of said township, and also from the secretary of said board, of such action, and that the law was in force requiring a license tax of \$15; but the defendant nevertheless continued the business of hauling logs over the public roads in said township with log wagon and team after having received the verbal notices aforesaid, without taking out license or paying the license tax, until later, upon receiving written notice that the board had refused to rescind the order, he discontinued using the public roads for hauling logs with log wagons. As the law did not require written notice of the action of the board under section 23, the defendant cannot avail himself of the fact that no written notice was served upon him. The special verdict finds that he had notice that the law had been put in force in said township by virtue of the authority conferred by section 23 of the act, above set out. The public roads are for ordinary use, and it is common knowledge that, when used by heavy vehicles hauling heavy logs and timber over them, the roads are cut up, and require an extraordinary expenditure to be kept in order. The general public might well complain at being called upon to bear this additional expense for the profit of lumber companies using the road, not for ordinary travel and usage, but for their individual benefit, not as members of the community, but in the prosecution of a special and usually temporary, but profitable, business.

That the General Assembly can provide a special road law and method of working the public roads for a county or several counties, or a township or other locality, and make the adoption of such system depend upon the acceptance or rejection thereof by the people or the landholders (as with "no fence" laws), or by the official boards of such county, township, or locality, is well settled. This is the flexible "local option" system which gives the greatest freedom of local self-government, and has been applied already to the sale of liquor, to fence laws, to the sale of seed cotton, to cattle running at large, to variations in the methods of electing town commissioners and in the mode of selection of county commissioners, to local provisions for public schools, to dispensaries, to close season for game, to this very matter of working the public roads, and in many other instances. *State v. Sharp*, 125 N. C. 632, 34 S. E. 264, 74 Am. St. Rep. 663, and cases there cited. This license tax is simply a mode of regulating the use of the public roads and requiring that those desirous of using them for extraordinary purposes, as hauling heavy lumber and logs over the roads in unusually heavy vehicles, shall not do so without taking out a license for such unusual and extraordinary and injurious use of the public highway, and paying a license tax for the privilege. This statute prescribes that the license tax shall be "placed to the credit of the board of super-

visors of the township, to be used by the board as other funds for said township." As all the funds of each board of road supervisors are to be used "solely for road purposes in its township," the evident purpose is to use these license taxes to make good the extra cost of road maintenance entailed by the use of the public road by heavy vehicles in hauling heavy logs and timber by these lumber companies and others. In *State v. Yopp*, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305, it was held that "the Legislature has complete power to regulate the highways in the state, and may prescribe what vehicles may be used on them, with a view to the safety of passengers over them and the preservation of the roads." This power may be conferred upon local governing agencies. *Elliot, R. & S.* (2d Ed.) § 424; *State v. Summerfield*, 107 N. C. 895, 12 S. E. 114. And its being put into effect can be made dependent upon the action of the board of supervisors. *State v. Barringer*, 110 N. C. 525, 14 S. E. 781; *State v. Chambers*, 98 N. C. 600. This statute deprives no citizen of any right to use the highway. It does not restrain trade, nor is it oppressive. Heavily loaded vehicles cut up and injure the public road, and a reasonable license tax, the proceeds of which are appropriated to repairing the damage thus produced, is exceedingly equitable.

The method of providing for working and keeping in repair the public roads is a matter solely for the legislative department. The old system of working the roads by conscription of labor was exceedingly inequitable, because it threw the cost of road maintenance upon those deriving the least benefit therefrom, the laboring element. This system was handed down to us by our British forefathers, in whose government that class had small voice, if any, in the adjustment of public burdens. It was a part of the "trinoda necessitas" under the Roman law, and in France, where that system of working the roads was known as "corvées," it was one of the great grievances which found utterance in the great French Revolution and was swept away. *State v. Covington*, 125 N. C. 644, 34 S. E. 272. The change to working the roads by taxation has been complete in most civilized countries, but has been slower in this state than in most. This is fairer than working by compulsory labor, but is far from being entirely equitable, since the taxable property of individuals rarely bears direct proportion to the benefits received from the use of the public roads. An ideal tax probably would be one proportioned to the benefits received by each, but this would be evidently impracticable. The license tax here imposed for raising a fund to be paid by those making extraordinary use of the roadways, to be applied to repairing the extra wear and tear of the roads caused thereby, is an approximation to the just rule of taxation for roads in proportion to benefits received. In many other states there has

been similar legislation, which has been upheld by the courts. The cases presenting the question are mostly those in which there has been an abatement of the road tax in consideration of the use of broad tires, an abatement granted by reason of the lessened wear and tear of the roads when those are used. *People v. James*, 16 Hun, 426; *Utica v. Blakeslee*, 46 How. Prac. 165; *Gartside v. East St. Louis*, 43 Ill. 47; *City of St. Louis v. Green*, 70 Mo. 562; *Brooklyn v. Breslin*, 57 N. Y. 591; *Nagle v. Augusta*, 5 Ga. 546; *Com. v. Mulhall*, 162 Mass. 496, 39 N. E. 183, 44 Am. St. Rep. 387; *Harrison v. Elgin*, 53 Ill. App. 452; and others.

It is for the legislative department to prescribe by what methods the roads shall be worked and kept in repair—whether by labor, by taxation on property, or by funds raised from license taxes, or by a mixture of two or more of these methods; and this may vary in different counties and localities to meet the wishes of the people of each, and can be changed by subsequent Legislatures. This matter has been fully discussed in *State v. Sharp*, 125 N. C. 632, 634, 34 S. E. 264, 74 Am. St. Rep. 663. Under this statute the state prosecutes for the misdemeanor, and the board of supervisors can sue for the penalty. *State v. Parker*, 91 N. C. 650; *State v. Bloodworth*, 94 N. C. 918; *State v. Taylor*, 133 N. C. 755, 46 S. E. 5; *School Directors v. Asheville*, 137 N. C. 510, 50 S. E. 279.

Upon the special verdict the court should have instructed the jury to find the defendant guilty.

Reversed.

(140 N. C. 83)

BALL & SHEPPARD v. PAQUIN et ux.
(Supreme Court of North Carolina. Nov. 28, 1905.)

1. PLEADING—GENERAL DEMURRER.

A demurrer not specifying wherein the complaint fails to state facts sufficient to constitute a cause of action is general, and not allowable.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 475, 477.]

2. HUSBAND AND WIFE—ACTION AGAINST WIFE—PLEADING—DEFENSE OF COVERTURE—DEMURRER.

A demurrer on the ground that defendant was a married woman is properly overruled, where her coverture does not appear in the complaint.

3. SAME—CONTRACTS.

Under Const. art. 10, § 6, providing that the property, real or personal, of a married woman, whether acquired before or after marriage shall remain her sole and separate estate, and Code, § 1826, providing that no woman during coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, etc., without the written consent of her husband, a contract of a married woman, admittedly for the improvement of her separate real estate, assented to by her husband, and where she was privately examined apart from her husband, is binding on her separate real estate.

4. SAME—MECHANIC'S LIEN—ENFORCEMENT.

Under Const. art. 10, § 6, providing that the property, real and personal, of a married

woman, whether acquired before or after marriage, shall remain her separate estate; section 3, relating to the homestead exemption; Code, § 1826, providing that no married woman during coverture shall make any contract to affect her real or personal estate without the written consent of her husband; section 1781, subjecting all buildings to liens for work and materials furnished in their construction; and Acts 1901 p. 859, c. 617, expressly extending the lien law to the property of married women—a lien may be enforced on the separate property of a married woman for work and material furnished under a contract for its improvement executed with her husband's consent, and where she was examined apart from her husband.

Appeal from Superior Court, Buncombe County; Justice, Judge.

Action by Ball & Sheppard against Paul Paquin and wife to enforce a mechanic's lien on the separate property of the wife under a contract for its improvement. From a judgment for the plaintiffs, defendants appeal. Affirmed.

The plaintiffs allege that the feme defendant, Hannah B. Paquin, was on or before October 15, 1900, the owner of a lot in the city of Asheville on Haywood street, known as the "Coffin Lot"; that she and the male defendant had begun the erection of a house on the lot to be used as a residence, to be fitted up with lavatories and equipped with a steam-heating apparatus and a number of tubs for both hot and cold baths; that said residence is known as "The Halthenon"; that on the 15th October, 1900, the defendants entered into a contract with the plaintiffs, whereby the plaintiffs were to complete certain plumbing in the building. The terms upon which the work was to be done are set forth, and the defendants "agree that upon completion of the work in a good workmanlike condition, they will pay to the said parties of the second part the contract price for the same, as hereinbefore set forth." The plaintiffs were permitted to amend in this court by alleging that said contract was in writing and was executed according to law, and that a charge and lien were created thereby on the land upon which the building was being erected. They allege that the work was performed and the materials furnished by them in accordance with the contract; that defendants made payments on the contract price, leaving due thereon at the time this action was instituted the sum of \$1,337.04; that prior to the commencement of this action, the plaintiffs filed a lien on the lot and building, in the office of the clerk of the superior court, in accordance with the Constitution and laws of the state, a copy of the lien is attached to the complaint. They demanded judgment for the balance due and the enforcement of the lien.

Defendants answered, saying that they had no knowledge or information sufficient to form a belief as to the allegation in regard to the partnership of plaintiffs; that the male defendant had no interest in the real estate other than as husband of the feme de-

fendant. They deny the other material allegations of the complaint, and for a further defense say that the defendant Paul B. Paquin entered into the contract with the plaintiffs by which they were to do "the plumbing on the building which was being erected on the property of the defendant Hannah B. Paquin, on Haywood street." They allege that the work was not done according to the contract, and that by reason of the failure to do so the defendants have sustained damage, etc., demanding judgment against the plaintiffs for \$443, amount overpaid, and \$1,000 damages sustained by the defendants. The plaintiffs filed a reply to the counterclaim. The pleadings are verified. The defendants upon the opening of the cause demurred *ore tenus* to the complaint for that it did not set forth facts sufficient to constitute a cause of action. His honor reserved the question raised by the demurrer, and submitted a series of issues to the jury presenting the controverted questions of fact. The defendants tendered the general issues which his honor declined to submit, and they excepted. The jury found upon the issues that the plaintiffs furnished, after October 15, 1904, material and labor on the building, the cost price and value of which was \$1,222.39; and that the defendants were entitled to recover \$50 on their counterclaim. From a judgment on the verdict, the defendants appealed.

Merrick & Barnard, for appellants. Tucker & Murphy, for appellees.

CONNOR, J. (after stating the facts). The demurrer is general, in that it does not specify wherein the complaint fails to state facts sufficient to constitute a cause of action. This, under the Code practice, is not allowable. His honor could have overruled it for that cause. *Elam v. Barnes*, 110 N. C. 73, 14 S. E. 621. We assume, however, that the real ground of the demurrer was that the feme defendant was a married woman. *Baker v. Garris*, 108 N. C. 218, 13 S. E. 2. The difficulty encountered by the defendant is that it does not appear, on the face of the complaint, that she was a married woman at the date of the contract or the commencement of the action. The pleaders appear to have carefully avoided this allegation. His honor properly overruled the demurrer.

The feme defendant does not plead her coverture, nor does it appear by the answer that she is covert, except that the male defendant informs the court that nothing can be made out of him because he has no interest in the dwelling house and lot, save as the husband of the feme defendant. He says, however, that he alone contracted for the work on the house which the written contract declares was being erected, "by the said Hannah B. Paquin." How all of this is we do not know, except as the jury have found. The plaintiffs put the contract of October 15th in evidence by which it appears

that they had theretofore furnished some material, and done some work for the defendants on the dwelling on the lot of the feme defendant "in the city of Asheville on Haywood street, known as the 'Coffin Lot,'" being erected by the said Hannah B. Paquin. The terms upon which the balance of the work is to be done and material furnished are set forth, and the defendants promise to pay promptly the amount due on the contract. It is signed by the defendants, acknowledged by them, and the private examination of the feme defendant taken and certified by a notary public in the manner and form prescribed for executing deeds of conveyance of real estate. The jury have found that there is due the plaintiff for material furnished and work done on the dwelling, since the execution of the contract, the sum of \$1,337. In this court the plaintiffs were permitted to amend the complaint to correspond with the proof.

The defendants contend that they may have, use, and enjoy the labor and material furnished, by which the dwelling is supplied with lavatories, hot and cold baths, and pay nothing for it; that the right to do all of this is secured to them by the Constitution and laws of this state, because the property is the separate estate of the feme defendant. If this contention is correct, it would seem that our Constitution and laws are sadly in need of radical amendment. The appeal renders it necessary to examine the statutory law and decisions of this court relied upon to sustain the defendant's exception to the judgment. It would serve no good purpose to review the numerous cases which have been before this court, in which creditors have endeavored to collect debts from married women. The construction of the Constitution and laws has received the most anxious and careful consideration of the judges who have sat upon this bench. We find that the same effort has been made in England, and in many of the states of the Union, to break away from the common-law conception of the status of married women, in regard to their property rights and contractual capacity. An interesting history of the course of parliamentary and judicial thought and action on the subject is given by Professor Dicey in "Law and Opinion in England," 369; *Pomeroy's Eq.* (3d Ed.) § 1098 et seq. Mr. Bishop (volume 1, § 847) says: "That since the confusion of tongues in the Tower of Babel, there has been nothing more noteworthy in the same line than the discordant and ever shifting utterances of the judicial mind on the subject." *Flaum v. Wallace*, 103 N. C. 306, 9 S. E. 567. It is but natural, and not to be regretted, that under our system of jurisprudence, in which, by the operation of the three agencies, legal fiction, equity, and legislation, the law is brought into harmony with society (Maine, *Anc. Law*), the movement is slow, and at times unsatisfactory. In no court in this

country was the common-law conception of the marital relation with all of its incidents more clearly and tenaciously retained than ours. Prior to 1848 we find no statute interfering with or limiting the common-law right and power of the husband over his wife's property. In respect to dower, the law was so changed that the husband could sell his land without her consent and deprive her of "her third." This was changed by the act of 1866-67, and dower as at common law restored. It is therefore not unnatural that when, by the Constitution of 1868, an entirely new theory was adopted by which it is declared that "the real and personal property of any female in this state acquired before marriage, and all property, real and personal, to which she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such female," etc. (Const. art. 10, § 6), the court should have moved with caution in giving it operation.

It would seem that this language carries with it, as an essential attribute of ownership of the wife, the power to deal with and make contracts in regard to such property, except as expressly restricted by the same instrument, as a feme sole. This was clearly intimated in *Withers v. Sparrow*, 66 N. C. 129. That expression was doubtless taken as an indication that this court would so hold when the question was fairly presented. At the session of 1868-69 we find no legislation upon the subject of married women. The effect of the holding, as foreshadowed in *Withers v. Sparrow*, supra, would have been to adopt the English and New York doctrine, by which a married woman could contract with respect to her separate estate as a feme sole. At the session of 1871-72 (Acts 1871-72, p. 328, c. 193) an act was passed "concerning marriages, marriage settlements, and the contracts of married women." The act is comprehensive in its scope, and evidently drawn with care. The subject-matter, as published in the Public Laws of 1871-72, is classified under "headings"; the third being, "What Contracts a Married Woman may Make with Strangers." Section 17, p. 334 (being section 1826 of the Code). "No woman during her coverture shall be capable of making any contract to affect the real or personal estate, except for her necessary personal expenses or the support of her family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed." It would seem that the Legislature enacted this statute with full recognition of the radical change made by the Constitution, and the clear suggestion by the court that the power to contract, as a feme sole, was conferred as a necessary incident to the power to own property "as if unmarried." It was not supposed that the words "devise" and "with the written assent of the husband convey," used in the Con-

stitution, referred to her power to enter into executory contracts. For the purpose of throwing around her the protection of her husband's counsel and advice, the Legislature declared that, with certain exceptions, she should not contract "without the written assent of her husband." In the absence of controlling decisions to the contrary, we should unanimously hold that she could make all manner of contracts with the written assent of her husband, and that for breach of them her property was liable as if she were a feme sole. The cases which came to this court during the years 1868 to 1876 clearly indicate that such was the construction of the statute by the profession and laymen. The first case is *Harris v. Jenkins* (1875) 72 N. C. 183. The feme plaintiff signed a sheriff's bond as security without the written assent of the husband. The case came clearly within the words of the act of 1871-72, and the court did not hesitate to hold that she was not bound. *Pippen v. Wesson* (1876) 74 N. C. 437, presented the question for the first time, whether, under the Constitution and the act of 1871-72, a married woman could, with the written assent of her husband, enter into an executory contract for breach of which she could be sued to judgment, and her property subjected to sale under final process. It will be noted that the statute uses the word "contract." There is no suggestion therein of any other form of obligation or remedy for breach thereof. This court held that no power to enter into an executory contract was conferred by the Constitution or statute on a married woman; that the only change made in her contractual capacity was that her separate estate, formerly called her equitable separate estate and property secured by the intervention of a trustee, was by the Constitution made her statutory separate estate, her husband occupying the position of trustee; that the only way in which such separate estate or property could be subjected to her engagements, even with the written assent of her husband, was by a specific charge or by showing a beneficial consideration; and that thereby her separate estate was charged with her obligations, not upon the theory that she had contracted a debt, but that her engagement, thus made, constituted a charge which the courts of equity had theretofore enforced.

It is not our purpose to do more than say that this decision was based upon the view that neither the Constitution nor the statute enlarged her common-law contractual capacity, and that the statute was disabling, rather than enabling in its provisions, except as to the class specified. Whatever, in the light of thought and experience of 30 years, may be said of this decision, it became the accepted law of this state, and its fundamental principle with modification, has been followed. A number of important and disturbing results have flown from it. A constant struggle has been going on to find some adjustment of the law to the inevitable result of the radical

change made by the Constitution. Married women to-day are the owners of property, both real and personal, worth millions of dollars. They employ tenants and croppers and cultivate thousands of farms, engage in merchandise, conduct hotels, boarding houses and almost every kind of business suited and sometimes unsuited to their mental and physical capacity. The largest possible powers have been conferred upon them in respect to the control of their property, as in *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324, and many other cases. It has been found by an experience of 30 years that the most unexpected and often startling results have come from this condition. As a matter of everyday experience, we know that a very large portion of the industrial and commercial life of the state is under the control and subject to their judgment and opinion. It is possible that nine-tenths of the contracts entered into by them are not enforceable in the courts. In *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644, upon a review of and in accordance with all former decisions, this court held that a note executed by husband and wife, charging her separate estate, is sufficient to bind her separate personal property; that, in the absence of a privy examination, it did not bind her separate real estate. In that case it appeared that the consideration enured to the benefit of her estate. In *Flaum v. Wallace*, supra, such a note was held binding on her separate personal estate, although not for her benefit. This court took one step forward in the enfranchisement of married women by holding, in a well-considered opinion, in *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461, that the restriction upon her right to convey her land, requiring the written assent of her husband, did not apply to her separate personal estate; hence, it is now the law of this state that she can sell and transfer her personal property as a feme sole. It is unnecessary to make further reference to the numerous decisions of the court in which her power to deal with her separate personal estate is discussed. *Flaum v. Wallace* and *Vann v. Edwards*, supra, settle her rights in this respect.

It is said, however, that a different principle obtains when it is sought to subject her separate real estate to her contractual obligations. While expressions had been used by some of the judges indicating an opinion that she could do so only by a contract executed with the formalities prescribed for the conveyance of her land, no decision was made to that effect until 1890, when the question underwent a careful and thorough consideration in *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998. There, Mr. Justice Shepherd, referring to *Flaum v. Wallace*, said: "We were greatly influenced in so holding because of the power of the wife to absolutely dispose of her statutory separate personal estate by the simple assent of her husband, and we deemed it but reasonable that if she could

so absolutely dispose of such property, she might exercise the lesser power of charging it, either expressly or by necessary implication. But when we come to the statutory separate real estate, the foregoing reason fails, because under our statute law the wife and husband cannot dispose of such property unless the former has been privately examined, separate and apart from her husband." The learned justice concludes that the power to charge her separate estate is measured by her power to dispose of the same; hence if she had expressly charged the debt in that case with the written assent of her husband, "it would have been of no avail without privy examination." In further discussing the law he says that the lands of a married woman cannot be charged by any undertaking on her part "unless it be evidenced by deed with privy examination." This, for the reason that she will not be permitted to do indirectly what she cannot do directly. *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694. Similar expressions are used in *Thurber v. LaRoque*, 105 N. C. 301, 11 S. E. 460; *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706; *Loan Ass'n v. Black*, 119 N. C. 327, 25 S. E. 975; *Bank v. Fries*, 121 N. C. 241, 28 S. E. 350. In *Weathers v. Borders*, 121 N. C. 387, 28 S. E. 524, the contract was not in writing, and of course there was no privy examination. The expression that she could only charge her real estate by "a regular conveyance executed as required by the statute, etc.," was not necessary to the decision of the case, and, as we have seen, is not required by any decision of this court. When the question came directly before the court, it was said that the cases did not hold it to be necessary that a mortgage should be executed. *Bank v. Ireland*, 122 N. C. 571, 29 S. E. 835. It will be found in all these cases that the question whether it was necessary that the form of the contract should be a conveyance was not presented. It is evident that the judges were referring to the formalities with which such contracts should be executed. In *Bank v. Howell*, 118 N. C. 271, 23 S. E. 1005, it is said that she cannot charge her separate real estate "except upon privy examination." In *Bank v. Ireland*, 122 N. C. 571, 29 S. E. 835, the present Chief Justice, writing in that respect for a unanimous court, referring to *Farthing v. Shields*, supra, and other cases, said: "Those decisions do not require that the charge shall be made by mortgage." In so far as it was intimated that no privy examination was necessary, the then Chief Justice and other justices did not concur.

The conclusion is irresistible that where the contract has all of the elements required by the statute and is reduced to writing, assented to by the husband, and the wife is privately examined separate and apart from her husband, it is binding upon her separate real estate. In this record we have such a

contract, executed with all the formalities required for conveying the property, describing it with sufficient certainty to convey, the consideration clearly set forth, admittedly for the improvement of her separate real estate. Why is such estate not bound for the breach of her express contract, by necessary implication? It is true that she does not expressly charge it upon either real or personal estate, but she refers to her separate real estate, describing it as her property, and stating that she is erecting a dwelling thereon, and that the work and material contracted for are for such dwelling. Language not so strong was held in *Bates v. Sulton*, 117 N. C. 94, 23 S. E. 261, sufficient to charge her personal estate. *Brinkley v. Ballance*, 126 N. C. 393, 35 S. E. 631. The decisions, while not in all respects harmonious, indicate a movement of the court towards bringing the law in this respect into harmony with our social, industrial, and commercial conditions. The Legislature has to some extent responded to this demand. In so far as it is within our province to do so, we desire to express our opinion that it is desirable that the Legislature simplify the subject by giving to married women full power to enter into executory contracts, binding their property, real, and personal, "as if unmarried", removing all doubt and uncertainty either as to the form of the contract, its execution, or remedy for breach. How far they should be restricted or protected by requiring the assent of the husband is worthy of the most careful consideration. It is manifest that the court, in its desire to so construe the statutes as to prevent injustice and wrong, has been hampered by the early decisions made when we were passing from the old into the new conception of the status of married women, in respect to their rights of property and power to contract. The wisdom of the experiment was seriously doubted by many of our wisest men, both lawyers and laymen. It was probably well, when confronted with two cases in which married women had signed bonds as security, that the court should move cautiously. We do not feel at liberty, nor is it necessary in this case, to overrule any of the decisions made in this court upon the subject. This, with the exception of *Bank v. Ireland*, supra, is the first case in which an executory contract was executed by the wife with privy examination. She was held liable there, because there was an express charge. In this case, in which the contract is executed with privy examination, we hold that she is liable upon an implied charge upon the separate real estate. We have not overlooked *Dougherty v. Sprinkle*, 88 N. C. 300, nor *Thompson v. Taylor*, 110 N. C. 70, 14 S. E. 513. In neither of these cases was there any express contract by the married woman.

We are of the opinion and so hold that upon the pleadings and contract, his honor

correctly held that the separate real estate of the feme defendant was bound for the amount found to be due by the jury. The plaintiffs are entitled to enforce their lien on her property. This court, in *Thompson v. Taylor*, supra, said that the lien, given by the Constitution and statute for work and labor done and material furnished, was predicated upon a valid contract, and, as a married woman had no capacity to make such a contract, her property could not be subjected to such lien. This was not the point in the case. The feme covert had not made any contract, either express or implied. In *Smaw v. Cohen*, 95 N. C. 85, it was held that an action against a married woman to enforce a lien for an amount less than \$200 was within the jurisdiction of a justice of the peace. The court, as we construe the opinion, did not pass upon the validity of the contract. Mr. Justice Shepherd, in *Farthing v. Shields*, supra, intimated that the lien could be enforced upon a simple contract by the married woman because of the lien law. However this may be, we are of the opinion that by construing section 6 in connection with section 3 of article 10 of the Constitution, and section 1826 in connection with section 1781 of the Code, the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman. It is true that the lien is given for the amount due upon debts contracted. In this connection it is permissible to give the term "contracted" the larger meaning, "agreed to be paid," thereby giving a highly remedial statute an operation commensurate with its purpose. The provisions for the mechanic's and laborer's lien, and for securing to the married woman her property, are found in the same article of the Constitution. In this case, the principle "noscitur a sociis" is invoked to ascertain the intention of the law maker. *Sutherland Const. St. § 414 et seq.* It has been held by many courts that when a married woman was empowered to contract for the benefit of her separate estate, the lien for debts contracted for that purpose attaches. *Boisot, Mech. Liens, § 271; Phillips on Mechanics' Liens, § 96; Carthage M. & W. Co. v. Baumann*, 44 Mo. App. 336. In *Stephenson v. Ballard*, 82 Ind. 87, it was held that a statute forbidding a married woman to incumber her separate estate, except by deed with her husband, must be so construed in connection with another statute giving a mechanic's lien as to give effect to the latter. *Greenough v. Wigginton*, 2 G. Greene (Iowa) 435; *Appeal Germania Savings Bank*, 95 Pa. 329; *Kuhns v. Turney*, 87 Pa. 497. However this may be, the act of 1901, p. 859, c. 617, expressly extends the lien law to the property of married women. It has been sustained in *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890. We think, that in the light of the authorities and upon the reason of the thing, the judgment can be sustained upon either view: that under the act of 1871-72 (Code, § 1826) the

feme defendant is liable, and that upon a proper construction of the lien law she is equally so.

We have examined the exceptions in the record to rulings of his honor during the trial, and do not find any error. We have taken this case under advisement from the last term, and given to it our most serious consideration. We hope that the subject of the powers and rights of married women in respect to their property and contracts may attract the attention of the General Assembly, and be brought into harmony with the best modern thought and conditions.

The judgment must be affirmed.

BROWN, J., concurs in result.

CLARK, C. J. (concurring). Code, § 1826, expressly provides that a married woman can contract and thereby "affect" both her personal and real property, requiring only in some cases her husband's "written consent," and dispensing with it in others. There is no need in this case to discuss the doctrine of "implied contracts" for here the wife made an express contract, and in writing, with the plaintiff to place these improvements upon her property. There was no necessity for her privy examination, for this was not a conveyance of her property, but only a contract. Her privy examination, however, was in fact taken. The husband's written consent under Code, § 1826, is amply evidenced by his joining in the written contract. *Jones v. Craigmiles*, 114 N. C. 613, 19 S. E. 638. The status of married women in North Carolina is very clearly stated in the Constitution and laws, as written by the convention and General Assembly, and may be thus succinctly summed up:

Property Rights. The property, real and personal, of a married woman, whether acquired before or after marriage, "shall be and remain the sole and separate estate and property of such female." Const. art. 10, § 6.

Right to Devise and Bequeath. By the Constitution this right cannot be restricted.

Conveyances. The only restriction placed by the Constitution upon conveyances by the wife is that there must be "the written assent" of the husband. Const. art. 10, § 6. Her privy examination is required by the Constitution only as to a conveyance of homestead by the husband (Const. art. 10, § 8), not as to conveyances by her. The statute (Code, § 1256) requires her privy examination as to any conveyance of realty.

Transfer of Personality. There is neither written assent of the husband nor privy examination required as to the disposal by sale, gift, or otherwise by a married woman of her personal property. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461.

Contracts. There is in the Constitution no restriction upon the power of a married woman to contract, and as her property rights remain as if she were single, with power to

devise and bequeath it, and to dispose of it by sale, gift, or otherwise, save that the "written assent" of the husband is required as to conveyances of realty, it would seem it was intended that she should be free to contract. But Code, § 1826, provides that she can make any contract whatever "with the written consent" of her husband, though this requirement of written consent is entirely dispensed with as to contracts for her necessary personal expenses, or for support of the family, or to pay her antenuptial debts, or when she is a free trader (Code, § 1830), or lives separated from her husband, or is abandoned by him. Code, §§ 1831, 1832. To avoid palpable fraud the written consent of the husband has further been dispensed with by chapter 617, p. 859, Laws 1901, in cases (like the present) where buildings are placed or repaired on the wife's land by her consent or procurement. *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890.

Such is the law as the lawmaking power has made it. It is plain and simple, and reasonably abreast with the spirit of the age, though in England, New York, and in most other states, the statute law does not add (as we have done) to the plain provisions of our Constitution, a requirement of privy examination as to conveyances of realty and of written consent of the husband as to some contracts. 1 A. & E. Encyc. (2d Ed.) 522. In none of the states adjacent to us—Virginia, South Carolina, Georgia, and Tennessee—is the privy examination of the wife now required. It is a useless and troublesome formality handed down from the past, and of most doubtful constitutionality under a Constitution which requires only the written assent of the husband to the wife's conveyances as the sole modification upon her property rights as a feme sole and expressly provides that with such assent, her property may be "conveyed by her as if she were unmarried." Const. art. 10, § 6. By our Constitution and laws, the status of married women is thus very plain. There is required by the Constitution only the written assent of the husband to conveyances and the statute requires only privy examination of the wife to convey realty, and written consent of the husband as to the wife's contracts, except those cases specified as to which the written consent is dispensed with. That is all.

Turning to the four pages of fine type in *Vann v. Edwards*, 128 N. C. at pages 431-434, 39 S. E. at pages 68, 69, are the tables wherein Prof. Mordecai has endeavored in vain to draw some order out of the confusion caused by the doctrine of "charging in equity." As was said by this court, in *Brinkley v. Balance*, 126 N. C. 396, 35 S. E. 631: "An examination of the Constitution (article 10, § 6) and of the statute (Code, § 1826) shows no foundation for the 'charging' the wife's property. The Constitution requires only the written assent of the husband to 'conveyances' and section 1826 requires only 'the written con-

sent' of the husband to contracts affecting the wife's real or personal estate in certain cases, dispensing with it in others." There is no statute which authorizes or recognizes a feme covert "charging her property in equity." The statute (Code, § 1826) requires no more as to the contract of a married woman, in any case whatever, than the "written consent" of the husband, and dispenses with even that in many cases. The courts should not require what the law does not. As Judge Daniel well said: "The court cannot be wiser than the law." The sooner they are in harmony the better.

Overruling the doctrine of "charging in equity" cannot possibly affect any rule of property, for to do so will not affect any title. It will not invalidate, but recognizes as valid, contracts, when made as the law requires, "with the written consent of the husband." In this connection my attention has been called to my dissenting opinion in *Zachary v. Perry*, 130 N. C. 202, 41 S. E. 533. It is needless for me to say that no sort of discourtesy was intended towards the distinguished justice who wrote the opinion in *Flaum v. Wallace*. The phrase, "charge in equity," there used, was not a quotation from that opinion.

(140 N. C. 121)

HAYES v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of North Carolina. Nov. 28, 1905.)

APPEAL—UNNECESSARY NONSUIT—DECISIONS REVIEWABLE—REMAND.

In an action in which plaintiff alleged his injury was caused by defendant's negligence, and specified various acts or omissions as constituting the negligence, each act not being pleaded as the basis of a distinct cause of action, but as singly, or in connection with the others, tending to establish the one cause of action for the negligence resulting in the injury, the court at the close of the testimony intimated it would charge that there was not sufficient evidence as to the negligence of defendant in failing to use a switch engine, but that it would submit only the evidence as to defendant's negligence in respect to the flange on the engine used and the questions of contributory negligence and proximate cause, whereupon plaintiff took a nonsuit, and appealed. *Held*, that the nonsuit was unnecessary at that time, and the appeal therefor could not be dismissed, but the cause will be remanded, with direction to set aside the nonsuit and proceed with the case.

Appeal from Superior Court, Mecklenburg County; O. H. Allen, Judge.

Action by Samuel Hayes against the Atlanta & Charlotte Air Line Railway Company. Plaintiff took a nonsuit, and appealed. Remanded.

Plaintiff brought this action to recover damages for personal injuries alleged to have been caused by the negligence of defendant. He was a switchman in defendant's employ, and belonged to the crew in charge of the "switch local" between Gastonia and Gaffney, which places were about 30 miles apart.

Plaintiff complains that defendant used a road or line engine, when it should have had a switch engine for that kind of work, and that the road engine was in itself unfit for such service, and, lastly, that it was out of order, in that it had a defective flange on the lower rim of the pilot, which was used by switchmen as a step to get on and off the engine when in motion and while they were engaged in switching; that plaintiff while in the performance of his duties stepped upon this flange, as it was his custom to do, and it gave way, causing him to be knocked down by the pilot and dragged some distance, when the wheel of the engine ran over his leg and crushed it. Plaintiff further alleged that he rode on the pilot with the knowledge and consent of defendant's employes, under whose orders, as his superiors, he worked. Defendant denies these allegations and avers that plaintiff was not entitled to have a switch engine for such work as he was doing, and that it was not required in such service and could not safely be used, as the train moved from place to place along a considerable stretch of the main track of its railway, and the switching was therefore not done in a regular switchyard where such engines are commonly used; that a road engine was proper and sufficient for the purpose; and that the engine in question was in good condition and supplied with a step and a staff behind the pilot, as good as a footboard and handhold, where plaintiff could get on and off the engine, and where he could stand and hold on with perfect safety. Defendant specially denies that the flange was not in good condition and avers that it was safe and sound, and that plaintiff's injuries were caused by his own negligence. Plaintiff denied that there was any step behind the pilot. Testimony was introduced by each of the parties to sustain their respective contentions. At the close of the testimony, the court intimated that it would charge the jury that there was not sufficient evidence as to the negligence of defendant in failing to use a switch engine, and that it would submit only the evidence as to defendant's negligence in respect to the condition of the flange, the contributory negligence of plaintiff, and the proximate cause of the injury as between these two alleged acts of negligence. In deference to this intimation, plaintiff submitted to a nonsuit and appealed.

Pharr & Bell and A. G. Mangum, for appellant. W. B. Rodman, for appellee.

WALKER, J. (after stating the case). We will not discuss the question raised in the argument before us, whether it was the duty of defendant to have had a switch engine instead of a road engine for the use of the crew on its train, as it is not necessary to a decision of the case. Plaintiff alleges that his injuries were caused by the negligence of defendant and specified different acts or omissions as constituting the negligence. Each

act or omission, so alleged, was not pleaded nor intended to be treated as the basis of a separate and distinct cause of action, but as singly, or in connection with the others, tending to establish the one cause of action for the negligence which resulted in his injury. When the court intimated that it would withdraw a portion of plaintiff's evidence from the jury, it acted prematurely, for the case was not being submitted to the jury at the time, and the ruling did not extend to the entire cause of action, as would be the case with a judgment sustaining a motion to nonsuit or to dismiss. The ruling at that time was calculated to embarrass and to handicap plaintiff in the development of his case and necessarily to prejudice him. But we will not further discuss this matter, nor will we even refer to the legal merits of the case, so far as presented by the pleadings and evidence, when it was abruptly brought to a close by the intimation of the court. Nor is it necessary to decide, as will hereafter appear, whether plaintiff proceeded properly when he elected to be nonsuited and appealed. It is common practice for a plaintiff to submit to an involuntary nonsuit, which he is driven or compelled to take, reserving leave to move afterwards to set the same aside, with a view, not to abandon the prosecution of the suit, but to further prosecute it by appeal, in order to test the correctness of a ruling of the court which may otherwise be fatal to his case; and the practice is a useful one when restricted within its proper limits. *Mobley v. Watts*, 98 N. C. 284, 8 S. E. 677; *Hickory v. Railroad*, 188 N. C. 311, 50 S. E. 683; *Hedrick v. Pratt*, 94 N. C. 101.

In order to avoid appeals based upon trivial interlocutory decisions the right thus to proceed has been said to apply ordinarily only to cases where the ruling of the court strikes at the root of the case and precludes a recovery by plaintiff. Plaintiff's right to take the course he did was challenged in this court, because the ruling did not cover the whole case, but left him ground upon which a recovery could be had. But we do not find it necessary to resort to said rule of practice in order to dispose of this appeal, and we do not therefore decide that it warranted or did not warrant the action of plaintiff. In *Davis v. Ely*, 100 N. C. 283, 5 S. E. 239, plaintiff sought by the allegations of his complaint to have a contract corrected in certain respects. After the jury were impaneled and the pleadings read, the court intimated that he was not entitled to the equity of correction but to that of rescission. He excepted, submitted to a nonsuit, and appealed. It was held that the nonsuit was unnecessary at that stage of the trial, and the appeal therefore could not be entertained. But notwithstanding this decision, the court, referring to the ground upon which it had based the ruling and in disposing of the case, said: "For these reasons we should dismiss the appeal and allow the cause to proceed in the court below, but that such

would not be the result in this case because of the nonsuit which ends the action, and this action was in deference to the intimated ruling. We therefore remand the cause that the nonsuit may be set aside and the action proceed." Pursuing the course taken in that case, we remand the cause, with direction to set aside the nonsuit and thereafter to proceed in the same according to the law and the course and practice of the court.

New trial.

(140 N. C. 203)

STANALAND et al. v. RABON et al.

(Supreme Court of North Carolina. Dec. 12, 1905.)

BOUNDARIES—ESTABLISHMENT—SPECIAL PROCEEDINGS—DENIAL OF TITLE.

Acts 1893, p. 44, c. 22, provides that the owner of land may have any disputed boundary line established by filing a petition, etc., and requires the cause to be heard by the clerk of the superior court, declaring that occupancy of the land by the petitioner shall be sufficient evidence of ownership. *Held*, that a mere denial by defendant of plaintiff's ownership or occupation did not entitle defendant to have the proceeding dismissed, because an issue of title was raised which could not be tried in such proceeding.

Appeal from Superior Court, Brunswick County; Ferguson, Judge.

Action by Thaddeus W. Stanaland and others against J. W. Rabon and others to establish a boundary line. From a judgment dismissing the proceeding, plaintiffs appeal. Reversed.

Special proceeding commenced before the clerk, to determine boundaries under the processioning act. Pub. Laws 1893, p. 44, c. 22. The defendants, J. W. Rabon and wife and F. M. Rabon, denied that the plaintiffs are the owners of the land described in the complaint, and also denied that there is any dispute between the plaintiffs and the said defendants as to any boundary lines. Other allegations are also denied. The clerk, on the return day of the summons, after hearing the matter, entered judgment against all the defendants except J. W. Rabon and wife and F. M. Rabon, directing the lines to be run, and appointing W. W. Drew, surveyor, for that purpose. The latter ran the lines after due notice, and filed his report. On the 14th day of December, 1903, the clerk heard the case and by his judgment established the lines as against all the defendants except the defendants, J. W. Rabon and wife and F. M. Rabon. The judgment as to them was without prejudice. The clerk did not pass upon the contention as to title raised in their answer, but upon their motion transferred the issue so raised to the civil issue docket. At the fall term, 1904, the court remanded the cause to the clerk to hear and determine the same and render judgment in full therein as to all the parties. No exception was taken to this order. On October 31, 1904, after notice the clerk entered his judgment as to all the parties, establishing the bounda-

ries. To this judgment the defendants, J. W. Rabon and wife and F. M. Rabon, excepted and appealed. The cause came on to be heard at the April term, 1905. The said defendants, by their counsel, moved to dismiss the action as to them, because there was a distinct issue of title raised in the pleadings, which could not be determined in this proceeding, but only by an action of ejectment. The counsel for petitioners stated that he was ready for trial, and, if allowed by the court to go to trial, the petitioners would be ready to prove their title and possession. The court granted the motion of the said defendants, and dismissed the action, for the reason, as stated in the judgment, that a distinct issue of title is raised, which cannot be settled in this cause, but only in an action of ejectment. Petitioners excepted and appealed.

Iredell Meares and Davis & Cramner, for appellants. John D. Bellamy, for appellees.

WALKER, J. (after stating the case). It seems to us that the question presented in this appeal is fully covered by the recent decision in *Smith v. Johnson*, 137 N. C. 43, 49 S. E. 62, and that case conclusively determines the matter herein involved against the contention of the defendant. The act of 1893 (Acts 1893, p. 44, c. 22) was evidently intended to simplify the procedure in processioning cases, and to afford a speedy and effective method of determining the true location of disputed lines and boundaries of lands as between their proprietors, instead of requiring them to resort to the cumbersome, and sometimes intricate and costly, remedy by suit to try the title, formerly an action of ejectment. Whether the Legislature has succeeded, as yet, in accomplishing this commendable purpose, is a question which naturally addresses itself to the consideration of that honorable body. But, however that may be, it cannot be doubted that if, upon a mere denial of ownership or occupation, a defendant is entitled to have the proceeding dismissed, the whole object in passing the act may be utterly defeated. If the plaintiff alleges in his petition such facts as bring his case within the provisions of the act, and these essential or material allegations are denied, the issues thus raised should be transferred to the superior court for trial, just as is done in other cases of special proceedings. The act in terms requires this to be done. The issues thus raised are to be tried and the cause further proceeded in according to the manner pointed out in *Smith v. Johnson*, supra. That case had not been reported, perhaps, at the time of the trial of this cause in the court below, and we presume was not brought to the attention of the court. It is closely analogous to our case, and, indeed, is substantially the same kind of case in its facts and in the principles involved. It must therefore govern our decision in the matter presented in this

record. His honor erred in dismissing the case.

The judgment will be set aside, and further proceedings will be had in accordance with the law and the course and practice of the court as herein indicated.

Error.

(72 S. C. 576)

MARION v. CITY COUNCIL OF CHARLESTON.

(Supreme Court of South Carolina. Nov. 7, 1905.)

1. ABATEMENT AND REVIVAL—DEATH OF PARTY—CONTINUANCE OF ACTION—PRACTICE.

Where it is desired to continue an action by or against a personal representative of a decedent, the proper practice is to make an ex parte application, supported by affidavit, for a rule to show cause why the action should not be continued; but any procedure having substantially the same effect is sufficient.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, §§ 445-450.]

2. EQUITABLE — PRACTICE — MOTIONS FOR JURY TRIAL.

In an action to cancel a deed on the ground of fraud and to recover damages on account of such fraud, a motion to fix a day for the submission of an issue to the jury was properly denied, where the moving party failed to comply with circuit court rule 28, prescribing the procedure on the submission to the jury of an issue of fact arising in an equity case.

3. ABATEMENT AND REVIVAL—SUBSTITUTION ON APPEAL.

Where a party died during the pendency of a case in the circuit court, and that court refuses to substitute the personal representative of such party, and an appeal is taken from the order refusing substitution, the Supreme Court will not on appeal grant an order of substitution.

4. APPEAL — JURISDICTION — EXERCISE — DEFAULT JUDGMENT.

The Supreme Court cannot, in the exercise of its appellate jurisdiction, order a judgment by default.

5. JUDGMENT—DEFAULT—WHEN ALLOWABLE.

An action to cancel a deed for fraud and for damages in consequence of the fraud is within Code Civ. Proc. § 267, requiring the relief to be afforded plaintiff in case of default in certain cases to be ascertained either by a verdict of a jury, or, in cases of chancery, by the judge, and consequently the court cannot give judgment by default.

Appeal from Common Pleas Circuit Court of Charleston County; Townsend, Judge.

Action by Sophia S. Marion against the city council of Charleston. From an order refusing to substitute a party, and to submit an issue to the jury, plaintiff appeals. Affirmed.

See 47 S. E. 140.

Julian Fishburne, for appellant. Geo. H. Moffett, for respondent.

JONES, J. This appeal is from an order of Judge Townsend, dated December 22, 1904, refusing to grant a motion to substitute the name of Sophia Helen Fishburne, as executrix under the will of Sophia F. S. Marion, as plaintiff in the above-stated case, and to

assign a date for submitting the question as to damages to a jury. So far as the case shows, the only paper served upon the defendant was the notice signed by "Julian Fishburne, Agent," to the effect that he would on the day specified make the motion for the purpose above named. So far as appears in the "case," there was nothing before the court to show that Sophia F. S. Marion was dead, that she left a will which had been probated, and that Sophia Helen Fishburne had qualified as executrix.

1. Under these circumstances, it was proper to refuse the motion. A proper practice in such case is to make an *ex parte* application, based upon a proper showing by affidavit for a rule to show cause why the action should not be continued by or against the party sought to be substituted, as suggested in *Dunham v. Carson*, 42 S. C. 391, 20 S. E. 197, and approved in *Pickett v. Fidelity Co.*, 60 S. C. 484, 38 S. E. 160, 629. However, under any procedure having substantially the same effect, filling the requirements of notice, proof of necessary facts, and opportunity to contest such alleged facts, would be sufficient, as in *DeLoach v. Sarratt*, 55 S. C. 275, 33 S. E. 2, 35 S. E. 441; *Shull v. Bradford*, 58 S. C. 580, 37 S. E. 30. The appellant not having made any proper showing before the circuit court, it was not error to deny his motion to substitute.

2. With reference to the second branch of the motion, which was to fix a day for the submission of an issue to a jury. The action was brought to cancel a deed on the ground of fraud, and recover damages in consequence of the alleged fraud by the city council of Charleston. Assuming that the action was being properly continued in the name of Sophia F. S. Marion, the motion was properly denied for noncompliance with rule 28 of the circuit court, providing the procedure when it was desired to submit to a jury an issue of fact arising in an equity case.

3. The appellant served notice of a motion requesting that this court grant (1) an order to substitute as plaintiff Sophia Helen Marion Fishburne, as executrix of Sophia F. S. Marion; (2) an order for judgment by default, and presented such motion on the call of the case. The movant now presents to this court a showing of the facts which he should have presented, but failed to present, to the circuit court, as it appears in the "case" prepared for argument. We will not, however, entertain this motion under the circumstances. While there are cases in which this court might find it proper or necessary to make such a substitution, as in the case of a death occurring pending appeal in this court, it would not be proper in this instance, when the necessity for substitution occurred while the case was pending in the circuit court. Furthermore, the appeal is from an order of the circuit court denying

such motion, and, if we should now grant such motion, the result would be to practically reverse the action of the circuit judge, when he committed no error as the case was presented to him.

4. This court, in its appellate jurisdiction, cannot order a judgment by default, as requested. Even the circuit court could not have ordered a judgment by default in this case upon facts presented in this motion, for it is shown that defendant appeared in due time, demurred in due time, and after the filing of the remittitur in the former appeal in this case, sustaining the action of the circuit court in overruling the demurrer, served answer in due time, in accordance with the rule stated in *Barnwell v. Marion*, 56 S. C. 54, 33 S. E. 719. In addition to this, the present case is such that, under section 287 of the Code of Civil Procedure, even in case of default of answer, "the relief to be afforded the plaintiff shall be ascertained either by the verdict of a jury or in cases of chancery by the judge, with or without a reference, as he may deem proper." The motion must therefore be overruled.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(73 S. C. 547)

Ex parte EVANS.

(Supreme Court of South Carolina. Oct. 31, 1905.)

APPEAL—FROM CITY COUNCIL—WHEN LIES.

No appeal lies to the circuit court from the refusal of a city council to issue a permit to build a house; the council acting in an administrative capacity.

Appeal from Common Pleas Circuit Court of Greenville County; Gage, Judge.

Petition to city council of Greenville by Mrs. Mary Evans for permit to build a house. Upon objection by Mrs. Maude Simmons, the permit was refused. Mrs. Evans appealed to circuit court, which reversed the action of the city council. From this order, Mrs. Simmons and the city council appealed. Reversed.

Mauldin & Townes, for appellant Simmons. M. F. Ansel and Cothran, Dean & Cothran, for respondent.

JONES, J. On June 14, 1904, petitioner applied to the board of fire commissioners of the city of Greenville, under the provisions of the ordinances of said city, for permission to erect a two-room frame dwelling on Academy street, in said city, and on same day a permit was granted, signed by the chairman of the board of fire commissioners and chief of the fire department; but on the 18th day of June, 1904, the chief of the fire department revoked said permit and forbade work on said build-

ing. On July 5, 1904, the petitioner applied to the city council of Greenville for the building permit. The appellant, Mrs. Maude Simmons, one of petitioner's neighbors, presented a petition opposing the permit on two grounds: (1) That the erection of the proposed building in such close proximity to her house and that of E. B. Owens will constitute a danger to their property in case of fire; (2) that the proposed cottage is to be occupied by negroes, and will operate as a nuisance. The matter was referred by the city council to the board of fire masters. This board referred the matter back to the city council, reporting that they did not feel justified in refusing the permit on the first ground, and had accordingly issued it. With reference to the second ground, this board reported that it was out of their jurisdiction to consider. The city council claiming to act under the ordinance approved April 20, 1887, after considering the petition and affidavits submitted, and hearing argument for and against the same, refused to approve the permit granted by the board of fire masters and refused permission for the building of the house. From this action of the city council, the petitioner appealed to the circuit court. A motion was made in the circuit court to dismiss the appeal on the ground that the circuit court had no jurisdiction to entertain the appeal, which was overruled. The circuit court then proceeded to hear the appeal, and made an order reversing the action of the city council, and allowing petitioner to proceed with the erection of the proposed building.

Mrs. Maude Simmons and the city council of Greenville served notice of intention to appeal. On the call of the case, the city council of Greenville, having announced that they abandoned the appeal, the appeal was by order of the court, dismissed so far as the city council of Greenville is concerned. Mrs. Maude Simmons presents a number of exceptions to the judgment of the circuit court, the first of which is that the circuit court had no jurisdiction to entertain the appeal of Mrs. Mary Evans, for the reason that the city council, in this particular matter, was not acting as a court of inferior jurisdiction, from which an appeal could be taken. If this view be correct, then no other question sought to be raised by the exceptions is properly before the court.

We are of the opinion that the circuit court was without jurisdiction to entertain the appeal sought to be taken from the action of the city council. Section 15, art. 5, of the Constitution, gives to the court of common pleas appellate jurisdiction "in all cases within the jurisdiction of inferior courts, except from such inferior courts from which the General Assembly shall provide an appeal directly to the Supreme Court." Is this a case within the jurisdiction of the city council as an inferior court? Judge Story, in his Commentaries on the Constitution (vol. 3, p. 626) says: "The essential

of appellate jurisdiction is that it reviews and corrects the proceedings in a case already instituted, and does not create that cause in reference to judicial tribunals; an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been instituted in and acted upon by some other court whose judgment or proceedings are to be reviewed. This appellate jurisdiction may be exercised in a variety of forms, and, indeed, in any form which the Legislature may choose to prescribe, but still the substance must exist before the form can be applied to it." In order, therefore, to give the circuit court appellate jurisdiction in the matter appealed from the city council, it must appear that the city council was, in the matter sought to be reviewed, acting in a judicial capacity as distinguished from doing a ministerial, administrative or discretionary act. "Appellate jurisdiction is the power vested in a superior tribunal to review and revise the judicial action of an inferior tribunal." 2 Ency. Pl. & Pr. 11.

The charter of the city of Greenville (19 St. at Large, pp. 109, 110), in section 13, gives the city council "power to prohibit the erection of any wooden building or buildings, or any wooden roof building or buildings, in any portion of said city that they may by ordinance define as the limit of the fire district, and to prescribe of what material buildings or structures within said limits shall be constructed," and in section 14, the city council is given power to abate all nuisances within the corporate limits, and in said section power is given to appoint a board of health and a board of fire masters for said city, and to pass such ordinances in regard thereto as may be necessary. By an ordinance ratified April 7, 1903, the city council created and established a board of fire masters, which defined the powers and duties of such board with respect to buildings in the city, and providing penalties for obstructing the action of said board or refusing to comply with their directions, and in section 6 provided "that no house, building, store or other structure shall be built, altered or erected in the city of Greenville without first obtaining a permit to do so, signed by the chief of the fire department and the president or secretary of the fire commission." By a previous ordinance, ratified April 20, 1887, it is provided:

"Section 1. That on and after the passage of this ordinance, it shall not be lawful for any party or parties to erect or move any wooden building of any kind whatever, within the distance of two hundred and fifty feet of Main street of said city at any point between Reedy river and North street.

"Sec. 2. That before any person or persons shall erect any storehouse, dwelling house, hotel, stable, fence, awning, cellar door, or structure of any kind on any street whatever, application in writing shall first be made to the city council, stating the use

and purpose for which said building or other structure is designed, and stating the place of location for the same, and a permit from the mayor and aldermen be obtained to erect said building or other structure, before the same shall be commenced: Provided, that before any permit to build shall be granted by the city council, the same shall be recommended by the board of fire masters, who shall have the power to require the person or persons who make application to build to submit their plans and specifications to them in writing."

Section 6 provides a penalty for failure to comply with this ordinance.

This would doubtless give the city council jurisdiction as a court to try offenses for a violation of said city ordinance, if sustained as valid, but no such authority is attempted to be exercised in the present matter, but it confers no authority upon the city council as a court to hear and determine a controversy arising between neighbors as to whether the owner shall have the right or a permit to build a certain kind of house upon her premises. In so far as the city council may assume to grant or refuse such a permit, their action is administrative rather than judicial. Their decision in such matters is not binding in the sense of a judgment of a court. The application for a permit is *ex parte*. If objection be offered, that does not raise a controversy between the petitioner and the objector which is submitted to the judicial authority of the city council. As the city council was not acting in the capacity of a court in the premises, there was no case before the city council for which a right of appeal is saved in article 5, § 15, of the Constitution. When the Constitution does not save the right of appeal from an inferior or special tribunal, there is no right of appeal unless expressly conferred by statute. *Whipper v. Talbird*, 32 S. C. 3, 10 S. E. 578. We find no express statutory authority for the present appeal from the city council. The petitioner must, therefore, seek other remedy.

The cases of *City Council v. Eichelberger*, 44 S. C. 351, 22 S. E. 345, and *City Council v. Brown*, 42 S. C. 184, 20 S. E. 56, have no application, as in those cases the city council acted as a court in the trial of offenders charged with violating the city ordinance. The circuit court being without jurisdiction to entertain the appeal in this matter, and as this court has no jurisdiction to go further than annul such decision, the other exceptions do not properly arise, and will not be considered.

The judgment of the circuit court is reversed for want of jurisdiction in that court to entertain the appeal from the action of the city council of Greenville, in refusing to approve the building permit granted by the board of fire commissioners.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(72 S. C. 556)

KEAN v. LANDRUM et al.

(Supreme Court of South Carolina. Nov. 2, 1905.)

1. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Code Civ. Proc. 1902, § 400, relative to evidence as to transactions with decedents, does not prohibit testimony as to conversations between plaintiff's agent and defendant's testator. [Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 577.]

2. PRINCIPAL AND AGENT—EVIDENCE OF AGENCY.

An agent to buy land may give parol testimony as to his agency.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Witnesses, § 39.]

3. SAME—CREATION OF AGENCY—CONSTRUCTION OF CONTRACT.

A power of attorney given by plaintiff, authorizing another "to make contracts to conduct farming and mill operations for me," creates an agency in that other to run the mill for plaintiff, and does not authorize that other to run it on his own account.

4. EVIDENCE—EXPERT TESTIMONY—VALUE.

On the issue of the value of timber cut from a tract of land, one who owns an adjoining tract, and who has testified that the timber on his land was about the same as that cut, and as to the price for which his timber was sold, and other facts concerning the same, may give his opinion as to the value of timber on his own land.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2218.]

5. SAME—DECLARATIONS OF DECEDENT.

Where it was alleged that a certain person was the party in interest in a settlement made by testator, declarations of testator that, if she made the settlement in question, it would inure to the benefit of such person, are competent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 876.]

6. MORTGAGES—TRANSACTIONS CONSTRUED AS MORTGAGES.

A. bought certain land from B. for C., taking a deed from B., and giving him in return a mortgage for the purchase money. He then put C. into possession and agreed to convey to him on payment of the purchase money. After payment he refused to convey. *Held*, A. could not be considered toward C. as a mortgagee.

7. VENDOR AND PURCHASER—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY—DEMAND.

Where a vendee demanded, and his vendor refused to convey, land according to contract, and the vendor subsequently died, it was not necessary for the vendee to demand a conveyance from the vendor's executor before suing the executor for money paid on the contract.

8. TRIAL—INSTRUCTIONS—CHARGE ON FACTS.

A charge stating the legal conclusions which would result from the establishment of certain facts is not subject to objection as a charge on the facts.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 471.]

9. VENDOR AND PURCHASER—BREACH BY VENDOR—DAMAGES TO VENDEE.

Where A. buys land for B. at the latter's instance, and agrees to convey the same to B. upon payment of the purchase money, and A. refuses to convey, the measure of B.'s damages is the actual value of the land at the time of tender and refusal of title, with interest from that date, less any depreciation subsequent

thereto due to B.'s action, and is not the money paid for the land, less the value taken from it by B.

10. SAME—RETURN OF PURCHASE MONEY—CONDITIONS OF RELIEF.

Where the purchaser in a contract for the sale of land is not in position to restore what he has received by the contract, and such position does not result from any fault on his own part, he need not return the consideration of the contract before demanding from the vendor the money paid thereon, but he may offer to allow credit for the value he cannot restore.

11. SAME—DAMAGES.

Where a purchaser in a contract for the sale of land pays more than the amount due, he may, on a breach of the contract by the vendor, recover the excess, with interest, in addition to damages for the breach.

Appeal from Common Pleas Circuit Court of Edgefield County; Purdy, Judge.

Action by May Belle Kean against Elizabeth R. Landrum and others, as executrices of Emily G. Budwell. From a judgment in favor of plaintiff, defendants' appeal. Reversed.

J. Wm. Thurmond, E. H. Folk, Croft & Tillman, Thompson & Wells, and J. W. De Vore, for appellants. Hendersons and Sheppard Bros., for respondent.

WOODS, J. The facts in this case were complicated, the evidence contradictory, and the questions submitted to the jury must have been difficult of solution. The foundation of the action was the allegation that Mrs. Emily G. Budwell, defendant's testator, bought for the plaintiff a tract of land from Mrs. Mims, and agreed with plaintiff, through her agent, John M. Bell, to convey the land to her on receiving from plaintiff the money expended in the purchase, with interest; that the purchase money, with interest, was paid, part to Mrs. Budwell and the remainder to Mrs. Mims, on Mrs. Budwell's debt for the land; that Mrs. Budwell nevertheless refused to make title to the plaintiff unless she would pay all debts due to her by plaintiff's agent, John M. Bell; that upon such refusal plaintiff elected to recover back the money paid, with interest, rather than seek specific performance of the contract to convey. The defense was that Mrs. Budwell made no contract with the plaintiff, but bought the land for John M. Bell altogether as an accommodation to him; that he had not paid the debts due by him to her on account of the purchase money of the land and on other matters; that John M. Bell took possession of the land, and by cutting the timber from it reduced its value to one-third of what it was at the time of the purchase; that even if the plaintiff, and not John M. Bell, is the real party in interest, she could not recover back the purchase money, because she would be unable to restore the land to the condition it was in before her alleged agent Bell had committed waste to the extent of \$4,000 by cutting off the timber. The plaintiff, replying, alleged she was ready and

willing that the purchase money claimed by her should be reduced by the value of any timber taken from the land by her agent. Defendant moved to have John M. Bell made a party to the cause, but the motion was refused, and from this decision there was no appeal. The plaintiff recovered judgment, and the defendants appeal, alleging error in admission of evidence, in refusing a motion for nonsuit, and in the charge to the jury.

1. The evidence of John M. Bell and Mrs. Clotworthy as to the conversations with Mrs. Budwell was not rendered incompetent by reason of the fact that they were agents of the plaintiff. An agent is no doubt usually partial to his principal, but he is not legally interested in the suit of his principal in the sense that his testimony as to transactions or communications with deceased persons is incompetent, under section 400 of the Code of Civil Procedure 1902. *Sanders v. Bagwell*, 37 S. C. 145, 16 S. E. 770.

2. It is competent to prove by parol an agent's authority to make a contract to buy land for his principal, and the testimony of Bell as to conversations with plaintiff tending to prove his authority to buy the land for her was competent.

3. The written power of attorney was also competent for the same purpose, because the conferring of authority thereby on Bell by the plaintiff "to make contracts to conduct farming and mill operations for me" tended to indicate that the sawmill was to be run by Bell, as plaintiff's agent, and not on his own account, as defendant alleged it was. As the point was not argued, we assume the exception complaining of the introduction of a deed from Bell to the plaintiff is abandoned. The deed covered entirely different property, and could have no effect whatever on the issues tried in this cause. Its admission or exclusion, therefore, could not be reversible error.

4. On the issue of the value of the timber cut from the land, the witness Holland was allowed to give his estimate of the value of timber on his own land; the land from which the plaintiff claims to have had the timber cut and the land of the witness having been originally in one tract, and the timber being in the opinion of the witness of about the same value. The witness had sold his timber, and gave the price received and all the facts upon which he based his estimate. The testimony was competent. *Mauldin v. Ry. Co.* (S. C.) 52 S. E. 677.

5. The objection made to the testimony of John Bell Towill reciting a conversation between Mrs. Budwell and her sister, Mrs. Timmerman, cannot be sustained. In this conversation, as recited by the witness, Mrs. Timmerman urged her sister to make a settlement with their brother, John M. Bell, saying it would help him in his old age, and the response attributed to Mrs. Budwell, "if I do settle with John, it will not benefit him; that May Belle Keese will be the beneficiary of

the settlement," tended to give some support to the allegation that the plaintiff, then Miss Keese, was the party in interest in the transaction between Mrs. Budwell and Bell.

6. It was submitted, first, on the motion for nonsuit, that "the deed to Mrs. Budwell from Mrs. Mims was only a mortgage, being a security for money," and from this the court was asked to conclude that even if Mrs. Budwell agreed to make a deed to the plaintiff, and not to John M. Bell, on the payment of the purchase money, she and the plaintiff stood in the relation of mortgagee and mortgagor; the payment of the purchase money therefore entitling her to the land free from the mortgage, but not to a return of the money paid on the mortgage. Under this view the defendant contends the only remedy of the plaintiff was an action for specific performance to compel the representatives of Mrs. Budwell, the equitable mortgagee, to convey the legal title to the plaintiff, the equitable owner, on payment of the mortgage debt. It is true Mrs. Budwell stood in the relation of mortgagor to Mrs. Mims, and upon payment of her mortgage could not recover back the purchase money, because Mrs. Mims had already made, and she had accepted, the title. But the plaintiff never had title to the land, and therefore could not execute a mortgage of it. The motion for nonsuit, therefore, could not be granted on the theory that Mrs. Budwell stood in the relation of mortgagee to the plaintiff.

7. There was evidence of a demand made on Mrs. Budwell for title to the land and of her refusal. This was a breach of her contract, and it was not necessary for the plaintiff to make another demand on her executors after her death. There was no tender of title by the executors, or devisees, or heirs, and therefore we do not consider what would have been the effect of such a tender before the action was commenced.

8. As to the other grounds of the motion for a nonsuit, it is sufficient to say that the allegations of the complaint and the evidence were sufficient to sustain a verdict for damages for breach of contract, even if the facts did not warrant a recovery for the specific sums of money paid on the contract, and hence a nonsuit could not have been granted for a total failure of proof to establish any cause of action alleged in the complaint.

9. There are numerous exceptions alleging that the circuit judge charged the jury with respect to matters of fact. The portions of the charge complained of were nothing more than statements of the legal conclusions which would result if the jury found certain facts alleged in the complaint. This was evidently not charging on the facts.

10. The most serious question is whether, under the facts of this case, the circuit judge was in error in charging that, if Mrs. Budwell breached her contract to convey the land, the plaintiff could recover for the money

paid on the contract. It is to be borne in mind this is not an action in equity for rescission, which is the converse of specific performance, but an action at law for the recovery of money paid on a contract which it is alleged the defendant refused to carry out. The right to recover money so paid arises from the obligation imposed by law to restore money for which the party who paid it has not received the consideration agreed upon, and is founded on the principle that no one shall be allowed to enrich himself unjustly at the expense of another. This obligation is frequently spoken of as an implied contract. The restoration of the purchase money under the obligation of a quasi or imputed contract because no equivalent has been given is a very different thing from the damages which the law exacts for breach of contract. The money paid under a contract sometimes is the true measure of damages for its breach, but it is not necessarily so. To illustrate, if one buys land at the instance and request, and for the benefit, of another, taking the title to himself merely because he advanced the purchase money, and the land is subsequently greatly enhanced in value, and then, after repayment of the purchase money to him, undertakes to benefit himself by retaining the land, it is evident he should pay as damages, not the amount of the purchase money repaid to him, but the value of the land. In the other hand, if, after such a purchase, the land should decrease in value, and the person advancing the money and taking title should refuse to convey on repayment of the purchase money on account of some other claim set up in good faith by him, which turned out not to be well founded, it is equally evident it would be unjust to fix as damages the purchase money refunded to him, because to do so would be requiring him to be responsible for the bad bargain of the person for whom the purchase was made. So here, if Mrs. Budwell made a contract with the plaintiff and refused to carry it out after the payment of the consideration, it follows she is liable for the damages resulting to the plaintiff. But whether her estate must restore just the sum of money paid out by the plaintiff depends upon the answers to these questions: (1) Was the purchase of the land really her bargain or the bargain of the plaintiff? (2) Was she unjustly enriched at the expense of the plaintiff to the extent of the purchase money? (3) Did the plaintiff restore to her estate that which the plaintiff received from her? We do not pause to consider whether the plaintiff's evidence made Mrs. Budwell the trustee of a resulting trust in favor of the plaintiff, for whether that was the technical relation or not will make no difference in fixing the measure of plaintiff's recovery, if the jury accept her version of the facts of the transaction. Assuming all the plaintiff's evidence to be true, her case was this: Mrs. Budwell advanced part

of the purchase money of the land and assumed obligations for the remainder to Mrs. Mims purely as an accommodation, and at the instance of the plaintiff through her agent, John M. Bell. Plaintiff sought the accommodation from Mrs. Budwell, and agreed to buy the land, on the judgment of her agent, John M. Bell, mainly for the timber standing on it. Much of the timber turned out to be inferior in quality, and hence the lumber cut from it was, to a large extent, unmerchantable. It is not pretended Mrs. Budwell received for herself from the plaintiff any of the price of the land, or profited by the purchase in any way beyond the land itself; on the contrary, all the purchase money went to Mrs. Mims at the plaintiff's instance. Obviously, therefore, Mrs. Budwell was not enriched at the expense of the plaintiff to the extent of the purchase money. It is alleged in the complaint that Mrs. Budwell's refusal to make title to the plaintiff was unreasonable, in that she demanded that the debts of plaintiff's agent, John M. Bell, should be paid before she parted with the title; but there is no allegation or proof of fraud on her part in withholding the title. In these circumstances nothing can be clearer than that the bargain for the land was the plaintiff's bargain, and, if it turned out to be of less value than the money paid for it, the loss should be the plaintiff's, and, if more, the gain should be hers. If Mrs. Budwell refused to convey, she has not taken from the plaintiff the purchase money, for that was paid to another by her or at her instance, but only the land which was bought for her. Under these facts the conclusion seems obvious that the measure of plaintiff's damage upon the refusal of Mrs. Budwell to convey was not the money paid for the land, less the value the plaintiff had taken from it, but the actual value of the land at the time she made tender to Mrs. Budwell and demanded title, and interest from that time, less any depreciation of it subsequent thereto due to plaintiff's own action.

11. It is said in Keener on Quasi Contracts, 302: "If the plaintiff is in a position to return what he received, it seems equally clear that a defendant should have a right to insist on a return thereof as a condition of refunding what he has received under the contract, in preference to being credited with the value thereof in an action brought to recover the money received by him under the contract. Accordingly it is held that, as a condition of maintaining an action to recover money so paid, the plaintiff must restore to the defendant what he has received under the contract. Thus, in *Miner v. Bradley*, 22 Pick. 457, the plaintiff, who had bought from the defendant a cow and a quantity of hay for a gross sum, on refusal of the defendant to deliver the hay, while retaining the cow, brought an action to recover the purchase money. It was held that the return of the

cow to the defendant was a condition precedent to his right to maintain the action." This rule does not apply in strictness, however, when the plaintiff, without any fault of his own, is not in a position to restore what he has received under the contract. In such case it is sufficient if he offers to allow credit for the value of the thing he is unable to restore. This offer should be made before suit brought, but whether this is in all cases indispensably necessary as a condition precedent to bringing the action for money had and received we do not now decide, for the reason that we have held on other grounds that this could not be sustained as an action of that character.

12. We conclude the circuit judge was in error in instructing the jury that, if Mrs. Budwell refused to carry out her contract to convey, the plaintiff could recover the money paid on the contract, less the value of any timber cut from the land by the plaintiff, and that he should have charged if there was a breach of the contract, as alleged, the recovery should be for the value of the land at the date of the tender and demand for title, with interest from that date, less the subsequent depreciation, if any, due to the action of the plaintiff or her agent.

13. If \$500, or any less amount, in excess of the purchase price agreed on was paid by mistake to Mrs. Budwell and retained by her, the plaintiff is entitled to recover the sum so paid, with interest, in addition to damages for any breach of the contract alleged to have been made with the plaintiff. There was no error in the charge on this point.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(72 S. C. 579)

BRUNSON v. FURTICK.

(Supreme Court of South Carolina. Nov. 7, 1905.)

1. JUSTICES OF THE PEACE — PLEADING — AMENDMENT.

Where, in an action on a note in a magistrate's court, it is alleged that \$100 is due, but the facts are not stated showing the amount due, it may be amended by alleging the date of the note and the time and place of payment.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 328.]

2. SAME—JURISDICTION.

The jurisdiction of a magistrate, which, by Code Civ. Proc. § 71, subd. 1, is limited in actions on contracts for the recovery of money only to \$100, is determined by the amount claimed, and not by the amount actually due.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 157.]

Appeal from Common Pleas Circuit Court of Richland County.

Action by Peter C. Brunson against W. F. Furtick. From a judgment of the circuit

court sustaining a judgment of a magistrate, defendant appeals. Affirmed.

De Pass & De Pass, for appellant. Weston & Aycock, for respondent.

JONES, J. The defendant appeals from a judgment of the circuit court affirming the judgment of the magistrate court in favor of plaintiff for \$100 in an action on a promissory note.

1. The first question presented is whether there was error in affirming the order of the magistrate overruling defendant's demurrer. The action was commenced March 12, 1904, before B. P. McMaster, Esq., a magistrate for Richland county, and the complaint alleged that the defendant "is indebted to him in the sum of \$100 on a promissory note, which said sum is long since due and payable." The demurrer to this complaint on the ground that it fails to state any cause of action, and that it is not sufficiently explicit to enable defendant to understand it, was overruled by the magistrate. The magistrate, however, permitted the complaint to be amended so as to insert these words: "Note dated at Columbia, S. C., November 29, 1901, promising to pay on March 1, 1902, to the order of Peter C. Brunson a certain sum of money, value received, payable at Central National Bank at Columbia, S. C., interest after maturity at eight per cent. per annum." On a subsequent date, when the case was called for trial, defendant demurred to the amended complaint, which the magistrate overruled.

We think the demurrer was properly overruled. Section 88, subd. 5, Code Civ. Proc., provides that in a magistrate court "pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended." In subdivision 6 it is provided that "either party may demur to a pleading of his adversary, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defense, although it be taken as true." In subdivision 7 it is provided that, "if the court deem the objection well founded, it shall order the pleading to be amended," etc. The original complaint informed the defendant plainly that the action was upon a promissory note, and that the amount claimed thereon was \$100. The amendment specifically described the note, except as to the amount thereof, but the complaint, as it stood originally and after amendment, claimed \$100 upon the note. This was certainly sufficient to enable a person of common understanding to know what was intended.

2. The next point raised by several exceptions is whether the magistrate had jurisdiction to entertain this suit, inasmuch as the amount of the note sued on, with interest, exceeded \$100. The note in question was one of a series of four notes, each for \$89.25, with interest after maturity at 8 per cent. per

annum, and each dated November 29, 1901, maturing 30, 60, 90, and 120 days thereafter, respectively. This note, maturing March 1, 1902, the principal and interest at the time of the commencement of this action exceeded \$100, but, as stated, the complaint claimed only \$100. The Constitution of 1895 (article 5, § 21) provides: "Magistrates shall have jurisdiction in such civil cases as the General Assembly may prescribe: Provided, such jurisdiction shall not extend to cases where the value of property in controversy, or the amount claimed, exceeds one hundred dollars," etc. In accordance with this provision, section 71, subd. 1, of the Code of Civil Procedure, provides that magistrates shall have civil jurisdiction in actions arising on contracts for the recovery of money only, if the sum claimed does not exceed \$100. In the cases of *Cavender v. Ward*, 28 S. C. 472, 6 S. E. 302, and *Catawba Mills v. Hood*, 42 S. C. 204, 20 S. E. 91, this court, construing a similar provision in the Constitution of 1868 and a similar statutory provision, held that the jurisdiction of a trial justice (now magistrate) in matters of contract is determined by the amount claimed, and not by the amount due. These cases are decisive of the question. The rule which prevailed in South Carolina previous to the Constitution of 1868 and statutes pursuant thereto, as laid down in *Ramsay v. Court of Wardens*, 2 Bay, 180, *Simpson v. McMillion*, 1 Nott & McC. 192, and *St. Amand v. Gerry*, 2 Nott & McC. 487, is not of force now.

All the exceptions which are not controlled by the foregoing conclusions were abandoned.

The judgment of the circuit court is affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(124 Ga. 349)

WATERS v. WATERS et al.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. HOMESTEAD—RIGHT TO CONVEY.

As has been repeatedly ruled, the head of a family to whom has been set aside a homestead under the Constitution of 1868, may convey his or her reversionary interest therein.

2. LIMITATION OF ACTIONS—PLEADING.

A petition filed in 1903, seeking to cancel a deed made in 1877 on the ground that its execution was induced by fraudulent misrepresentations by the grantee, but which does not allege when the fraud complained of was discovered, is bad, as against an appropriate demurrer setting up the statute of limitations. This is so for the reason that it is incumbent on the plaintiff to show in himself a complete right of action, and because pleadings must be construed most strongly against the pleader.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 664-668.]

3. EVIDENCE—PAROL CONTEMPORANEOUS AGREEMENT.

Equity will not decree the specific performance of a parol agreement made contemporaneously with the execution of a deed and alleged to have been a part of the consideration

moving the grantor; the deed on its face being an unconditional conveyance, and it not appearing that anything was omitted therefrom by mistake. If the written instrument does not speak the true intention of the parties, it must be reformed before relief can be obtained.

4. INJUNCTION—ACTION AT LAW.

Equity will not enjoin the institution of a suit to which the party seeking the injunction may have a defense available to him on the trial of the same.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 56.]

(Syllabus by the Court.)

Error from Superior Court, Bullock County; B. T. Rawlings, Judge.

Suit by Mrs. Sarah Waters against Robert B. Waters and others. There was judgment for defendants, and plaintiff brings error. Affirmed.

This case comes up on exceptions to the ruling of the court below sustaining a demurrer to the plaintiff's petition. The allegations of the petition were substantially as follows: In June, 1870, Mrs. Sarah Waters, the petitioner, being then the head of a family consisting of herself and certain minor children, took a homestead, under the Constitution of 1868, in described realty, title to which she had acquired some two years previously. In March, 1877, during the continuation of said homestead, and before the beneficiaries thereof had attained their majority, petitioner executed to her son, Robert B. Waters, one of the defendants, a paper purporting to be a warranty deed to the land mentioned. This instrument was executed only on condition that petitioner be allowed to remain in possession and control of the land during her life; this agreement being made simultaneously with the execution of the deed, and understood as part of the consideration thereof. The deed recited a consideration of \$250, but this amount has never been paid to petitioner; the only payment which Robert B. Waters has ever made on the land being a sum less than \$200, the exact amount being unknown to petitioner, which was paid about the time of the execution of the deed to cancel a mortgage in favor of one Preetorious, which was not a legal lien against the land, but which Robert B. Waters represented to petitioner was enforceable and valid. In making this representation to her Robert B. Waters misled petitioner, and took advantage of the confidence she placed in him as her son; and petitioner, "being ignorant of the forms and processes of law," believed that she was in danger of losing her home. Robert B. Waters then offered to take up and settle the mortgage on condition that his mother would execute a deed to the land to him, at the same time making the oral agreement already mentioned. Petitioner has ever since remained in the open and peaceable possession of the property, and has never paid any rent therefor, nor has any rent been exacted of her. Recently Roberts B. Waters has sold the property to Deal, who is prepar-

ing and threatening to eject petitioner from the premises; and, unless restrained by the court, he will carry out his threats. The agreed purchase price is \$4,000, of which amount \$1,000 is a cash payment; the remainder being secured by a note and mortgage from Deal to Waters. It was alleged that the deed from the plaintiff to her son was void because it was without sufficient consideration, because it was procured by undue influence over petitioner, because it purported to convey homestead property which could not be conveyed, and because it was in truth a deed to secure a debt growing out of the Preetorious mortgage, and Waters has been fully repaid, having received from the sale of a portion of the land and certain timber thereon more than enough to satisfy the debt mentioned. It was also alleged that petitioner's uninterrupted possession of the land was notice to Deal, the purchaser from Waters, of her title; that Deal acquired no better title than Waters had; and that he is bound in law and equity by petitioner's right in the same manner as Waters. Petitioner claims the full legal title to the land; but, if the court should decree otherwise, she claims an equitable title, and alleges that the deed to her son was only a security deed, and, the debt having been paid, she is entitled in equity to the land. If, however, it should be held that she parted with the title to the land, she alleges that she is entitled to the possession, control, and occupancy, and to the rents, issues, and profits thereof, for the remainder of her life, in accordance with the terms of the agreement made with her son contemporaneously with the execution of the deed to him. But if it should be held that Deal by reason of his purchase from Waters, has acquired the legal title and the right to the possession of the premises, petitioner alleges that Robert B. Waters is indebted to her, by reason of his failure to carry out his agreement, in a sum equivalent to the value of her life estate in the property, based on the standard tables of life expectancy. Also, if Deal has acquired the legal title to the property and the right to the immediate possession thereof, it is alleged that the money and notes given in payment therefor are her property, and charged with a trust in her favor in the hands of Waters and Deal. She prayed (1-3) that her deed to Waters, executed in 1877, and the deed from Waters to Deal, be canceled, and the full legal title to the property in dispute be decreed to be in petitioner; (4) that Waters and Deal be enjoined from interfering with petitioner's possession, by process of law or otherwise; (5) that Waters be enjoined from transferring or otherwise disposing of the notes, mortgage, or other evidence of indebtedness given him in the purchase of the land by Deal; (6) in the event it should be decreed that title was in Deal, that this title should be decreed to be an estate in remainder, to take effect only after the death of petitioner;

(7) in the event it should be decreed that full legal title, with the right to immediate possession, is in Deal, that the \$4,000 purchase price of the land be decreed to be a trust fund for the benefit of petitioner; (8) in the event that none of the preceding prayers be granted, that judgment be awarded against Robert B. Waters for damages in the sum of \$4,000 for the violation of his contract with petitioner; (9-10) for general relief, and for process. The demurrer was general, and on the further grounds that the right to cancellation prayed for is barred by the statute of limitations; that the petition sets up inconsistent and contradictory causes of action; that the petition seeks to annex a condition to a deed by parol, and to contradict, add to, and vary the terms of a written contract by parol; and that certain paragraphs were not sufficiently definite to constitute the basis of a recovery.

Brannen & Booth, for plaintiff in error. J. K. Hines, J. F. Brannen, and G. S. Johnston, for defendants in error.

CANDLER, J. (after stating the facts). 1. The question whether Mrs. Waters could, under the Constitution of 1868, obtain a valid homestead as the "head of a family," was not raised by counsel, either at the trial below or upon the hearing before this court; but both sides treated the homestead set apart to the plaintiff as in every respect valid. Without going into this question, then, we come to consider the effect of the deed made by Mrs. Waters to her son, in which she undertook to convey the fee to the land to her son. While the plaintiff could not convey the homestead property in such a way as to defeat the rights of her minor children therein, her deed was sufficient to pass out of her whatever claim to, or interest in, the land that she may have possessed. *Huntress v. Anderson*, 110 Ga. 427, 35 S. E. 671, 78 Am. St. Rep. 106. There is no merit in the contention that the deed was void as to the plaintiff because it sought to convey homestead property.

2. The only other reason assigned why the deed from the plaintiff to her son should be held void is that fraud was committed in its procurement. It is extremely doubtful if the allegations of the petition as to the alleged misrepresentation by Waters of the legal effect of the Preterious mortgage make such a case of fraud as to warrant the cancellation of the deed made to him in consequence of such misrepresentation. But granting, for the sake of the argument, that they do, more than 26 years elapsed between the commission of the alleged fraud and the filing of the present suit, and it does not appear at what time during that long period the plaintiff discovered that she had been defrauded. Apparently nothing was done to prevent her from acquainting herself with the truth as to the legal effect of the so-called Preterious mortgage. It was incumbent upon her, in

filing her petition, to show that her cause of action was not barred. This was not done. Her pleading must be construed most strongly against her, and therefore it will be presumed that she discovered the alleged fraud at such a time in the past as that her right of action has expired by limitation.

3. As to the prayer that the plaintiff be decreed to have a life estate in the property in dispute, it is sufficient to say that this would be nothing more or less than ingrafting a parol agreement upon a written deed and changing the estate conveyed by the written instrument. The relief sought is not available without a reformation of the deed from the plaintiff to her son, which was not prayed (*Perkins Lumber Co. v. Wilkinson*, 117 Ga. 394, 43 S. E. 696); and that reformation of the deed could not be had, because it appeared that there was no intention to insert in the instrument any provision of the character indicated. *Ligon's Adm'r's v. Rogers*, 12 Ga. 281.

4. As to the various other prayers of the petition, it does not appear that the plaintiff's possession of the premises has been interfered with, nor does it appear that the plaintiff has any right which she may not assert in defense to an action of ejectment or other legal proceeding that may be taken to oust her from possession. "Equity will not enjoin the proceedings and processes of a court of law unless there is some intervening equity, or other proper defense, of which the party, without fault on his part, cannot avail himself at law." Civ. Code 1895, § 4915; 7 Enc. Dig. Ga. Rep. 340, 369. Should Deal make any effort to oust the plaintiff from possession of the land, it will then be time for her to assert any rights she may have. The court did not err in sustaining the demurrer and dismissing the petition.

Judgment affirmed. All the Justices concurring.

(194 Ga. 357)

SEABOARD AIR LINE RY. v. O'QUIN.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. CARRIERS—FORCIBLE EXPULSION OF PASSENGER—PUNITIVE DAMAGES.

Punitive damages are recoverable in an action against a railroad company by a passenger, where the evidence shows that he was, without justification, or excuse, forcibly expelled from its train by the conductor or other employees in charge thereof.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1439.]

2. SAME—TORTS OF SERVANTS.

When a common carrier undertakes, through its servants, to exercise its rights to eject from its cars passengers who have been guilty of disorderly conduct, it acts at its peril in determining their identity; and if by mistake one who has in no way forfeited his rights as a passenger be ejected, the carrier will be liable to respond in damages for the tort thus committed by its servants, their good faith being only available in defeating a recovery of punitive damages.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1412, 1483.]

8. JUDGMENT — CONCLUSIVENESS — CRIMINAL PROSECUTION.

In such an action it is not permissible for the carrier to plead or prove the conviction of the plaintiff, in a criminal prosecution brought against him on the charge of using profane and vulgar language in the presence of females, while upon its cars on the occasion when he was forcibly expelled from the train.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1310.]

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action by Preston O'Quin against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action to recover damages from the defendant for unlawfully and wrongfully expelling the plaintiff from its cars on which he was riding as a passenger, and for ejecting him with unnecessary force and causing him to be arrested for an offense alleged to have been committed on the cars. The jury on the trial found a verdict for \$500 damages. The defendant made a motion for a new trial, which was refused by the court, and it excepts to the judgment overruling this motion. The evidence for the plaintiff tended to prove that he was a passenger on the cars of the Seaboard Air Line Railway, and was traveling from Savannah to his destination at Fitzgerald; that when the train reached the station of Collins, in Tattnall county, certain detectives, employes of the railway company, forcibly ejected him from the train, without allowing him to get his baggage, and turned him over to the marshal of Collins; that on the next day a warrant was sued out in Bryan county at the instance of one of the detectives who ejected him from the train, and he was arrested on this warrant and had to give bond for his appearance before the committing court; that the warrant was subsequently dismissed for want of prosecution; that at the time of his ejection he was conducting himself in a proper and orderly manner; and that his previous conduct had given no pretense to the servants of the railway company for expelling him from the train, causing his arrest, and suing out a warrant against him. The defendant offered evidence to show that at the time the plaintiff boarded its cars at Savannah he was partially intoxicated; that while on its cars he used profane and obscene language in the presence of the passengers, among whom were several females; that because of such improper conduct he was expelled from the train by its employes; and that in ejecting him no more force was used than was necessary.

Brown & Randolph, Tom Eason, and J. V. Kelley, for plaintiff in error. W. T. Burkhalter and Jos. K. Hines, for defendant in error.

EVANS, J. (after stating the facts). 1. The first ground of the amended motion for

a new trial complains that the court erred in charging the jury: "In every tort there may be aggravating circumstances, either in the act or in the intention; and in that event, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as a compensation for the wounded feelings of the plaintiff." The error assigned on this charge is that it was not applicable to the facts of the case. The charge was almost a literal excerpt from Civ. Code 1895, § 3906, which is applicable in all cases where there has been a trespass upon or unlawful invasion of the personal rights of the aggrieved party. *W. & A. R. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842; *City & Suburban Ry. v. Brauss*, 70 Ga. 368; *Georgia R. v. Homer*, 73 Ga. 257; *Georgia R. Co. v. Dougherty*, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499. The case made by the plaintiff is that, while traveling as a passenger and behaving in a decorous manner, he was ruthlessly ejected from the defendant's train by its servants, without any excuse and without informing him why he was so treated; that he was forcibly expelled; and that in ejecting him the company's employes, in the presence of other passengers, roughly took hold of his person and jerked him from the train. If this was the truth of the case (and the verdict of the jury solves this question in favor of the plaintiff), the conduct of the railway company's employes evinced a reckless disregard of the plaintiff's rights, their wrongful act amounted to a trespass upon his person, and the charge of the court was applicable to the case as made out by the evidence introduced in his behalf. *Georgia R. v. Homer*, supra; *Head v. Railway Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Atlanta St. Ry. Co. v. Hardage*, 93 Ga. 457, 21 S. E. 100; *Southern Ry. Co. v. Harden*, 101 Ga. 263, 28 S. E. 847.

2. The following charge was also excepted to: "I charge you further, in determining this question and in dealing with the passenger while on the train, the railroad was bound to exercise extraordinary diligence in looking into the facts and circumstances and determining the question as to whether or not this particular passenger, or whether somebody else, had been using profane and vulgar language. In other words, in determining the question as to whether or not the passenger was subject to the section of the Code which I have read to you—being ejected for using obscene language—they should use extraordinary diligence in determining that question." This charge is alleged to be erroneous, because the rule as to extraordinary diligence did not apply to the facts of the case, and because the court should have qualified the charge by instructing the jury that if the employes of the company acted in good faith and used ordinary diligence in undertaking to ascertain whether the plaintiff was the person who had been guilty of disorderly conduct on the train, the company could not be held liable for his

expulsion. We agree with counsel for the plaintiff in error that the question of extraordinary diligence was not involved under the facts of this case. A common carrier owes to a passenger the duty of exercising extraordinary diligence to guard him against injury and to provide for his safety while he is traveling on its cars; but where the carrier, through its employes, acting within the scope of their authority, wrongfully ejects a passenger, the carrier is liable for the tort thus committed, irrespective of the good faith of its employes and the exercise on their part of ordinary prudence in determining whether or not the passenger has been guilty of misconduct. A mistake of fact on their part will not relieve the carrier from liability, even though they may have acted in entire good faith. *Georgia R. Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490; *Atlanta Ry. Co. v. Keeny*, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824. Their intention can only be looked to in determining whether the case is one calling for punitive damages. *Georgia R. Co. v. Eskew*, just cited. In expelling a passenger from its train, the carrier acts at its peril; and, if he be wrongfully ejected, the fact that its servants acted under a misapprehension in supposing that he had been guilty of misconduct can afford no excuse to the carrier for his unlawful expulsion. A conductor on a passenger train is "invested with all the powers, duties, and responsibilities of police officers while on duty," and may lawfully eject a passenger who is guilty of disorderly conduct, and cause him to be arrested and detained for a violation of any of the penal laws of this state; but the statute which clothes a conductor with this authority expressly provides that nothing therein contained "shall affect the liability of any railroad company for the acts of its employes." Pen. Code 1895, § 902. While the law as to extraordinary diligence does not apply to a case where a passenger is wrongfully ejected from a train by the servants of a railway company, yet the charge excepted to affords no cause of complaint to the defendant company, as the charge was more favorable to it than would have been a correct presentation to the jury of the law bearing upon its liability as a common carrier. *Atlanta St. Ry. Co. v. Keeny*, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824.

3. On the trial the defendant offered an amendment to its plea, alleging that since the filing of the suit, the plaintiff had been indicted and convicted in the superior court of Chatham county for using profane, obscene, and vulgar language, in the presence of females, on a passenger car, on the same day as that on which he claims he was unlawfully ejected from the defendant's train. The court declined to allow this amendment. The record of the criminal proceeding therein referred to was offered in evidence in behalf of the company, but was excluded by

the court. Error is assigned upon both of these rulings. The judgment of conviction in a criminal prosecution constitutes no bar to a civil action based upon the same act or transaction. 24 Am. & Eng. Enc. Law. (2d Ed.) 831; *Cottingham v. Weeks*, 54 Ga. 275. This rule rests upon the reasoning that the two proceedings are not, ordinarily, between the same parties; different rules as to the competency of witnesses and as to the weight of evidence exist, and the issue in the criminal proceeding is not necessarily the same, either as to scope or as to its attendant results, as that involved in the civil action. In this state the defendant is not, in a criminal case, permitted to testify, and his version of the transaction may be believed or rejected in the discretion of the jury; while, on the other hand, the party against whom the civil action is brought should not be held bound by the result of the criminal proceeding, not being a party thereto, and not having the right to examine or cross-examine witnesses, or to control the conduct of the case. It follows that the court did not err in refusing to allow the amendment, or in rejecting the proffered evidence.

Judgment affirmed. All the Justices concurring.

(124 Ga. 361)

SCREWS v. ANDERSON.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. APPEAL—NEW TRIAL—EXCLUSION OF EVIDENCE—NECESSITY OF STATING REJECTED EVIDENCE.

Where one ground of a motion for a new trial alleged that the court erred in refusing to permit two named witnesses to testify "what the whole services of the attorney for defendant in illegality are worth in the case up to date of trial and including the same," without stating what such testimony would have been, or whether the judge was informed of what was expected to be proved, it cannot be considered.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1747.]

2. SAME—SETTING OUT DOCUMENTARY EVIDENCE

Nor can a ground be considered which alleges error in the exclusion of a written transfer, without setting out the rejected evidence. Evidence which has been rejected cannot properly be included in a brief of the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2905.]

3. EXECUTION — TRANSFER — NECESSITY OF WRITING.

The transfer of an execution must be in writing in order to put the legal title in the transferee, and authorize him to proceed in his own name.

4. NEW TRIAL—RELATIONSHIP OF JURORS TO PARTIES.

Where an execution was levied, and the defendant therein interposed an affidavit of illegality, alleging payment, and the jury found that the affidavit of illegality be sustained except as to a certain sum, for which the execution should proceed for the benefit of the plaintiff's attorney, it furnished no ground for a new trial, on the motion of the plaintiff in *fi. fa.*, that two of the jurors trying the case were her

second cousins. And this is true although the attorney testified that he had been employed under an agreement by which he was to have one-half of the recovery, and another person, not a party of record, testified that he had a transfer of the claim from the plaintiff, while she denied both of these statements.

5. APPEAL AND ERROR—VERDICT—CONCLUSIVE-NESS.

The evidence being conflicting, and the presiding judge having approved the verdict, this court will not interfere with his judgment on the ground that the verdict was contrary to the evidence.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1836, 1875.]

6. SAME—PARTIES—AMENDMENT.

If parties who should be plaintiffs in error are omitted, they can be added by amendment to the bill of exceptions filed by one proper plaintiff in error.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1814, 1836.]

7. SAME.

No amendment is necessary in the present case.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action by Sarah Screws against J. C. Anderson, in which plaintiff recovered a judgment, and, upon the levy of a *fi. fa.* upon certain property, defendant interposed an affidavit of illegality, alleging payment of the execution. There was judgment upholding the *fi. fa.*, and plaintiff brings error. Affirmed.

A suit was brought by Sarah Screws against J. C. Anderson, and judgment was recovered for \$236.42, principal, and \$203.71, interest to October 4, 1900. A levy was made on certain property, and the defendant interposed an affidavit of illegality, alleging that he had paid off and discharged the *fi. fa.* except the cost, which he tendered. On the trial it appeared that Mrs. Screws had made a settlement with Anderson, the defendant in *fi. fa.*, that the fee of W. T. Burkhalter, the attorney of record for the plaintiff, had not been paid, and that he claimed the right to have the execution proceed, for the purpose of collecting such fee, which he claimed was to be one-half of the recovery. It was also claimed that there had been an assignment by Mrs. Screws to one Sapp, and that, in addition to proceeding for attorney's fees, the *fi. fa.* should proceed also for his benefit. Mrs. Screws admitted that she had settled the execution with Anderson, who was her nephew. She denied that she had ever employed Burkhalter to bring the suit, or made any contract with him. She admitted that she was very old, being between 80 and 90 years of age, and that her memory was bad. She also admitted that she had been present at the trial when the case was litigated and the judgment obtained. She denied that she had authorized Sapp to retain Burkhalter as her attorney, or that she had transferred the claim to Sapp. There was conflicting evidence, some of the witnesses testifying that

Sapp had been authorized to employ Burkhalter, and had done so, and that Mrs. Screws ratified and confirmed the employment, and recognized him as her attorney; also, that the contract was that he was to receive one-half of the recovery as a fee. Sapp testified that the suit had been assigned to him. It appears that an effort was made to prove a written assignment, but it was rejected by the court. The jury found the following verdict: "We, the jury, find for the illegality, and direct that the *fi. fa.* proceed for the benefit of plaintiff's attorney for \$75; so say we all." A motion was made for a new trial in the name of Mrs. Screws, which was overruled, and she excepted.

W. T. Burkhalter and Z. D. Harrison, for plaintiff in error. J. K. Hines and Isaiah Beasley, for defendant in error.

LUMPKIN, J. (after stating the facts). 1. 2. A ground of a motion for a new trial which alleges error on the part of the court in refusing to let two named witnesses state "what the whole services of the attorney for defendant in illegality are worth in the case up to date of trial and including the same," without stating what such testimony would have been, or that the judge was informed of what was expected to be proved, cannot be considered. *Grant v. Noel*, 118 Ga. 258, 45 S. E. 279 (2); *Freeman & Turner News Co. v. Mencken*, 115 Ga. 1017, 42 S. E. 369. For the like reason, the ground of the motion for a new trial, alleging error in the exclusion of a written transfer from Mrs. Screws to Sapp, cannot be considered, because the evidence excluded is not set out in the motion for a new trial.

3. The court charged that the transfer of an execution must be in writing in order to put the legal title in the transferee, and authorize him to proceed in his own name, and this was clearly correct. *Civ. Code* 1895, § 3682; *Anderson v. Baker*, 60 Ga. 599.

4. One ground of the motion for a new trial is because two of the jurors were disqualified by reason of relationship to Mrs. Screws, being her second cousins, and that this was not known to Burkhalter, the attorney, until after the trial. It is not shown that this was not known to his client, either Mrs. Screws, the original plaintiff in *fi. fa.*, or Sapp, who claimed to be a transferee of it. The execution was proceeding in the name of Mrs. Screws as a party of record. It is true that the evidence developed the fact that she had made a settlement with the defendant in *fi. fa.*, and the attorney claimed that such a settlement did not extinguish the execution, or prevent its proceeding. He testified that, under his contract of employment, he was entitled to one-half of the recovery as a fee. She denied that there was such a contract. In addition to the evidence on this subject, there was also evidence as to the value of services.

Thus, while the attorney claimed to have the execution proceed for his benefit, which he might do for the amount of his fee (Civ. Code 1895, § 2814; Kimbrough v. Pitts, 63 Ga. 496), and Sapp claimed to be a transferee, on the face of the record Mrs. Screws was the only party plaintiff, and the case proceeded in her name as such. A verdict was rendered against the affidavit of illegality to the extent of \$75 as the attorney's fee. In Wright v. Smith, 104 Ga. 174, 30 S. E. 651, it is held that "relationship of a juror within the prohibited degrees to the unsuccessful party in a case, although unknown to such party or his counsel until after the verdict, is not sufficient ground for a new trial." See, also, Sikes v. State, 105 Ga. 592, 31 S. E. 567; Downing v. State, 114 Ga. 30, 39 S. E. 927. If, therefore, the plaintiff is to be considered as the losing party because the affidavit of illegality was sustained in part, these cases would be directly controlling. If she is to be treated as the successful party because the affidavit of illegality was not sustained in its entirety, a fortiori, one in whose favor a verdict is rendered is not in position to complain of having relatives on the jury. Although the attorney and his client differed in their testimony, yet he was not a party of record, nor can it be said that his client, in whose name alone the case was proceeding, was the opposite party.

5. While the evidence was conflicting, we cannot say that the trial court abused his discretion in refusing to set aside the verdict.

6, 7. A motion was made to dismiss the writ of error, but it is without merit. The only ground which need be mentioned is that neither the attorney nor Sapp was made a party plaintiff in error. Neither of them was a party of record in the court below, and although it was claimed that the *fi. fa.* should proceed for their benefit, the only parties of record were the plaintiff and defendant in *fi. fa.* It was not essential, therefore, to make them plaintiffs in error. Had it been so, they could have been joined with the original plaintiff in error by amendment to the bill of exceptions. *Western Union Tel. Co. v. Griffith*, 111 Ga. 551, 36 S. E. 859.

Judgment affirmed. All the Justices concurring.

(124 Ga. 399)

HADEN v. ATLANTA NORTHERN RY. CO.
(Supreme Court of Georgia. Nov. 20, 1905.)
EMINENT DOMAIN—REMEDIES OF OWNER—INJUNCTION.

Where, on the interlocutory hearing of a petition to enjoin a street railway company from using or operating its cars on a certain described strip of land to which petitioner claimed title, the judge, under the evidence submitted, could properly find that the petitioner had not shown title to the land in question, there was no abuse of discretion in refusing to grant the injunction prayed for.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. W. Haden against the Atlanta Northern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. O. Lovett and W. W. Haden, for plaintiff in error. Rosser & Brandon, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 343)

GREEN v. STATE.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. CRIMINAL LAW—EVIDENCE—STATEMENT OF ACCUSED AT INQUEST—METHOD OF PROOF.

It is competent to prove on a subsequent trial the statement of the prisoner at a coroner's inquest by the testimony of witnesses who profess to remember the substance of such statement; and it is not error for the court to overrule an objection to such testimony, urged on the ground that "the law requires the evidence before the coroner's jury to be in writing, and the writing would be better evidence of what the witness said."

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 884, 1240-1245.]

2. SAME—COMPULSION—WANT OF EVIDENCE.

An objection to the admission of the same evidence, on the ground that "the defendant was in the custody of the officers, under arrest, and while thus situated was compelled to give testimony against herself and it was unlawful to require her to make any statement tending to incriminate herself, and therefore such statement would be inadmissible," is equally without merit where the record does not disclose any evidence, either of compulsion or that the statement proved by such testimony was not freely and voluntarily made.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 460, 871.]

3. HOMICIDE—EVIDENCE—RELEVANCY.

The evidence set out in the second ground of the amended motion for a new trial, being irrelevant, was properly excluded by the court.

4. SAME—INSTRUCTIONS—JUSTIFICATION AND MITIGATION.

When on the trial of one charged with murder the accused admits the homicide, but at the same time states circumstances of justification or alleviation, and the only testimony of witnesses which proves the homicide also discloses circumstances of mitigation or justification, it is error for the court to charge, without qualification, "When a homicide, however, is proven, the burden is on the the slayer to justify or mitigate the crime or the offense."

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 276-278, 611.]

5. SAME.

While the charge that "when homicide is proven, the law presumes malice, and, unless the evidence relieves the slayer, he or she should be convicted," is less objectionable, it does not aptly state the law in cases where, whether the admission of the defendant be considered or the evidence of the witnesses, there is no proof of the homicide save such as carries, in immediate connection with it, circumstances which, if believed to be true by the jury, would amount to a palliation or justification of the act.

6. SAME—CHARACTER OF DEFENDANT.

Although a defendant's character is not put in issue, still, where the evidence discloses facts which tend to show that the defendant is a woman of immoral life, it is not hurtful to her for the court to charge that a "woman or person of bad character has the right to defend [herself] upon the same principles as people of good character."

7. SAME—MANSLAUGHTER.

As there were facts and circumstances in evidence which would have warranted the jury to find that at the time of the homicide the deceased was attempting to commit a serious personal injury upon the accused, it was not error for the court to give in charge to the jury the law of voluntary manslaughter.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 650-653.]

8. SAME — APPEAL — BURDEN OF SHOWING ERROR.

Before the refusal of a written request to charge the jury will be held to constitute error, it must appear that the request was in itself a correct statement of the law, and applicable to the case.

(Syllabus by the Court.)

Error from Superior Court, Polk County;
A. L. Bartlett, Judge.

Clem Green was convicted of murder, and brings error. Reversed.

Blance & Tison and Bunn & Warrick, for plaintiff in error. W. K. Fielder, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

BECK, J. The plaintiff in error, Clem Green, alias Clem Nunis, was convicted of the offense of murder. She made a motion for a new trial, based upon the general grounds, and by amendment added substantially the following: (1) That the court erred in admitting to the jury evidence of the defendant's statement before the coroner's jury, in which the defendant admitted shooting the deceased, but contended that she did it because he broke into her house, and was advancing on her with a razor. The defendant objected to the admission of this evidence, on the ground that the law requires the evidence before a coroner's jury to be in writing, and that this writing would be best evidence of what the witness said; and because the witness, being in the custody of officers, was while thus situated compelled to give the testimony against herself, and it was unlawful for her to have been allowed to make a statement tending to incriminate herself, and that therefore this testimony was inadmissible. (2) Because the court withheld from the jury the testimony of Levi Cook to the effect that he had "fixed a clock at Clem Green's house. Jim Davis [the deceased] broke into the door—broke the door open—and fired a shot through the door into the house. This was one or two years before his death. (4) [Should be 3, but numbered 4 in motion]. Because the court erred in charging the jury as follows: 'When a homicide is proven, the law presumed malice, and, unless the evidence relieves the slayer, he or she should be convicted. If the state has failed to establish

the guilt of the accused, the defendant should be acquitted.' The foregoing portion of the charge was error under the facts of this case, first, because the very evidence which proved that the defendant committed the homicide also showed complete justification. In this case the state was dependent upon the statement of the defendant for proof of the corpus delicti, and, while her statement showed that she did the killing, it also showed that the same was in self-defense. Therefore there could be no presumption of malice against her. (5) Because the court erred in charging the jury as follows: 'When the homicide, however, is proven, the burden is on the slayer to justify or mitigate the offense.' The foregoing portion of the charge was error under the facts of this case, because the evidence which showed that the defendant committed the homicide also showed that she was justified in so doing. This was true of all the evidence which tended to show that the defendant committed the homicide. Therefore, the burden was never shifted." Error was also assigned because the court charged: "So, also, a woman or person of bad character has the right to defend themselves upon the same principles as people of good character," for the reason that "it amounted to an expression on the part of the court that the defendant was a woman of bad character," as she had not placed her character in issue. The court charged the law in reference to voluntary manslaughter as contained in Pen. Code 1895, § 65. The defendant alleges that that part of the section which begins with the sentence, "Provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder," should not have been charged, "because it was not justified by the evidence in this case, and, the case * * * being a close case, it tended to unduly prejudice the jury against this defendant." And again, exception was taken because the court refused a written request to give in charge the following: "A statement which admits the commission of the act, but which also gives a legal excuse or justification, is not a confession. The jury would have no right, where the state relies on such a statement, to consider that part of it which tends only to criminate the defendant, and reject that part of it which would excuse or justify the killing; and when the statement is relied on for conviction as admitting the killing, but also, in itself, shows that the act was justified or excusable, the jury would not be justified in convicting the defendant of either murder or manslaughter. This rule of law applies where the state relies on such statement to identify the defendant as the slayer." The motion was overruled, and the defendant excepted.

1, 2. There was no error in admitting the testimony complained of in the first ground of the amendment to the motion for a new

trial, it not appearing from the record that the accused was under oath when she made her statement during the coroner's inquest. This court has in terms decided this very question. In *Woolfolk v. State*, 81 Ga. 562, 8 S. E. 728, it was held: "Nor was there any error in admitting the testimony * * * in relation to * * * the statements of the defendant made during the [coroner's] investigation. The objection was that the circumstances then surrounding the defendant amounted to force and compulsion. We see no error in the admission of this testimony. * * * So far as this record discloses the statements made by the defendant were perfectly voluntary, and not under oath. It is true that there was some excitement in the crowd during the day, and that the defendant was under arrest, charged with the murder of his whole family; but there had been no threats made against him, so far as the record discloses." See, also, *Wharton's Cr. Ev.* §§ 664, 668; 1 *Bishop's Cr. Proc.* §§ 1255-1257. As it does not appear from the record in the case at bar that the incriminating statement of the accused was not voluntarily made, and the burden being upon her to show such fact, if it was a fact (*Eberhart v. State*, 47 Ga. 599), her failure so to do renders her objection to the testimony without merit. Nor should this testimony have been excluded on the ground that, because the law requires the substance of the evidence before a coroner's jury to be reduced to writing, the writing would be better evidence of what the witness said. It is true that a coroner is required to "commit to writing the substance of the testimony delivered before the inquest." *Pen. Code* 1895, § 1265. But this "substance of the testimony" is in its character very similar to the "abstract of evidence" which in courts of inquiry the judge is required to have made where the charge is of a felony; and it has been held that evidence of the testimony of a witness on a committing trial may be proved as well by one who heard it as by the notes or memoranda taken by the court. "This [abstract of evidence] differs from an approved record, where all the facts are taken down and scrutinized by the counsel for the parties, and approved by the court, and becomes a matter of record. It also differs from a voluntary statement made by the accused before a committing court, which the law requires the magistrate to take down in writing, and return to the superior court." *Brown v. State*, 76 Ga. 626.

3. The court properly rejected the evidence the exclusion of which is complained of in the second ground of the amended motion. In no event could it have been admissible, unless it had further appeared that at the time of such shooting Clem Green was in the house, and that the shooting was an attempt to do her an injury. But even if this had

appeared, the admission of such testimony would have been of doubtful propriety; for it appears that whatever might have been the state of the deceased's feelings towards the defendant one or two years before his death, amicable relations had been re-established between them before the time of the tragedy that culminated in the shooting with which the defendant in this case is charged.

4. Though some other courts lay down a different rule, it is now a well-established rule in this state that, where a killing of a human being is proved, and the evidence adduced to establish the killing does not show circumstances of justification or alleviation, malice will be inferred. But if the evidence relied upon by the state to show the killing contains circumstances of alleviation or justification, the burden of proving that the crime was murder is not shifted. Until malice is shown, one vital element of the offense is lacking. This element, as we have seen, may be presumed to exist when by the evidence proving the homicide no circumstances of mitigation appear. "The law presumes every homicide to be felonious until the contrary appears from circumstances of alleviation, of excuse, or justification; and it is incumbent on the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him." *Hudgins v. State*, 2 Ga. 188. "'In every charge of murder,' says Mr. Justice Foster, 'the fact of killing first being proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to be founded in malice, until the contrary appears.' Foster, 255." *Hopkins*, *Pen. Code* 1895, § 858. But in the case at bar, whether the jury based their finding that the defendant did the killing upon the admissions of the accused herself, or upon the testimony of witnesses in the case, they could not have found the fact of the killing except from evidence or from admission which carried, in close and immediate connection with proof of the killing, circumstances of necessity, excuse, or mitigation. Of course, where the evidence or admission which established the fact of a killing contains also circumstances of the character just indicated, it would be within the province of the jury to accept the entire testimony, and give full effect to the circumstances reducing the killing from murder to some lower grade of offense than murder, or to find it justifiable homicide, or they might reject entirely all of the evidence of an exculpatory nature, if under all the proved facts and circumstances they disbelieved the same, and believe only that which tended to fix guilt upon the accused; but the charge should have been so adjusted to the facts as to allow to the jury the free exercise of their functions. The jury was authorized in this case to find that the de-

fendant did the killing from the admission of the defendant herself, but in connection with that admission she stated strong facts of mitigation, excuse, and justification. So also, the testimony of the two witnesses, Mick Smith and Pope Means, would have authorized the jury to find that the defendant committed the homicide; but it is likewise true of their evidence that it contains circumstances of mitigation, for in the same breath in which they establish the killing they show circumstances of necessity or palliation, and these would have negated the presumption of malice which would otherwise arise upon the bare proof of the homicide, had the jury from all the evidence believed them to be proved.

5. The portion of the charge complained of in the fourth ground of the motion might not constitute reversible error, but it is not entirely unobjectionable. It is true that it is in the very language of the headnote in the case of *Clarke v. State*, 35 Ga. 75, and that in that case a charge very similar to the one under consideration was approved; but in the *Clarke* Case the evidence for the state, without disclosing any circumstances of alleviation or justification, clearly proved the fact of the homicide committed by the accused. But where the very witnesses whose evidence establishes the fact of the killing include in their testimony circumstances of mitigation, malice will not be presumed, and the jury will be left free to find, from all the proved facts and circumstances in the case, whether the killing was done with malice aforethought or not.

6-8. The other errors complained of are sufficiently dealt with in the headnotes.

Judgment reversed. All the Justices concurring.

(124 Ga. 218)

MC COY v. STATE.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. ERROR—AFFIDAVIT—IN FORMA PAUPERIS.

An affidavit by the plaintiff in error that "he is, because of his poverty, unable to pay the costs" in the case, fully complies with the requirement of the statute as to taking criminal cases to the Supreme Court on affidavits in forma pauperis.

2. INDICTMENT—VARIANCE.

Where an accusation for cheating and swindling charged that the accused fraudulently procured \$10 in money from the prosecutor, evidence that the accused procured from the prosecutor and had cashed a draft for \$10 was admissible.

3. CRIMINAL LAW—WAIVER OF ERROR.

Though it was erroneous to admit, over the objection of the accused, secondary evidence of a fact, by subsequently admitting such fact in his statement to the jury, he lost the right to except to the ruling.

4. MASTER AND SERVANT—BREACH OF CONTRACT—EVIDENCE.

The evidence did not authorize the verdict, and the court erred in not granting a new trial. (Syllabus by the Court.)

Error from City Court of Baxley; J. I. Carter, Judge.

Lawrence McCoy was convicted of being a common cheat, and brings error. Reversed.

Lawrence McCoy was convicted in the city court of Baxley of being a common cheat and swindler, under an accusation based upon the act of the General Assembly of August 15, 1903 (Acts 1903, p. 90). His motion for a new trial being overruled, he excepted. The accusation charged that the accused, on December 1, 1903, in the county of Appling, contracted with the prosecutor to work for him as a laborer, with intent to procure money from him, and not to perform such service, and thereby procured from the prosecutor \$10 in money, and after procuring the same failed to perform the labor in pursuance of the contract, to the loss and damage of the prosecutor in the sum of \$10. On the trial the prosecutor testified: "On the 29th day of November, 1903, this defendant came to my place, and wanted to borrow from me the sum of ten dollars, and he wanted to cut boxes for me and work for me after Christmas. I first refused to loan him the money, knowing that he was at work for the Kirkland boys, but he stated to me that he wanted to work for me the next year, and that he was out of debt to the Kirkland boys, and that if I would let him have the ten dollars he would come to my place after Christmas and work for me. * * * Defendant agreed that if I would let him have the ten dollars, he would come back after Christmas and work for me. I did not have the ten dollars to let the defendant have in money, so I drew a draft on my factors, and gave to him, for the sum of ten dollars. The draft was of the value of ten dollars. I have been damaged, I consider, more than ten dollars by the failure of this defendant to complete his contract. He has never up to this time completed his contract. This all occurred in Appling county, this state. The defendant was to cut boxes for me after Christmas, and do work, too, during the year on my turpentine place. After Christmas the defendant came to me, and told me that Rich Kirkland claimed an account against him of six dollars, and stated that he was ready to go to work, and wanted me to pay the account of some four or six dollars for shoes to Rich Kirkland. I told him I would not do so, and told him that it would be satisfactory with me for him to go back to Rich Kirkland and work out the shoes, and that he could then come to my place and work out what he owed me. He came to see me twice about going to work for me before he went to work for me; that he could work it out in one week, and come back and go to work. Just about the 12th of March, before box season was out, he came to my place, and came on Monday morning, and commenced cutting boxes, and cut boxes for me one or two days, and then I had him to go to work

cornering boxes, and he worked at that until Friday of that week, and told me that he had left his family, and would go and see how they were, and would return on the following Monday morning, but did not make any provision about going back the following Monday morning. His wife died, so I am informed, about the month of October. My woodsman and myself counted the boxes he cut, and his work, less the amount of rations he got to live on while he was at work, amounted to two dollars and fifty-seven cents, for which amount I credited him. I have never seen the draft I gave him since I gave it to him, and do not know whether the factors have ever paid it, or whether it has ever been presented for payment. The defendant's family lived seven miles from where he did this work. I do not know whether defendant's wife ever recovered from this illness defendant referred to when he left my place on that Monday morning or not. * * * I know I paid my factors the ten dollars for the draft." Another witness for the state testified that the accused admitted to him that Mr. Davis, a son-in-law of the prosecutor, "cashed" the draft for the accused. The accused, in his statement to the jury, admitted that he procured "the draft" from the prosecutor.

J. H. Thomas and N. E. Padgett, for plaintiff in error. N. J. Holden, for the State.

FISH, C. J. 1. Counsel for the state moved to dismiss the writ of error, on the ground that the plaintiff in error had not paid the costs, nor, in lieu thereof, made an affidavit in accordance with the statute. There is an affidavit by the plaintiff in error, properly entitled, attached to the bill of exceptions, in which the affiant makes oath "that he is, because of his poverty, unable to pay the cost in said case." This affidavit fully complies with the requirements of the statute. Counsel for the state relied on *DeLoach v. Richards*, 94 Ga. 730, 19 S. E. 717, but the ruling there made is not in conflict with that which is here held. That case, as was stated in *Barnes v. State*, 105 Ga. 830, 31 S. E. 561, is incorrectly reported. The record thereof of file in this court shows that the affidavit there in question conjunctively stated that the affiant was unable to pay the costs and give security, thus failing to affirmatively show that he was unable to pay the costs.

2. The accused objected to the testimony of the prosecutor, that he drew a draft on his factors for the sum of \$10 and gave it to the accused, on the grounds that the accusation charged that the accused procured \$10 in money from the prosecutor, and this charge could not be sustained by proof that a draft for \$10 was so procured; and that the draft, being in writing, was the highest evidence of its contents. The first objection would have been meritorious if the state had offered no evidence to show that the accused procured the money for which

the draft called; but, as the prosecution introduced such evidence, the objection was without merit. While the charge in the accusation that the accused procured from the prosecutor \$10 in money could not be sustained by mere proof that he procured from the prosecutor a draft for \$10, yet if this evidence was followed by proof that the accused had the draft cashed, this would be equivalent to his procuring the money from the prosecutor. In *State v. Palmer*, 40 Kan. 474, 20 Pac. 270, the indictment charged that the accused obtained money under false pretenses. The proof was that he obtained a check, which was cashed out of money deposited in bank by the drawer of the check. It was held that there was no variance between the charge and the proof. Similar rulings were made in *People v. Dimick*, 107 N. Y. 18, 14 N. E. 178, and *Adams v. People*, 25 Colo. 532 (2), 55 Pac. 806.

3. Whatever merit there was in the other objection to the evidence in question, the accused lost the benefit of the objection when he subsequently admitted, in his statement to the jury, that he had procured "the draft" from the prosecutor; clearly referring to the draft described by the prosecutor in his testimony, as this was the only draft which had been mentioned or alluded to in the case.

4. The evidence did not warrant a verdict of guilty, and the court, for this reason, erred in not granting a new trial. As was said in *Glenn v. State*, 123 Ga. 585, 51 S. E. 605, before one can be lawfully convicted of a violation of the statute upon which this accusation was based, there must be proof of a distinct and definite contract for service. No such contract was proved in the present case. The charge in the accusation was that the accused did contract with the prosecutor to perform service as a laborer for him, with intent to procure money, and not perform such service, and did thereby procure from the prosecutor \$10 in money, and after procuring the money did not perform the labor as contracted, to the loss and damage of the prosecutor, etc. It is therefore clear that, in order to make out the case, the state had to prove that there was an existing contract at the time the accused procured the \$10 from the prosecutor; for the accused, after having procured the \$10, could not contract with the prosecutor with intent to procure it. We must look, then, for the contract upon which the accused procured the money, to what occurred before or at the time that the prosecutor gave the accused the draft for \$10. Upon this subject the prosecutor testified as follows: "On the 29th of November, 1903, this defendant came to my place, and wanted to borrow from me the sum of ten dollars, and he wanted to cut boxes for me and work for me after Christmas." The accused "agreed that if I would let him have the ten dollars, he would come back after Christmas and work for me. I did not have the ten dollars, * * * so I drew a draft on my

factors, and gave to him, for the sum of ten dollars. * * * The defendant was to cut boxes for me after Christmas, and do work, too, during the year on my turpentine place." What, then, was the agreement or promise of the accused upon the faith of which he obtained the draft for \$10 from the prosecutor? It was that he would come back after Christmas, and work for the prosecutor on the latter's turpentine place. At what time after Christmas he was to come back and work for the prosecutor was not stated. How long he was to so work was not disclosed. How he was to work—whether by the day, by the week, or the month, or by the year—or whether he was to be paid according to the amount of work he should do, is left by this evidence to mere conjecture. So, too, it is utterly impossible from this testimony to ascertain what wages, if any, the accused was to receive for his work. The contract, if such there was, was indefinite as to the time when service thereunder should begin, indefinite as to the time during which such service should continue, and wholly silent as to the compensation which should be paid for such service. Even if, by strained construction of this testimony, it could be inferred that the accused was to work for the prosecutor until the debt contracted for the loan of \$10 should be discharged, there is absolutely no way of ascertaining how much work, in time or quantity, the accused was to do in order to discharge this indebtedness, for the contract discloses no measure of compensation by which to estimate the value of his work. The accused did come back to the prosecutor's place after Christmas, and work thereon, by cutting and cornering turpentine boxes. This is all that he expressly agreed to do. Whether the work which he did was, as to time or quantity, sufficient to comply with the contract, interpreted as above indicated, cannot, for the reasons given above, be ascertained from the testimony. It is true that the prosecutor sought by his own testimony to show that the accused did not perform his contract, by testifying that the work which the accused did for him, less the amount of rations which he got to live on while at work, amounted to \$2.57; but how or where the witness got the measure of value by which to estimate in money the work done by the accused does not appear. He certainly did not get it from anything that appears in the agreement between the parties, and it does not even appear what was the market value of the work done. Of course the mere statement by the prosecutor in his testimony that the accused had never completed his contract is of no probative value whatever, being a mere conclusion of the witness. The question whether the accused completed the performance of his contract was for the jury, and not for the witness. The statute involved in this case provides that, if any person shall contract with another to perform for him services of any kind, with intent to procure

money or other thing of value thereby, and not to perform the service contracted for, etc., he shall be deemed a common cheat and swindler. A criminal statute must be construed strictly. It is clear, therefore, that before there can be a lawful conviction under this statute, the evidence must show a contract for service which is so distinct and definite as to its terms that nothing essential is left to be supplied by mere inference or conjecture. When the contract relied on is for a term of service which the parties have left indefinite and unascertainable from their agreement, it is insufficient to support a prosecution under this statute.

Judgment reversed. All the Justices concurring.

(124 Ga. 159)

IVEY et al. v. COWART.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. EVIDENCE—ADMISSIONS—TAX RETURNS.

Where the location of a line between two tracts of land was in dispute, and evidence was introduced to show the contents of certain land lots and fractional lots, and the effect which running the line as claimed by the adverse party would have on such lots and the improvements on some of them, it was admissible in rebuttal to introduce the tax returns of certain of the defendants, while claiming as owners, for the purpose of showing that they returned some of the lots as containing less land than the evidence on their behalf indicated.

2. SAME—PREVIOUS PROPOSAL TO FIX BOUNDARY.

Where land was bounded by a county line, and processioners ran and marked the line, and subsequently it was in controversy between landowners, it was error to admit evidence that at the time of the processioning one of the parties proposed to one of the adverse side that they, with the processioners, should go south to a place about seven or eight miles distant from the location of the tract of land involved, where the proposing party said there was no dispute about the county line, and run a line from that point, and that both sides should abide by it, and agree to make the decision final.

3. SAME—CONTINUATION OF ESTABLISHED BOUNDARY.

Where the location of the line between two counties was uncertain and disputed, and the lines between adjoining lands coincided with the county line, which was claimed by both sides to be a straight line, evidence was admissible to show that, for a considerable distance south of the place where the line was in dispute, owners of land in the two counties, whose lands were bounded by the county line, had built fences up to a certain line, and recognized it as being the county line, and had so bounded their possessions for 20 years or more, and that the line run between the lands of the parties by processioners was a continuation of the line so recognized.

4. SAME—ESTABLISHMENT BY ACQUIESCENCE—ACTS OF ADJOINING OWNERS.

Acquiescence for seven years by acts or declarations of adjoining landowners will establish a dividing line. But acquiescence of certain landowners, whose lands are bounded by a county line, as to the location of such boundary, will not be binding on other landowners not holding under them, and whose lands touch the county line at another place.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 232-242.]

5. INJUNCTION—TRESPASS—CODEFENDANTS.

In an equitable action seeking to recover land, to enjoin a trespass, and to recover damages against several defendants as trespassers, there was no error in refusing to charge that, "if the evidence showed that the title and possession of the defendants was not joint, or failed to show that the acts of trespass complained of by them were not committed by them jointly, then there could be no recovery by the plaintiff."

6. TRESPASS—RECOVERY AGAINST PART OF DEFENDANTS.

Under Civ. Code 1895, § 3915, where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. The jury in their verdict may specify the particular damages to be recovered by each, and judgment will then be entered severally; but the defendants are not entitled to require damages to be apportioned by the verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Tresp., § 70.]

7. SAME.

In a suit against several persons as trespassers, some of the defendants may be found to be trespassers, and a recovery may be had against them, while some may be found not to be trespassers, and a verdict rendered in their favor.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Tresp., § 70.]

(Syllabus by the Court.)

Error from Superior Court, Early County; J. D. Rambo, Judge pro hac.

Action by J. S. Cowart against R. F. Ivey and others. There was judgment for plaintiff as against defendants R. F. Ivey and another, and they bring error. Reversed.

J. S. Cowart brought suit against R. F. Ivey, F. P. Ivey, T. J. Ivey, M. E. Livingston, E. E. Ivey, and Mollie Ivey, seeking to recover a strip of land which he claimed formed a part of land lot No. 400, in the sixth district of Early county, to recover damages for a trespass alleged to have been committed by the defendants in cutting timber on it, to enjoin further trespassing, and to recover the land and mesne profits. On the trial the jury found in favor of the plaintiff, and also that the plaintiff recover of R. F. Ivey and E. E. Ivey \$150 as damages. The court entered judgment that the plaintiff recover of the defendants the premises in dispute, and that he recover of R. F. Ivey and E. E. Ivey \$150 "for damages or mesne profits." Defendants moved for a new trial, which was refused, and they excepted.

Wm. C. Worrill and W. D. Sheffield, for plaintiffs in error. A. G. Powell, for defendant in error.

LUMPKIN, J. 1. The parties were in controversy as to the location of the line between lot No. 400 in the sixth district of Early county, and lots Nos. 381 and 382 in the seventh district of Baker county. Land lot No. 381 was a fractional lot, as was also lot No. 380, which lay just east of it. In seeking to determine where the line between Baker and Early counties ran, evidence was

introduced as to the contents of various lots, and what effect as to the settlements upon some of the lots the establishing of the line in one place or another would have. Thus it was contended that lot No. 381 contained 50 acres. Plaintiff responded by introducing the tax returns of one of the defendants, showing that it had been returned as 10 acres. The returns of this defendant as to the other adjacent lots for that year were introduced, and the tax returns of another defendant for a preceding year were also introduced. Each return was made while the defendant making it claimed the land. These were admissible, and tended to throw some light on the question at issue. As to the admissibility of tax returns as admission, see *Tolleson v. Posey*, 32 Ga. 372; *Lynch v. Lively*, 32 Ga. 575; *Smith v. Haire*, 58 Ga. 446; *Mashburn v. Dannenberg Co.*, 117 Ga. 567, 44 S. E. 97 (18). One of the returns introduced contained lot No. 337, which does not appear to have been a contiguous lot. The only possible relevancy of this, so far as we can perceive, was to explain the difference in the quantity of land included in the two returns; and this was no doubt the purpose of its introduction.

2. Evidence was introduced, over objection, that when processioners of Baker county ran the line between the property of the plaintiff and that of M. A. V. Ivey, one of the defendants (who appears to be the defendant called Mollie Ivey in the declaration), R. F. Ivey, another defendant, representing her, was present; that plaintiff proposed to him that they, with the processioners, should go south to a place about seven or eight miles distant, where the line between Baker and Early counties was undisputed, and run it from that point, and that both should abide by it, and agree to make the decision final, but that R. F. Ivey refused. This ruling was hurtful error. A proposition to begin a survey at a point which the proposer claimed was undisputed, and that the decision based upon the line thus run should be final, which was rejected by the adverse side, was not admissible in behalf of the person making the proposition. The possible injury which may have resulted from this error is made clear by another ground of the motion for a new trial, which alleges that counsel for plaintiff commented on this testimony, and urged that it showed R. F. Ivey to be unfair and acting in bad faith in his contention as to the line claimed, and that his testimony was therefore unreliable.

3. The line between the property of the plaintiff and that of the defendant coincided with the county line between Baker and Early counties, which both sides treated as being a straight line. Evidence was admitted to show that for a considerable distance south of the place where the line was in dispute owners of land in Baker and Early counties bounded by the county line had built dividing fences up to the line, and recognized it as the county line, and had so

bounded their possessions for 20 years prior to the trial, and that the line lately run by the processioners was a continuation of the same line. This was objected to on the ground that it was irrelevant and not binding on the defendants. The evidence admitted may not strictly fall within the rule that "traditionary evidence as to ancient boundaries and landmarks is admissible in evidence, the weight to be determined by the jury according to the source whence it comes." Civ. Code 1895, § 5185. But where a public boundary, such as a county line, is the dividing line between two lots of land, use and occupancy by other neighboring landowners, whose lands are also bounded by the county line, for more than 20 years, up to a certain line as the county line, erecting fences, and treating it as the county line, and the fact that such line coincides with that claimed by one of the parties, is admissible. *Tyler's Law of Boundaries*, 296 et seq.; *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. 376 (8); *Taylor v. Fomby*, 116 Ala. 621, 22 South. 910, 67 Am. St. Rep. 149; *Wimblish v. State*, 70 Ga. 718; *Riley v. Griffin*, 16 Ga. 142 (18), 60 Am. Dec. 726; *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415. This hearsay or traditionary evidence was not conclusive on the defendants as to the location of the county line, but it was admissible, and its weight was to be determined by the jury.

4. It is complained in the sixth ground of the motion for a new trial that the court charged as follows: "General reputation in the neighborhood shall be evidence as to ancient landmarks, * * * if more than seven years standing, and acquiescence for seven years, by acts or declarations of adjoining landowners, shall establish a dividing line." The entire charge is not sent up, and this seems to be an incomplete extract, with some words omitted. Apparently the charge was taken from Civ. Code 1895, § 3247, which provides that "general reputation in the neighborhood shall be evidence as to ancient landmarks of more than thirty years standing, and acquiescence for seven years, by acts or declarations of adjoining landowners, shall establish a dividing line." This section is incorporated in the law of processioning. If the presiding judge meant to state that ancient landmarks of more than seven years standing were referred to in that section. It was a misquotation. The latter part of the charge also is not clear. Where lots of land are described as being bounded by a line between two counties, acquiescence for seven years by owners of some of the lands thus bounded would not be conclusive as to the true location of the line as against others, whose lands touched the line at a different point. It would be for the jury to determine, from all the evidence, where the true line was. If the location of the line was uncertain, and the parties to the controversy, or their predecessors in title, while holding it, had acquiesced by acts or

declarations for seven years or more in a dividing line between their lots, this would establish it as to them. Civ. Code 1895, § 3247; *Riley v. Griffin*, 16 Ga. 142 (19), 60 Am. Dec. 726; *Watt v. Ganahl*, 34 Ga. 290; *Glover v. Wright*, 82 Ga. 115, 8 S. E. 452; *Catoosa Springs Co. v. Webb*, 123 Ga. 33, 50 S. E. 942.

5. It is contended that the presiding judge erred in refusing a request to give in charge the following: "If the evidence showed that the title and possession of defendants was not joint, or failed to show that the acts of trespass complained of them were not committed by them jointly, then there could be no recovery by plaintiff." It has been held by some courts that in an action of ejectment several defendants in possession, although holding separate and distinct titles, may be joined where the plaintiff's title in relation to all is the same, and they may defend separately, each for the part in his possession. *Adams on Ejectment* (4th Ed.) side p. 237, note 2; *Tyler on Ejectment*, 445, 446, 580, 581; 15 Cyc. 83; *Jackson v. Woods*, 5 Johns. 278. This court announced a different rule in *Wood v. McGuire*, 17 Ga. 308 (7); and the decision there made has been embodied in Civ. Code 1895, § 5000, in the following language: "When several persons claim several parcels of land under distinct titles, and do not sustain the relation to each other of landlord and tenant, a joint action of ejectment cannot be maintained against them, nor can a joint or several recovery be had in such action, either for the premises or mesne profits." The point may be raised by demurrer if the fact appears on the face of the proceedings (*Lewis v. Adams*, 61 Ga. 559), or by motion for nonsuit if it first appears from the evidence. In the latter event the plaintiff may dismiss as to the improper parties. *Cunningham v. Bradley*, 26 Ga. 238. And it has been said that where two or more defendants are charged in the plaintiff's declaration with holding possession of the premises in dispute jointly, if it appear on the trial that each of them possesses a parcel of the land not jointly but in severalty, the plaintiff will be entitled to a verdict for one possession only, at his election. *Tyler on Ejectment*, 580, 581; *Jackson v. Hazen*, 2 Johns. 438. The present action is neither ejectment nor complaint for land, but an equitable action, seeking not only to recover land, but also to enjoin a trespass, and to recover damages for a trespass already committed. The fact that it may seek to recover land and damages, as well as to have equitable relief, does not prevent it from being an equitable action. *Collinsville Granite Co. v. Phillips*, 123 Ga. 830, 51 S. E. 666. No demurrer was filed to it as being without equity, nor was any defense made on the ground of misjoinder of parties, and the case proceeded as such an action, including a prayer for injunction, al-

though in fact none was granted. The common-law rule that in a joint action all of the plaintiffs must recover or none does not prevail in equity. In *Bigham v. Kistler*, 114 Ga. 453, 40 S. E. 303, it was said: "It is well settled at law that in a joint action to recover land, if it appears that one of the plaintiffs is not entitled to recover, the suit will fail as to all. * * * But even in cases of this character, where equitable defenses are interposed, the common-law rule above referred to will not be applied. *Rumph v. Truelove*, 66 Ga. 480 (2); *Milner v. Vandivere*, 86 Ga. 540, 545, 546, 12 S. E. 879. Much more would such a rule not be applicable in an action which is purely equitable. * * * The common-law rule that all must recover or none was never adopted by courts of equity. In such a case a decree will be moulded so as to do justice to all the parties. See *Pomeroy's Rem. Rights*, § 209 et seq." It would seem that in an equitable action against several defendants, the rule would equally apply that a failure to recover against some would not necessarily result in a failure as to all.

6. Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. The jury may in their verdict specify the particular damages to be recovered of each, and judgment will then be entered severally. But the defendants are not entitled to have damages apportioned by the verdict. Some of the defendants may be found to be trespassers, and a recovery may be had against them, while some may be found not to be trespassers. *Civ. Code 1895*, § 3915; *McCalla v. Shaw*, 72 Ga. 458; *Hollingsworth v. Howard*, 113 Ga. 1099, 39 S. E. 465; *Hay v. Collins*, 118 Ga. 248, 44 S. E. 1002. Of course there cannot be a recovery for a trespass against a defendant if he is not connected with it. To recover against defendants as against trespassers they must be such.

On the subject of whether in a suit brought against two or more defendants as partners a recovery can be had against one there has been some diversity in the decisions of this court; but it has been said that, even in that case, a separate verdict may be had, and, if no objection was made until after verdict, it comes too late. *Maynard v. Ponder*, 75 Ga. 664. See, also, *Waldrop v. Wolff*, 114 Ga. 610, 617-619, 40 S. E. 830. The decision in *Swift v. Tatner*, 89 Ga. 680, 673, 15 S. E. 842, 32 Am. St. Rep. 101, does not conflict with the ruling here made. There an attachment was taken out against several defendants as joint owners of a ship, and it was held "that plaintiff having failed to prove the joint ownership as alleged, and that being the foundation of liability as to certain of the defendants, and this being an attachment case, the court erred in not granting a new trial for the want of evidence to uphold the joint verdict." Nor is

there anything in the decision of *Brownlee v. Abbott*, 108 Ga. 761, 33 S. E. 44, in conflict with the present ruling. There, also, a joint verdict was rendered as to several defendants, without evidence to support it as to some of them.

As the case must be tried again, we refrain from expressing any opinion as to the evidence.

Judgment reversed. All the Justices concurring, except BECK, J., not presiding.

(124 Ga. 181)

HUXFORD v. SOUTHERN PINE CO. et al.
(Supreme Court of Georgia. Nov. 13, 1905.)

1. APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions which recites that a motion to dismiss a petition was made upon various grounds and overruled, and that to this ruling "the defendant then and there excepted, and now assigns the same as error," and that a motion for a new trial was made and overruled, and to this ruling "the defendant excepted, and now assigns the same as error," specifies "plainly the decision complained of and the alleged error," and specifically sets forth the error alleged to have been committed," within the meaning of *Civ. Code 1895*, §§ 5527, 5528.

2. INJUNCTION—TRESPASS—IRREPARABLE INJURY—PLEADING.

A petition by an owner of land and another, who holds a timber lease from him, alleging that, when the lessee entered into possession and undertook to exercise the privileges granted under the lease, the defendant, by threats of violence, intimidated the servants of the lessee, and drove them away from the land, and by intimidation continues to prevent the lessee and his servants from entering upon the land, thereby making it impossible for the lessee to exercise his rights under the lease, and praying for permanent injunction to restrain the wrongful conduct complained of, sets forth a cause of action, authorizing the granting of a writ of injunction, as against a motion to dismiss, in the nature of a general demurrer, made at the trial term.

3. EVIDENCE—JUDICIAL NOTICE.

The courts of this state take judicial notice of the governmental survey of its territory and the relative location as originally laid off, as well as the effect of legislative enactments creating new counties, and fixing the boundary lines thereof.

4. TAXATION—WILD LANDS.

The act of 1874, regulating the manner of returning wild lands for taxes, authorizes the Comptroller General to issue an execution against an unreturned lot of wild land for the taxes of that year.

5. TRESPASS—OWNERSHIP OF LAND—FINDINGS.

In actions of trespass to realty, ownership of the premises is incidentally involved, and while in such cases a special finding by the jury as to ownership is not required, the incorporation of such a finding will not vitiate it, if the verdict is in other particulars regular and proper.

6. INJUNCTION—MANDATORY INJUNCTION.

The finding of the jury in favor of a permanent injunction did not, in the light of the petition and evidence, have the effect of granting an injunction which was mandatory in its nature.

7. SAME—EVIDENCE.

The evidence demanded the verdict directed by the court, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by the Southern Pine Company of Georgia and J. I. Crawley against C. Huxford. Judgment for plaintiffs, and defendant brings error. Affirmed.

The Southern Pine Company of Georgia, a corporation, and J. I. Crawley were the plaintiffs and C. Huxford was the defendant. The petition alleged that the Pine Company was the owner of two described lots of land, and had a perfect title thereto, an abstract of which was attached to the petition, and that it had authorized Crawley to enter upon one of the lots, and box the timber thereon for turpentine, and to cut the timber suitable for cross-ties on the other. The petition then proceeded as follows: "Your petitioner further shows that, when said J. I. Crawley undertook to exercise the privilege which had been granted unto him by the said Southern Pine Company of Georgia, and had made arrangements to box and work the timber on said lot 236 aforesaid for turpentine, and to cut and remove the timber for cross-tie purposes on said lot 189 aforesaid, and had his agents, servants, and employes enter thereon for these purposes, respectively, thereupon C. Huxford, of said county, came on said lots of land where the employes of said J. I. Crawley were at work, and by threats of violence intimidated the employes of said J. I. Crawley, and drove them away from their work, and has since continued his said threats, and by intimidation continues to prevent the said J. I. Crawley and his employes from entering upon said lots of land, and boxing and using the same for turpentine, or cutting, felling, and removing the timber for cross-ties therefrom; and the said C. Huxford, by and through his intimidation aforesaid, makes it impossible for your petitioner to exercise their rights of ownership in and to the aforesaid property, and unless the said defendant is restrained and enjoined from further interference with your petitioners' rights in the premises, he will continue to intimidate the employes of said J. I. Crawley, and thereby defeat his right to exercise the privilege he has and holds in the timber aforesaid, and as well defeat the right of your petitioner Southern Pine Company of Georgia, who is the true and lawful owner thereof, and thus irreparably injure and damage your petitioners, respectively; and, being without remedy at common law, they therefore ask the aid and intervention of a court of equity for protection." There was no allegation of insolvency. The prayers were for an interlocutory injunction, and, upon the final hearing, for a permanent injunction, for damages, and for process. At the trial term the defendant moved to dismiss the petition upon various grounds, among them that there was no cause of action; that there was no allegation of insolvency, nor that the damages would be irreparable, nor that an injunction was necessary to avoid a multiplicity of suits; that

the abstract of title attached to the petition is insufficient; that the petition asks that defendant be enjoined from committing a crime not affecting the property of plaintiffs; and that there is an adequate remedy at law for a recovery of damages for the alleged injury. The motion was overruled, and the defendant excepted *pendente lite*. The case proceeded to trial, and at the close of the plaintiffs' evidence, the defendant introducing no evidence, the court directed the jury to find a verdict in favor of the plaintiffs for a permanent injunction. The defendants made a motion for a new trial, which was overruled. Error is assigned in the bill of exceptions upon the judgment overruling the motion to dismiss, and upon the refusal to grant a new trial.

Frankford & Dickerson, for plaintiff in error. Jno. C. McDonald, for defendants in error.

COBB, P. J. 1. There was no motion to dismiss the writ of error, but the point is raised in the brief of counsel for the defendant in error that the assignments of error are not sufficiently definite and specific to be considered. The bill of exceptions recites that a motion to dismiss the petition was made upon grounds therein set forth, and was overruled, and the assignment of error is in the following language: "To which said ruling the defendant then and there excepted, and now assigns the same as error." This was sufficient to bring under review any question raised by the motion to dismiss. *Melson v. Thornton*, 118 Ga. 99, 88 S. E. 342 (2). The bill of exceptions also recites that a motion for a new trial was overruled, and the assignment of error on this judgment is in the following language: "To which said order the defendant excepted, and now assigns the same as error." This assignment of error is in compliance with the rule of this court in reference to assignments of error of the character now under consideration. Rule of Court 6; Civ. Code 1895, § 5605.

2. The plaintiffs are not the owners of timber, complaining of a trespass by a timber cutter, but they are timber cutters themselves, whose right to cut is alleged to have been interfered with by one who, they allege, is not the owner, nor in any way interested in the timber. It is apparent, therefore, that the timber cutter's act (Civ. Code 1895, § 4927) has no application to the case. The case must therefore be determined upon general equity principles governing where an application is made to enjoin a wrongdoer or trespasser from interfering with a property right of another. The circumstances under which a court of equity will by injunction interfere in such a case are set forth in Civ. Code 1895, § 4916, which is in the following language: "Equity will not interfere to restrain a trespass, unless the injury is irreparable in damages, or the trespasser is insolvent, or there exist other circumstances which, in the discretion of the court, render

the interposition of this writ necessary, among which shall be the avoidance of circuitry and multiplicity of actions." There is no allegation of insolvency. The petition sets forth the wrongful conduct complained of, which is the interference with the plaintiffs in the right to the exclusive control of their property and the quiet possession of the same, and the narrative concludes with the averment that the plaintiffs are without a remedy at law, and would be irreparably injured and damaged. A mere general averment that the damages resulting from a wrongful act would be irreparable, being only a conclusion of the pleader, is generally not sufficient. *Burrus v. Columbus*, 105 Ga. 46, 31 S. E. 124 (2). It is necessary that the petition should set forth the facts, so that the court may determine whether the damages would be of this character. It is therefore necessary to determine whether, under the averments of the petition, such a case is made as would authorize a court of equity to interpose in behalf of the plaintiffs, and grant the injunction prayed for.

The question of the sufficiency of the petition not having been raised until the trial term, the averments of the petition will not be subjected to that scrutiny which would be required if the defects had been pointed out by special demurrer. While it is not alleged in terms that the wrongful acts complained of would give rise to a multiplicity of actions for damages, still it is apparent that the only remedy which the plaintiffs would have at law would involve a multiplicity of actions. The Pine Company is the owner of the land, and Crawley holds a timber lease under it. The Pine Company is entitled to the peaceful and uninterrupted occupation of its property, either by itself or its tenant, and Crawley is entitled to possession of the same character under his lease. The servants of Crawley have been driven from the place by the wrongful act of the defendant, and by intimidation, which continues from day to day, he prevents Crawley and his servants from using the timber upon the property for the purposes which, under the lease, he had a right to use it. Every day that he is deprived of the possession of the premises gives him a right of action against the defendant to recover such damages as would result from this wrongful act. Frequent acts of trespass, accompanied with a threat to continue, constitutes a sufficient reason to grant an injunction. *Bish. Prin. Equity* (4th Ed.) 490; 1 *High on Injunction* (3d Ed.) 536. In *Gray Lumber Co. v. Gaskin*, 122 Ga. 351, 50 S. E. 164, it was said: "An action at law for damages would have been a complete remedy for the injury sustained prior to the suit; but it would not have prevented further trespasses. Ought the plaintiffs to be harassed and annoyed by being required to bring a new suit every day as long as the trespasses continued, when the whole controversy could be settled in one suit? As has been shown

above, the Code expressly authorizes the judge, in his discretion, to grant an injunction to restrain a trespass in any case where, under equitable principles, the writ should issue, and enumerates among such cases the prevention of a multiplicity of suits." But even if he were to bring suit each day for the wrongful conduct of the defendant on the day preceding, the damages recovered in all such suits would not be an adequate compensation for the wrong done by depriving him of the right to cut and dispose of the timber as he is authorized to do under the lease. It is not a sufficient reply to an application for an injunction that the defendant has a remedy by suit at common law for damages, but it must appear, in addition, that the common-law remedy is adequate and complete. Even if in a suit for damages against the defendant for wrongfully preventing Crawley from taking possession of the timber a recovery could be had for the value of the standing timber, there could not be a full recovery for all the damages sustained by him, for the reason that the profits resulting to him from the marketing of the timber after it has been cut, or other uses to which he may lawfully put the same, are dependent upon so many contingencies that it is impossible to estimate what such profits would be. The allegations of the petition are sufficient, not only to make a case of irreparable injury as against a motion to dismiss in the nature of a general demurrer, but also to show that the only remedy at law available to the plaintiffs involves a multiplicity of actions. But it is said that the application is one merely to prevent the commission of a crime, and that a court of equity has no criminal jurisdiction, and that an injunction will not be granted for the purpose of preventing a criminal act. The general rule undoubtedly is that no injunction, or order in the nature of an injunction, will be granted to restrain proceedings in a criminal matter; but where it is evident that a right of private property is involved and is invaded, or is about to be invaded, by acts which are criminal in their nature, equity will interfere by injunction to protect such right, and prevent the commission of the criminal act. See cases cited; 7 *Ency. Digest Ga. Rep.* 347. None of the grounds in the motion to dismiss was well taken, and there was no error in overruling the same.

8. While an assignment of error upon the admission of evidence will not be considered unless it appears that the objection relied on was made at the time that the evidence was offered, still when evidence has been admitted, either with or without objection, the losing party may in a motion for a new trial raise the question that the evidence as admitted was not sufficient to authorize the verdict rendered. A party may allow a deed relied upon by his adversary to go in evidence without objection, but his failure to object does not preclude him from urging in his motion for a new trial that the deed is invalid for

some reason appearing upon the face of the same, or for other reason appearing in the evidence. While a number of documents were admitted in evidence without objection, the defendant in his motion now complains that the verdict is unsupported, for the reason that the evidence as a whole, including these documents, was not sufficient to authorize a finding in favor of the plaintiffs. The petition alleged that the Pine Company was the owner of lots Nos. 189 and 236 in the Seventh district of Clinch county. In the plaintiffs' chain of title to one of the lots appears a grant from the state to lot No. 189 in the Seventh district of Appling county, and a deed to lot No. 189 in the Seventh district of Appling county. It appears from the abstract of the deed in the brief of evidence that the Seventh district of Appling county is now the Seventh district of Clinch county. But even if this did not appear, the courts would take judicial notice of that fact. *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161.

4. There was in the plaintiffs' chain of title a tax deed which was based upon a sheriff's sale under an execution issued by the Comptroller General against an unreturned lot of wild land. The execution was issued for the taxes of the year 1874. It is claimed that this deed is void, upon the ground that it did not appear from the evidence that there was an advertisement by the Comptroller General of the land as unreturned wild land, in which the owner was required to come forward and pay taxes upon the same, as required by law, before the execution was issued; and for the further reason that the execution was void, the taxes for which the same was issued being for the year 1874, the act under which the execution was issued having been passed after the beginning of that year. The deed recites a compliance with the provisions of the act of 1874 (Acts 1874, p. 106), and the execution is regular upon its face. But, even if this were not so, there is a presumption that the Comptroller General complied with his duty as to advertising in the manner required by the act, and the burden of proof was upon this defendant to show that he did not. *Bedgood v. McLain*, 94 Ga. 283, 21 S. E. 529. See, also, *Bentley v. Shingler*, 111 Ga. 780, 36 S. E. 935, and citations. The act of 1874 was approved February 28, 1874. It provided that from and after its passage wild lands owned by the citizens of this state should be returned to the tax receiver of the county of their residence by the 1st day of July in each year, and such land owned by nonresidents shall be returned to the Comptroller General by the 1st day of August in each year. Provision was then made for the collection of taxes upon both returned and unreturned wild land. It was clearly contemplated that this act should apply to the taxes of the current year, as it was approved prior to the time then fixed by law for the valuation of property for taxation, and also several

months before the time fixed in the act for the return of the property affected by the act. No taxes for 1874 were due on the 28th day of February of that year, and the date for the valuation of all property at that time was the 1st day of April in each year. The lot in question not having been returned for taxation in the year 1874 in the manner prescribed by the act, the Comptroller General had authority to issue an execution against the lot for the taxes of that year.

5. The jury returned a verdict finding that the lots in dispute belonged to the Southern Pine Company, and that Crawley had the right to exercise his privilege under the lease; also finding in favor of a permanent injunction against the defendant. It is claimed that that part of the verdict which finds that the lots in dispute belong to the Southern Pine Company is illegal, for the reason that the land is situated in Clinch county, and the present suit was brought in Coffee county, where the defendant resides, and that the superior court of the latter county has no jurisdiction to determine any question of title to the land. If the purpose of the suit was to recover possession of the land, of course the superior court of Coffee county would have no jurisdiction. Such was not the object to be attained by the judgment prayed. It was simply to restrain the defendant from doing acts prejudicial to the rights of the plaintiffs, one of whom claimed to be the owner of the land. The title to the property was incidentally and collaterally involved, but it was not such a suit respecting title to land as under the Constitution is required to be brought in the county where the land lies. It was incumbent upon the plaintiffs to show that they had such an interest in the property as a court of equity would protect, and they showed this interest by showing a complete chain of title. While it was not necessary for the jury to specifically find that the property belonged to the plaintiffs, it was necessary that the jury, before they could find in favor of a permanent injunction, should believe that ownership in the plaintiffs was established. The insertion in the verdict of the finding as to ownership will not vitiate the verdict.

6. It is contended that the verdict of the jury is in fact the finding of a mandatory injunction, and that such an injunction is unauthorized by the law of this state. It is said that the effect of the injunction is to transfer the possession of the property from the defendant to the plaintiffs. We do not think this is a proper construction to be placed upon the prayer and petition, or upon the verdict, which is in accordance with that prayer. It does not appear, either from the petition or from the evidence, that the defendant was in possession of the land. So far as the record discloses, he has simply driven the servants of Crawley from the land, and by intimidation prevented them from going upon the same. Whether he was

in possession himself at the time of the wrongful acts complained of, or whether he was out of possession, and by intimidation kept the servants of Crawley from entering, does not clearly appear. It is to be inferred from the allegations of the petition that he was not in possession, and there is nothing in the evidence to indicate that he was. We do not think that the injunction as it stands could be construed into one which is mandatory in its nature.

7. The defendant introduced no evidence. A witness for the plaintiffs testified that the defendant told him he did exactly what was alleged in the petition; that he claimed the land; that he ran the hands off, as set out in the petition; and that he was not going to let the plaintiffs get the timber, as it was his. This evidence, uncontradicted, not only warranted but required the verdict which the court directed. There was no error in directing the verdict, and no reason has been shown for reversing the judgment.

Judgment affirmed. All the Justices concurring, except BECK, J., not presiding.

(124 Ga. 376)

S. G. MOZLEY & CO. v. FONTANA.

(Supreme Court of Georgia. Nov. 20, 1905.)

EXEMPTION—ESTOPPEL OF WIFE TO CLAIM.

Where a man, as the head of a family, including his wife and minor children, applied for an exemption of personalty under the Constitution of 1877, and certain creditors objected, on the grounds that he had previously made a conveyance of a part of the property contained in the schedule to another person, and did not have title to it, and that also that the title to certain articles named in the schedule was not in him, and where, after hearing evidence, the ordinary dismissed the application without stating any ground therefor, this did not estop the wife of the applicant from making another application for exemption of the same and other property at a later date, alleging that her husband refused to apply.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by S. G. Mozley & Co. against Antonio Fontana. Judgment for plaintiff. Application of Rosa Fontana to have certain personal property set aside as exempt. From the judgment, Mozley & Co. bring error. Affirmed.

Antonio Fontana made application, on June 12, 1903, to have an exemption set apart to him under the Constitution of 1877, as the head of a family consisting of himself, his wife, and minor children. The schedule of personal property attached to the application contained certain marble and granite pieces, household furniture, live stock, machines, drays, buggies, and similar articles, and a growing crop of hay on each of two places. Mozley & Co., as judgment creditors, filed objections to the granting of the exemption on two grounds: First, that a part of the property sought to be exempted was not the

property of the applicant but had long since been deeded by him to one Joseph Fontana; and, second, because the title to certain described property was not in the applicant. On July 15, 1903, to which time the hearing had been continued, the ordinary passed an order that "after hearing evidence submitted in said case, and argument of counsel, it is ordered said application be dismissed." From this judgment an appeal was entered to the superior court. A motion was made to dismiss the appeal, on the ground that it could only be taken in cases provided by the statute (Civ. Code, §§ 2836, 2838), where certain objections were made by creditors. The motion was overruled, and this judgment was reversed. *Fontana v. Mozley & Co.*, 121 Ga. 46, 48 S. E. 707. On January 3, 1905, Rosa Fontana, the wife of Antonio Fontana, made application for an exemption of personalty, alleging that her husband was the head of a family of minor children, that he refused to apply for an exemption, and that she desired to do so. Attached to her application was a schedule of personalty, which appears to contain the same items as the schedule attached to the former application of her husband. By amendment, she added to it a number of other items of personalty. Mozley & Co. filed objections (as stated in the answer of the ordinary to the writ of certiorari), on the ground that the husband did not refuse to apply for the setting apart of an exemption, and that the property embraced in the schedule was not the property of the husband, "except to the extent and for the purpose of making said property liable for and subject to the said judgment debt of S. T. Mozley & Co., the judgment creditors of Antonio Fontana." They also pleaded that the judgment dismissing the application of the husband estopped the wife and children from applying for an exemption. The ordinary sustained this plea. The case was carried to the superior court by writ of certiorari, which was sustained upon the hearing, and Mozley & Co. excepted.

Price Bros. and Chas. P. Pressley, for plaintiff in error. C. Henry Cohen and S. H. Myers, for defendant in error.

LUMPKIN, J. (after stating the facts). It is not essential that the head of a family should have the legal title to property in order to apply for a homestead or exemption. "No present interest or estate in land beyond that implied in the fact of possession is requisite to sustain the claim of exemption as against a debt or lien inferior to the exemption right." *Pendleton v. Hooper*, 87 Ga. 108, 13 S. E. 313, 27 Am. St. Rep. 227; *Whitehead v. Mundy*, 91 Ga. 198, 17 S. E. 287. In a contest between one who claims the homestead and a person asserting a paramount title to the property, the general law applicable to titles would determine their respective rights. As against a title conveyed to secure a debt, a homestead would avail

nothing. *Johnson v. Griffin, etc., Co.*, 55 Ga. 691; *West v. Bennett*, 59 Ga. 507; *Christopher v. Williams*, 59 Ga. 779; *Kirby v. Reese*, 69 Ga. 452. It therefore furnishes no ground of objection on the part of creditors to allege merely that the title to the property is not in the applicant, or that he has made a conveyance of it. In the present case, the objectors insist that the applicant cannot obtain an exemption, because her husband does not own the property, and yet claim a status to urge this objection so as to subject the property as his. The objections made to the application of Antonio Fontana were not specified in the statute. The ordinary dismissed the application, not on demurrer, but after hearing evidence. He did not state any grounds for the dismissal or adjudicate in terms that no exemption could at any time be granted to the applicant. We think his action should be analogized to that of the magistrate in the case of *Roseberry v. Roseberry*, 81 Ga. 122, where it was held, that "an order of magistrates or of a magistrate, before whom a possessory warrant is returned, dismissing the warrant, without any reason stated in the order or appearing in the record, will not be regarded as an adjudication of the right of possession in favor of the defendant, but as a nonsuit, or dismissal in the nature of a nonsuit." The decision in that case has been criticised on another point, but not as to that just referred to. See *Weaver v. Carter*, 101 Ga. 209, 28 S. E. 869. In *Phipps v. Alford*, 95 Ga. 215, 22 S. E. 152, it was said: "Where an action was brought in a justice's court, which after the hearing of evidence was dismissed by the court, and an appeal entered by the plaintiff and thereafter dismissed by him, this constituted no bar to bringing a second suit upon the same cause of action." See, also, *Herndon v. Black*, 97 Ga. 327, 22 S. E. 924; *Alabama R. Co. v. Blevins*, 92 Ga. 522, 17 S. E. 836. The order dismissing the application of Antonio Fontana in 1903 did not estop his wife from making an application for an exemption in 1905. It might furnish additional reason for so holding, if more were necessary, that some 18 months intervened between the two applications; and even if the husband did not own or have an interest in the property when he made his application, it would not necessarily follow that such was not the case when the second application was made by the wife; and moreover the amended schedule annexed to the application made by the wife contains a considerable amount of property which was not included in the application of the husband. It is contended in the brief of counsel that these additional items arose from the use of the property described in the first schedule, but there is nothing in the record to show this. In fact, the objections filed to the husband's application did not purport to cover all the property included in the schedule.

When a homestead or exemption has been

granted to the head of a family, he occupies the position of a trustee, and a judgment against him touching the homestead property, such as a judgment recovering it from him or subjecting it to a debt, binds the beneficiaries. *Barfield v. Jefferson*, 84 Ga. 609, 11 S. E. 149; *Wegman Piano Co. v. Irvine*, 107 Ga. 65, 32 S. E. 898, 73 Am. St. Rep. 109; *Willingham v. Slade*, 112 Ga. 418, 37 S. E. 737. But the difference between such a judgment and one of the character here pleaded in bar is apparent.

Judgment affirmed. All the Justices concurring.

(124 Ga. 384)

AUGUSTA RY. & ELECTRIC CO. v. WEEKLY.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. NEGLIGENCE—PLEADING AND PROOF.

In a suit to recover damages for personal injuries alleged to have been sustained by reason of negligence on the part of the defendant, the plaintiff must recover, if at all, upon proof establishing the specific acts of negligence alleged in his petition.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 203-206.]

2. TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.

Even in a case to which the doctrine of "res ipsa loquitur" is applicable, it is erroneous for the court to charge the jury that a given state of facts either constitutes, or affords prima facie proof of, negligence, when there is no statute expressly declaring that this is true as matter of law.

3. ELECTRICITY—STREET RAILROADS—LIVE WIRES—INJURY TO PEDESTRIAN.

The charge of the court being in certain respects inaccurate and prejudicial to the excepting party, a new trial is ordered.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Joseph Weekly against the Augusta Railway & Electric Company. Judgment for plaintiff. Defendant brings error. Reversed.

Wm. H. Barrett and Boykin Wright, for plaintiff in error. C. Henry Cohen and Bryson Crane, for defendant in error.

EVANS, J. The plaintiff below, Joseph Weekly, brought an action for damages against the Augusta Railway & Electric Company, alleging that he had received serious injuries by coming in contact with a live wire belonging to the defendant company, which was lying across a public thoroughfare in the city of Augusta. The trial resulted in a verdict in favor of the plaintiff, and we are called on to determine whether or not the company's motion for a new trial should have been granted.

1. Our attention is called, in the first place, to the fact that the investigation of the case was not confined to the issues raised by the pleadings. The plaintiff alleged in his petition that the breaking of the wire and the

falling thereof to the ground were due to the negligence of the company in its maintenance of the wire, and that "the falling of said wire to the ground, as aforesaid, was due to the negligence of the said defendant in creating negligently, and maintaining, a dangerous condition that made the injury to petitioner possible." No complaint was made that the company did not exercise due diligence in discovering that the wire had fallen, or that the company was negligent in not promptly cutting off the deadly current with which it was charged, or that the company had failed to take proper steps to remove the wire from the street after it fell. The court declined a written request to give to the jury a charge presented in behalf of the company, wherein the specific acts of negligence upon which the plaintiff relied for a recovery were correctly stated and attention directed to the fact that a negligent failure to cut off the current was not alleged, and in which the proposition was laid down that no acts of negligence other than those alleged in the petition could be proved or considered by the jury. The court did, in general terms, instruct the jury that if they should find "the defendant was guilty of the acts of negligence set out in the declaration," and injury to the plaintiff resulted therefrom, while he was in the exercise of ordinary care and diligence, he would be entitled to recover. But nowhere in the charge did the court undertake to inform the jury what were "the acts of negligence set out in the declaration," and, in charging the jury as to what would constitute due negligence on the part of the company, instructed them as to the duty resting on the company not to permit a wire, after it had fallen, to remain in a dangerous condition for an unreasonable length of time. Indeed, throughout the entire charge the court made the liability of the company depend, not alone upon the question whether or not it had exercised all ordinary and reasonable care in "constructing, maintaining, and inspecting its wires," but upon the further inquiry whether or not it had, "after the fall, exercised such care in repairing same."

2. A charge of which the plaintiff in error makes special complaint was in the following language: "If the jury believe that a horse attached to a brewery wagon stepped on a wire belonging to the Augusta Railway & Electric Company and fell to the ground in a dying condition, and the driver was thrown to the ground, receiving a shock and burn, it would be *prima facie* proof of defective insulation and negligence." Unless the commission of a particular act or an omission to do a particular thing be declared by law to constitute negligence, it is error for a judge to instruct the jury that such act or omission amounts to negligence. He cannot invade the province of the jury by declaring that a given state of facts raises a presump-

tion of negligence, when this is not true as matter of law. *Central Ry. Co. v. McKenney*, 116 Ga. 13, 17, 42 S. E. 229, and cases cited. It must now be accepted as the settled law of this state that "on the trial of a suit for damages alleged to have been occasioned by the negligence of the defendant, it is always error, requiring the grant of a new trial, for the court to charge the jury that given acts constitute negligence, when such acts are not declared by statute to be negligent." *Augusta Ry Co. v. Smith*, 121 Ga. 29, 48 S. E. 681. And it has been held that, even when the plaintiff's petition is good as against a general demurrer, it is erroneous for the judge to charge the jury that, "if the defendant's failure to do its duty 'was in accordance with the allegations of the plaintiff's petition, then that would be negligence, as he charges in this case.'" *City of Rome v. Sudduth*, 121 Ga. 420, 49 S. E. 300; *Atlanta R. Co. v. Hudson*, 123 Ga. 108, 51 S. E. 29. It is urged by counsel for the defendant in error that in the present case the judge merely undertook to instruct the jury as to the doctrine of *res ipsa loquitur*, which was, under the decision in *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443, unquestionably applicable to the facts of this case. A complete reply to this suggestion is to be found in the opinion delivered in that case by Mr. Justice Cobb, when it was again before this court (119 Ga. 837, 47 S. E. 329), who said: "Under our system, where every question of negligence is left for determination by the jury, even in cases where the maxim under consideration [*res ipsa loquitur*] is applicable, the judge should not charge the jury that there would be an inference of negligence from a given state of facts, but should instruct them in clear and unequivocal terms that negligence must be proved, and it is for them to consider whether the manner of the occurrence and the attendant circumstances are of such a character that they would, in their judgment and discretion, be authorized to draw an inference that the occurrence could not have taken place if due diligence on the part of the master had been exercised." See page 843 of 119 Ga., page 330 of 47 S. E., and note the discussion which precedes and follows the above quotation. This was not a case, as the court below recognized, where any presumption of negligence arose upon proof of the injury, under the provisions of the Civil Code of 1895, § 2321, but the plaintiff was bound to assume the burden of establishing by sufficient evidence the acts of negligence alleged in his petition.

3. In certain particulars, other than those above mentioned, the charge of the court was open to criticism, as pointed out in the motion for a new trial. After charging as requested touching the diligence to be expected of the company to a traveler on a public street, his honor added that if the

company failed to exercise ordinary care and diligence under the circumstances, and injury resulted, it "would be liable." He should, of course, have qualified this statement by informing the jury that this would be true only in the event the plaintiff was not chargeable with negligence which was the cause of his injury, and could not by the exercise of ordinary care have avoided the consequences of defendant's negligence, if it was the proximate cause of the injury. While charging upon this phase of the case, the court further instructed the jury, in effect, that when an electric railway company has used ordinary care and diligence, such as a prudent man would use, "in the erection and maintenance of wires containing electricity of this degree, and without fault injury occurs, there would be no liability." The complaint made of this instruction is that the use of the words "without fault," in the connection in which they were employed, subjected the defendant to a higher degree of diligence than that imposed by law. The charge of the court was, in other respects than those above pointed out, free from any serious verbal inaccuracies, and sufficiently covered the law bearing on the case. Certain requests to charge with respect to the duty devolving upon the company to exercise ordinary diligence to prevent injury to the plaintiff were refused; but, as they embraced instructions as to the obligation resting on the company to ascertain the fact that one of its wires had fallen and to remove the incident danger within a reasonable time, these requests were not pertinent to any issue raised by the pleadings, and the company cannot justly complain that they were not given in charge. As already stated, the investigation should have been confined to a consideration of the question whether or not the falling of the wire was due to negligence on the part of the company, since it was not charged with any lack of diligence in failing to remove the wire from the street or rendering it harmless before the plaintiff came into contact with it.

Judgment reversed. All the Justices concurring.

(124 Ga. 387)

WARNER et al. v. MARTIN.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. INJUNCTION—CONTEMPT—EVIDENCE—AFFIDAVITS.

On the hearing before a judge in a proceeding for contempt for the violation of a restraining order granted on application for injunction, affidavits are admissible in evidence to prove the fact of violation.

2. SAME—APPEAL—REVIEW.

The judgment rendered on such a hearing will not be disturbed by the Supreme Court, unless the judge has grossly abused the sound discretion vested in him in such cases.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 517.]

3. SAME—EVIDENCE.

Where, in such a case, irrelevant evidence was admitted over the objection of the person on trial, such error is not cause for reversing a judgment against him, when it appears that his case was not thereby injuriously affected, and where the evidence as to the admissibility of which there could be no doubt warranted the judgment.

4. SAME—PUNISHMENT.

A judge of the superior court has no power to impose a fine of more than \$200 for contempt in violating a temporary restraining order, where the violation was treated by the judge as a single act.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 521-528.]

5. SAME—COSTS.

The costs in a proceeding for contempt constitute no part of the fine imposed, and may be awarded against the contemner in addition to a fine of \$200.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, § 241; vol. 27, Cent. Dig. Injunction, § 518.]

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsley, Judge.

Action by Harrison T. Martin against A. J. Warner and others. A temporary restraining order was issued, and a rule nisi against the defendants for an alleged violation thereof. From a judgment holding defendants in contempt and imposing a fine, defendants bring error. Affirmed, with directions.

Harrison T. Martin presented an equitable petition to the judge of the superior court, in which he alleged that he was the owner of a certain lot of land lying along the bank of the Chattahoochee river, which derived its chief value from the fertility of its bottoms on the river and the shoals and waterpower which he owned in connection with the land; that A. J. Warner, W. A. Carlisle, and John Sargent were preparing timber and other material and making ready to construct a dam across the river at a place called "Wilson Shoals," below petitioner's land; that if the dam should be constructed it would cause the backwater in the river to flood his land and destroy his water power. The prayers of the petition were "that a permanent injunction be granted * * * enjoining [Warner, Carlisle, and Sargent] from constructing said dam, and that, after hearing, a temporary injunction be granted, enjoining said defendants from proceeding to erect said dam, and that in the meantime a restraining order be granted enjoining the defendants, their agents, * * * and confederates from erecting said obstruction in said river," etc. On June 2, 1905, the judge ordered the defendants to show cause on July 17, 1905, why a temporary injunction should not be granted, ordered that defendants be served ten days before the hearing, and further ordered that "in the meantime, and until the further order of the court, the defendants are restrained from erecting the obstruction in or across the Chattahoochee

river, as complained of in this petition." The order further provided that the defendants might bring on an earlier hearing upon five days' notice to the petitioner. On June 13, 1905, Martin presented to the judge a petition, setting forth the fact of his filing the original petition, its substance, and the temporary restraining order granted therein, and alleging that since the granting of such order and its service the defendants had violated its terms, by themselves or their employes actually engaging in erecting such dam and obstructions, by "putting large logs in said stream, laying the foundation for said dam, bolting them to the rock bed of said stream with iron bolts, and hauling sand and gravel to a coffer-dam across a part of said river, preparatory and a part of the work of building the main dam; and that since the date of said order and service of the same, they have been building said coffer-dam." Petitioner prayed that an order be granted forbidding defendants from proceeding with said work, and calling upon them to show cause why they should not be punished for contempt in violating the restraining order. A rule nisi was issued against the defendants. They answered the same, denying that they had violated the restraining order. They denied that they had done anything to obstruct the flow of the river, or put any obstructions in or across the river. They claimed that, instead of putting obstructions in the river, they had merely been excavating a large hole on the right bank of the river and inside of their coffer-dam, which coffer-dam had been completed before the filing of the original petition in the case; that the water of the river had been entirely diverted to its left bank by the coffer-dam before the filing of the original petition, and was running unobstructed between the coffer-dam and such left bank; and that all defendants had done since they were served with the restraining order or had notice of it was to excavate a hole in the bottom of the river by removing the sand and debris so as to get down to hard rock and to fill up the hole with logs and rock, but that they had not placed the logs or rock above the bed or bottom of the river. They alleged that none of such work had been in the stream of the river, but had been done to one side, where the water had been diverted by means of the coffer-dam, and that all the work they had done was below the crest of the shoal upon which the coffer-dam had been erected, and could not in any way obstruct the flow of the river, even if the coffer-dam were removed. The answer also alleged that defendant had no intention of making any construction higher than the bottom of the river, but only intended to fill the hole or excavation below the bed of the stream. On the hearing the petitioner submitted in evidence his original verified petition and the orders thereon, and affidavits, by himself and others, which tended to sustain the allegations of his petition for the rule. Defend-

ants put in evidence their verified answers, their affidavits, the affidavits of others, and the oral testimony of several witnesses, all of which tended to support defendants' answers. Defendants also introduced certain documentary evidence relating to the title of the land upon which the dam was to be constructed. The judge decided that the defendants had violated the restraining order, and adjudged that in so doing they were in contempt of court, and imposed a fine of \$250 on Warner, a fine of a like amount on Carlisle, and a fine of \$50 on Sargent, and rendered judgment against defendants for the costs of the rule proceeding, to all of which judgment defendants excepted.

H. H. Dean, for plaintiffs in error. H. H. Perry, G. H. Prior, Saml. C. Dunlap, Howard Thompson, and F. M. Johnson, for defendant in error.

FISH, C. J. (after stating the foregoing facts). One of the assignments of error is that the court erred in admitting in evidence affidavits offered by petitioner against defendants, over the objection that the proceeding was quasi criminal, and only oral testimony was admissible. In *Welch v. Barber*, 52 Conn. 147, 52 Am. Rep. 567, it was said: "A civil contempt is one in which the conduct constituting the contempt is directed against some civil right of the opposing party, as where an injunction is disregarded, or some act required by the court for the benefit of the other party should be neglected. In cases of contempt of this sort the proceeding for its punishment is at the instance of the party interested, and is civil in its character." In such cases the general rule seems to be that the question of contempt or no contempt may be decided upon affidavits, where the chancery rule is in force that the answer of the contemner is not conclusive. *Rapalje on Contempts*, §§ 120, 126. "In proceedings for contempt for the violation of an injunction, the usual method of proving the fact of violation is by affidavit." 2 High on Inj. § 1452. See, also, 1 Beach on Inj. § 262; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Una v. Dodd*, 38 N. J. Eq. 460; *Witter v. Lyon*, 34 Wis. 564; *People v. Brower*, 4 Paige (N. Y.) 405; *State v. Mitchell*, 3 S. D. 223, 52 N. W. 1052; *Rutherford v. Metcalf*, 5 Hayw. (Tenn.) 58. So far as we know to the contrary, it has been the practice in the courts of this state to admit affidavits in evidence on the hearing of proceedings for contempt for the violation of an injunction. Among the cases where such practice was followed may be cited *Howard v. Durand*, 36 Ga. 346, 91 Am. Dec. 767; *Thweatt v. Gammell*, 56 Ga. 98; *Hayden v. Phinzy*, 67 Ga. 758. The same practice has been followed in proceedings for contempt in not paying over money, etc., to a receiver. *Ryan v. Kingsbery*, 88 Ga. 361, 14 S. E. 596. So far as we are advised, the question as to the admissibility of affidavits on the hearing in such proceedings has never been

heretofore made in our courts. We are of opinion, however, from what we have said above, that affidavits are admissible in such a case, and that the court did not err in so ruling. We do not hold, however, that the judge could not in his discretion require witnesses to testify orally.

2. The evidence was to the effect that the defendants, after the restraining order was served upon them, continued the work of constructing the dam. One of the defendants testified: "We continued to make the excavation after the papers were served. After the excavation was made we began to put in timber and rock for the dam and bolted them down to the bed. That was part of the work of constructing the dam." There was evidence for the petitioner that logs were placed in the main dam, within the coffer-dam, and bolted or chained down, and that such logs were above the water. The contention of the defendants was that as the language of the order restraining them "from erecting the obstructions in or across the Chattahoochee river, as complained of in this petition," laying a foundation of the dam, in an excavation which was within the coffer-dam, and at a place where the river was not then running, but from which defendants had diverted it before the original petition was filed, was not an obstruction in or across the river, especially if, as they contended, such foundation was not built above the bed of the river. A restraining order has all the force of an injunction until vacated or modified, and a defendant is bound to obey it at his peril. He cannot set up his opinion as to its meaning as against the court's opinion. If he is in doubt as to what he may do without violating the restraining order, he should ask for a modification or a construction of its terms. 10 Enc. Pl. & Pr. 1108; 16 Am. & Eng. Enc. L. 436. The order in the present case was not in general terms, but defendants were restrained from doing a specific thing—from erecting a dam in the river. That is clearly the meaning of the order. The obstruction complained of was the dam, and that is what the court restrained the defendants from erecting. The defendants assumed the responsibility of construing the order, and construed it to mean that they could continue the construction of the dam until it should reach such a height that further construction would obstruct the flow of the water. They were not restrained, however, from obstructing the flow of the water, but from erecting the dam. One is erecting a dam when he is constructing it, whether he is constructing that portion of it which is below the bed of the stream or that portion which is above such bed. When he is engaged in placing logs, rock, or other material in an excavation below the bed of a river for the purpose of forming the foundation for a dam across such river, he is erecting the dam. It is too well settled to need citation of authority that the decision of a judge on the question of con-

tempt will not be disturbed by the Supreme Court, except in a case where such discretion has been grossly abused. In the present case there was no abuse of discretion.

3. The court, over the objection of the defendants, allowed the petitioner to put in evidence a certified copy of a mortgage from the North Georgia Electric Company to the Knickerbocker Trust Company, dated November 1, 1904, recorded in the clerk's office of Hall superior court, reciting that it was to secure bonds for the erection of the dam in question, and creating a lien on the "Wilson Shoals water power" and other property. The objections urged were that the evidence was immaterial and secondary. The objection of irrelevancy, at least, was well taken, but we are unable to understand how the defendants were hurt by the admission of this evidence. As we have seen, there was ample evidence, about the admissibility of which there was no question, to warrant the judgment of the court. See *Shirley v. Hicks*, 105 Ga. 504, 31 S. E. 105 (3).

4. The judge exceeded his authority in imposing a fine of \$250 each on two of the defendants. The Constitution declares that "the power of the courts to punish for contempt shall be limited by legislative acts." Civ. Code 1895, § 5717. The Legislature has enacted that "the superior courts have authority * * * to punish contempt by fines not exceeding two hundred dollars, and by imprisonment not exceeding twenty days." Civ. Code 1895, § 4320 (5). In *Cobb v. Black*, 34 Ga. 162, it was held that a similar section of the Code of 1863—section 242 (5)—was "applicable only to the punishment for contempt by acts done." In the case now under review the contempt for which the fines were imposed had been committed by doing an act or acts which the judge decided to be in violation of his restraining order, and therefore came directly within the scope of the legislative provision limiting the power of the superior courts in imposing fines for contempt. The judge treated the violation of the restraining order as a single act of contempt.

5. The judge, however, did not exceed his power in awarding the costs of the contempt proceedings against the defendants. The costs were no part of the fines. Rapalje, in his work on Contempts, § 132, states the rule to be that, "where the proceeding arises out of the disobedience of an order or decree in a civil suit, and is prosecuted between the parties to such suit, costs are generally awarded to the prevailing party, the same as in other civil proceedings. We affirm the judgment of the trial judge, with direction that he order the sum of \$50 to be written off the fine of A. J. Warner and a like sum to be written off the fine of W. A. Carlisle, and that the costs of bringing the case to this court be taxed against the defendant in error.

Judgment affirmed, with direction. All the Justices concurring, except CANDLER, J., not presiding.

(58 W. Va. 546)

LEVY v. SCOTTISH UNION & NATIONAL INS. CO.(Supreme Court of Appeals of West Virginia.
Dec. 15, 1906.)**1. APPEAL—REVIEW—REFUSAL OF CONTINUANCE.**

It is well settled as a general rule that the question of continuance is in the sound discretion of the trial court, which will not be reviewed by the appellate court, except in case it clearly appears that such discretion has been abused.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 8837.]

2. INSURANCE—ACTION ON POLICY—EVIDENCE—AWARD.

Upon an issue involving the question whether there was or not a verbal submission between the plaintiff and defendant and a written award of arbitrators ascertaining the loss under a fire insurance policy, where another insurance company and plaintiff had in writing submitted their differences touching the same loss to arbitrators, who had returned a written award, the defendant, claiming to be a party thereto by verbal agreement of submission to the same arbitrators and having offered evidence tending to prove that fact, offered in evidence a written award to which defendant claimed it was a party, which award is as follows:

"Award of Appraisers.

"To the Parties in Interest:

"We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and we have appraised and determined the actual sound value to be six hundred and sixty-three 68-100 (\$663.68-100 dollars, and the damages on same to be four hundred and forty-two 92-100 (\$442.92-100)—which includes totally consumed goods—dollars.

"Witness our hands this 31st day of December, 1898.

"[Signed]

R. H. Bell,

"[Signed]

T. J. Boyd,

"[Signed]

J. L. Richardson.

"Appraisers."

Held error to exclude the said written award from the jury.

3. SAME—EVIDENCE TO DISCREDIT.

Such written award being admitted in evidence, the plaintiff would be entitled to introduce any evidence, oral or documentary, tending to discredit the award as being an award between the plaintiff and defendant, or to which defendant was in any way a party.

4. TRIAL—INSTRUCTIONS.

It is error to instruct the jury hypothetically upon a state of facts, when there is no evidence in the case tending to prove such facts.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Trial, §§ 582-586.]

5. ARBITRATION AND AWARD—REVOCATION OF SUBMISSION.

After an award is made and published, neither party can revoke the submission without the consent of the other.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, §§ 64-66, 342.]

(Syllabus by the Court.)

Error from Circuit Court, Kanawha County.

Action by Annie Levy against the Scottish Union & National Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Watts & Ashby and Chilton, McCorkle & Chilton, for plaintiff in error. A. B. Littlepage, Brown, Jackson & Knight, and Angus W. McDonald, for defendant in error.

McWHORTER, J. This is an action brought by Annie Levy against the Scottish Union & National Insurance Company, in the circuit court of Kanawha county, to recover for a loss by fire, on an insurance policy issued by the defendant on a stock of goods in a storehouse in the city of Charleston. The insurance on the goods was for \$850; the same policy carried \$150 on fixtures in the said store. The amount of loss of fixtures was agreed between the parties and paid by the defendant. Plaintiff also carried \$1,000 insurance on the same stock of goods in the Germania Insurance Company. The loss occurred on the 26th of December, 1898. William Lohmeyer was the agent of the defendant company and R. S. Frazier was the agent for the Germania Company. The agent of the defendant company, being called away from the city of Charleston the day after the fire, requested and authorized Frazier, the agent of the Germania company, to act for the defendant company in adjusting the loss. An appraisement was demanded by Mr. Frazier on behalf of both companies. The plaintiff by her attorney, A. B. Littlepage, refused to enter into an appraisement until he was satisfied by Mr. Frazier that both companies would be bound by any award made. Mr. Littlepage then made out an agreement for submission in writing. Mr. Frazier objected to signing Mr. Lohmeyer's name to it, but assured Littlepage that Lohmeyer would sign it immediately upon his return. The plaintiff and Frazier each selected an appraiser, and said appraisers selected an umpire and proceeded to discharge their duties, and made their award and finding on December 31, 1898. The award showed the actual sound value of the goods in the store at the time of the fire to be \$663.68, and damages on same, including the value of the goods totally destroyed, at \$442.92. The liability of the companies, respectively, under the award, if all parties were bound by the award, was, the Germania \$239.41, and defendant company \$203.51. On Mr. Lohmeyer's return to Charleston he offered to sign the paper of submission, but the paper was withheld from him by Mr. Littlepage, and he was not permitted to sign it. Tender was made by the defendant company for the amount it claimed to be liable for under the award. Plaintiff refused to accept the same and brought this action.

The defendant tendered seven pleas in writing, to the filing of which plaintiff objected. The court overruled the objection and filed the pleas, to which ruling of the court plaintiff excepted. Plaintiff then demurred to each and all of said pleas, which demurrers were overruled. The plaintiff replied generally to each of said pleas, and is-

sue was joined thereon. Plaintiff also filed special replications in writing to pleas 5, 6, and 7, to the filing of which replications defendant objected; objection was overruled and replications filed, and defendant excepted and entered general rejoinder to each of said replications, and issue was joined. A jury was impaneled on the 23d day of March, 1900, and on the 27th of March, after a part of the evidence had been heard, plaintiff asked and obtained leave to file an amended statement of facts relied upon in waiver of the matters alleged in defendant's pleas, Nos. 5, 6, and 7, to the filing of which defendant objected, which objection was overruled and the statement filed, to which ruling defendant excepted and moved the court to withdraw a juror and continue the cause on the ground that defendant was surprised by the introduction of new matter in the statement filed, which motion was also overruled and defendant excepted. The jury returned a general verdict for plaintiff assessing her damages at \$802.17, and returned certain special findings upon interrogatories asked to be submitted to them by the defendant. The defendant moved to set aside the general verdict because it was contrary to the law and the evidence, and also to set aside the special findings upon the interrogatories propounded to the jury by the court at the instance of the defendant, which motion the court overruled and rendered judgment on said verdict in favor of plaintiff, to which rulings of the court defendant excepted. Defendant's first plea was simply the general issue. The second set up a submission to an appraisal and award between the plaintiff, on the one part, and the defendant company and the Germania company on the other part, and a tender under the award of \$203.51, the defendant's proportionate part of said award. Plea No. 3 was the same as plea No. 2, except that it alleged the agreement of submission and award to have been between the plaintiff and the defendant alone, and a tender of the amount that it claimed to be liable for under the award, the said \$203.51. No. 4 alleged the liability of defendant under the policy to be the \$203.51 and tendered the same. Plea No. 5 alleged the failure of plaintiff to furnish proof of loss within 60 days after the fire, as provided in policy, and No. 6 alleged default on part of the plaintiff to submit to examination, under oath, and to produce for examination all books of account, bills, invoices, and other vouchers as required by the policy, and plea No. 7 alleged failure on the part of the plaintiff to submit the loss to appraisal, as provided and called for in the policy.

Plaintiff's principal ground of objection to the pleas was that they were inconsistent, stating inconsistent defenses. This objection is fully met by section 20, c. 125, Code 1899, where the only exception is the plea of non est factum, where without the leave of the court the defendant will not be permitted

to plead any other plea inconsistent therewith. *Nadenbousch v. Sharer*, 2 W. Va. 285.

Plaintiff's special replications to pleas Nos. 5, 6, and 7 were to the effect that the defendant waived the performance of the several covenants and provisions of the policy in the respective pleas mentioned, and denied liability upon the policy. During the trial the defendant took four several bills of exceptions. The first bill of exceptions was to the ruling of the court, in that, after plaintiff and her other witnesses Beulah Slaughter and Adam B. Littlepage had been fully examined, and after the defendant had offered its testimony in chief given by witnesses Adam B. Littlepage, R. S. Frazier, R. H. Bell, J. L. Richardson, Annie Bossey, and William Lohmeyer, and pending the cross-examination by the plaintiff of defendant's witness Littlepage, recalled for the plaintiff, the court permitted the plaintiff to file "An amplification of the plaintiff's statement of facts relied upon to show a waiver of the alleged failure on her part to comply with the conditions of the policy of insurance sued upon, as set forth in defendant's pleas Nos. 5, 6, and 7." It is insisted by plaintiff in error that the filing of this statement worked a surprise to the defendant which entitled it to a continuance to enable it to meet the matters set up in the statement. The statement filed was but an amplification of the special replications filed to the pleas of defendant Nos. 5, 6, and 7. In *Harvey v. Insurance Co.*, 37 W. Va. 272, 16 S. E. 580, Syl., point 7, it is held: "Under section 66, c. 125, Code 1899, the court may during the trial permit plaintiff to file a special statement of any matter in waiver, estoppel, or otherwise in confession and avoidance, as provided for by section 65, c. 125, Code 1899, as justice may seem to require; but this will not give defendant a continuance as matter of right; but it is within the sound discretion of the trial court." In *Cappellar v. Insurance Co.*, 21 W. Va. 576, such statements are held not to be in the nature of pleadings but in the nature of notices to the adverse party of the nature of the claim of defense intended to be set up against him. There is nothing contained in the statement permitted to be filed, by way of amendments, that is not substantially stated in the special replications to the pleas. It has been well settled by this court that the question of continuance is in the sound discretion of the trial court, which will not be reviewed by the appellate court except in case where it clearly appears that such discretion has been abused. *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821; *Bank v. Hamilton*, 43 W. Va. 75, 27 S. E. 296; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299. See, also, *Buster v. Holland*, 27 W. Va. 511; *Logie v. Black*, 24 W. Va. 21; *Riddle v. McGinnis*, 22 W. Va. 253.

The second error assigned is in the court

refusing to allow in evidence the award set out in bill of exceptions No. 2, which award is as follows:

"Award of Appraisers.

"To the Parties in Interest:

"We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and we have appraised and determined the actual sound value to be six hundred and sixty-three 68-100 (\$663.68-100) dollars, and the damages on same to be four hundred and forty-two 92-100 (\$442.92-100)—which includes totally consumed goods—dollars.

"Witness our hands this 31st day of December, 1898.

"[Signed] R. H. Bell,

"[Signed] T. J. Boyd,

"[Signed] J. L. Richardson,

"Appraisers."

Lohmeyer, the agent of the defendant company, testified that on leaving town he authorized Frazier, the agent of the Germania company, to represent him in adjusting the loss; Frazier and Littlepage, the attorney for the plaintiff, agreed upon an appraisement and appointed appraisers R. H. Bell and T. J. Boyd, who together appointed an umpire, J. L. Richardson; Littlepage prepared an agreement of submission in writing, which agreement does not appear in the record. Witness Frazier testified that, he being authorized thereto, Wm. Lohmeyer, agent for defendant, appointed an appraiser for and on behalf of both companies, and testified also that Littlepage and plaintiff selected an appraiser whose name witness had forgotten, and when he found he could not get that man, who lived up the river somewhere out of town, Mr. Littlepage substituted Mr. Bell. Defendant also introduced in evidence a letter of Adam B. Littlepage, attorney for plaintiff, written January 4, 1899, four or five days after the signing of the award, addressed to and inclosing to defendant company proof of loss, in which he makes the following reference to the award: "I regret exceedingly that we do . . . feel justified in accepting the award recently made by the appraisers of about \$445." He further says: "The court may force her to stand by the award, but I think not. The award, while intended as equitable and just upon the part of the appraisers, was a surprise to many people. The appraiser selected by your able and deserving adjuster certainly understood his business, and I am fearful that he cut so deep, and his course was such in arriving at the adjustment, that the result will not stand. Of this I may be mistaken, but it is my full determination to try to obtain for the assured that which she is entitled to at the hands of your company. I regret to be instrumental in having this matter legally adjudicated, but I guaranty to you that I am

determined to have for this young woman that which I believe she is honestly entitled to at the hands of your company. I think the award was absolutely and unconditionally unjust, and the assured will not stand by it unless forced to do so by the court." In this letter, addressed to and received by the defendant company, the writer, Mr. Littlepage, attorney for the plaintiff, recognizes the company as a party to the award, and notifies it that the award is unjust and that plaintiff would not stand by it unless forced to do so by the courts.

The defendant company offered in evidence the written award in connection with the oral testimony of R. S. Frazier, William Lohmeyer, and the said letter of Adam B. Littlepage, attorney for plaintiff, to the company. It is true it is denied by plaintiff that there was an appraisement for and on behalf of the defendant company, but there was evidence tending to prove that fact, and also tending to prove that the appraisers named or who signed the written award had acted after a verbal agreement on the part of the plaintiff and defendant to submit to arbitration, and it is conceded, and on motion of the defendant the jury were so instructed, that a verbal submission is sufficient, that it does not have to be in writing under the terms of the policy. The question as to whether there was a verbal agreement of submission between the plaintiff and the defendant company, and, if so, whether there was an award in writing in pursuance of that submission, are questions for the jury to be deduced from all the evidence in the case, and it was for the jury to say whether the writing offered was an award returned in pursuance of the verbal agreement to submit between the parties to the action in case the jury should find there was such submission. The defendant was contending that there was a certain paper writing in existence and offered what they claimed to be the genuine original paper, it was then for the plaintiff to show that it was not what it purported to be, and for this purpose she could not only introduce oral testimony, but could introduce any writing that would tend to prove that it was not what it was claimed by defendant to be. The issue between the parties on this point was as to whether there had been a submission by them, and, if so, whether there was a written award in pursuance thereof. There was much evidence tending to prove the submission. The defendant then offered in evidence a writing purporting to be an award, claiming it to be an award between the parties in pursuance of the verbal submission they had sought to prove. It is conceded that submission was not required to be in writing. By refusing to admit this writing the court decided the fact in issue that the paper offered was not the written award, which there was evidence tending to prove had been made in writing between the par-

ties to this suit. This was a fact in issue which only the jury could decide, and this material part of the evidence to prove it was withheld from the jury. It should have gone to the jury for what it was worth, subject to be discredited by evidence, oral or documentary, which might be offered against it. It is not at all, as claimed by counsel for plaintiff, analogous to an attempt to introduce as evidence one part or clause only of a written contract while withholding the residue or other parts of the same contract; this, if an award between the parties to this action as claimed by defendant, was a paper independent and complete in itself, not dependent on any other paper, but based upon a verbal agreement of submission which there was evidence tending to establish. If the agreement to submission had been required to be in writing, then there would be reason in plaintiff's contention that before introducing the award the agreement in writing should be introduced with it. The words "The foregoing appointment," contained in the award offered, were wholly immaterial and had no significance, as the submission, if such there was, as between plaintiff and defendant company was verbal, while that between plaintiff and the Germania company was in writing. It is claimed by counsel for defendant in error that the special finding of the jury in response to the interrogatory, whether appraisers and an umpire were selected, and did they reach a conclusion and make an award in writing, that they did not, is conclusive. If there was no submission, as contended by plaintiff in opposition to the contention of the defendant, then the way was still open, under the provisions of the policy, for a submission to arbitration.

The third and fourth errors assigned are set out in bill of exceptions No. 3, in giving plaintiff's instructions Nos. 1 to 7 inclusive, and refusing defendant's instructions Nos. 5, 6, 7, 8, and 10. Plaintiff's instruction No. 1 is bad and should not have been given for the reason that defendant's instruction No. 8, hereinafter mentioned rejected by the circuit court, is held to be good.

The second instruction of plaintiff, as follows: "The court instructs the jury that the finding of the appraisers under submission between the Germania Insurance Company and the plaintiff cannot be considered by the jury in ascertaining the amount of the loss sustained by the plaintiff at the fire in the declaration mentioned"—the defendant objected to as bad, because it withdrew from the jury defendant's defense of arbitrament and award. It was contended by the defendant, and there was evidence tending to prove, that the award which was claimed to be between the Germania Insurance company and the plaintiff was between both insurance companies and the plaintiff. The instruction to the jury, under the evidence, that the finding of the appraisers under the submission between

the Germania company and plaintiff could not be considered, was misleading and should not have been given, as it was contended by defendant, and there was evidence tending to prove the fact that the award was made under the same submission, that on the part of one company in writing and on the part of the other verbal; the arbitrators being the same, one appointed by the two companies, the other by the plaintiff, the umpire being appointed by the two arbitrators, and the award being a common award under submission by both companies.

The third instruction complained of by defendant is: "The court instructs the jury that any party to a submission of arbitration and award, such as that alleged in this case, can revoke such submission at any time before the completion of the award." It is hard to conceive why the plaintiff would ask such an instruction, when the whole contention of the plaintiff was that no submission was ever had between the plaintiff and the defendant company, and there is not the slightest evidence that plaintiff ever revoked the submission which she claimed to have entered into, and, further, plaintiff could not revoke her agreement set out in the policy to submit to arbitration. In *Winkler v. Railroad Co.*, 12 W. Va. 699, Syl., point 5, it is held: "Error to instruct the jury hypothetically upon a state of facts, where there is no evidence in the case tending to prove such facts." *Bloyd v. Pollock*, 27 W. Va. 75, Syl., point 2. It is contended that the letter of the defendant to the plaintiff of January 28, 1899, proposing an appraisal, was an admission that there had been no submission and award as between the parties to this action. It certainly could not be considered a revocation. The letter was in evidence to show for itself what it was and what its purpose. It was a letter returning the proof of loss as not complying with the provisions of the policy, and, as dissatisfaction with the award returned had been expressed by plaintiff's attorney when inclosing the proof of loss in his letter of January 4th, defendant company proposed an appraisement between defendant and plaintiff, and it was for the jury to give to the letter such construction and meaning as in their judgment was intended by defendant. "After an award is made and published, neither party can revoke the submission without the consent of the other." 3 Cyc. 610, and cases there cited.

Counsel for defendant company offer nothing to sustain their objections to the other instructions given for plaintiff, which are to the effect that the burden of proof is on the defendant to show a valid award of the kind and to the effect set up in its special pleas; that such award must be in writing to be binding upon the parties to it; and that such award could only be proven by the production in evidence of such writing or a satisfactory accounting for its loss, destruction, or absence; and also that an award is only

binding between the parties to the submission and not binding upon a controversy between one of the parties and one not a party to the submission.

As to the instructions offered by the defendant and refused by the court, as set out in bill of exceptions No. 3, instruction No. 5 was to the effect that the burden being on the plaintiff to show that she gave to the defendant notice in writing of the fire and rendered a statement signed and sworn to by her, within 60 days after the fire, showing the matters and things set forth in lines 70 to 76, both inclusive, and that she having failed to prove that she gave said notice or rendered such statement, the jury should find for the defendant. The court here would seem to assume to tell the jury that plaintiff's evidence, tending to show her compliance with the said provisions of the policy, had failed to prove the fact, and therefore they should find for the defendant. There was evidence tending to prove that she had so complied with the provisions of the policy, therefore it was within the province of the jury and not the court to decide as to the weight of the evidence offered tending to prove it. The instruction was therefore properly refused.

The sixth instruction, so rejected, reads as follows: "The court instructs the jury that they must not consider any of the evidence offered by the plaintiff as an excuse for not giving the notice in writing or rendering the statement in writing, required in lines 67 to 74, inclusive, of the policy, and set forth in defendant's plea No. 5, except such matters as are specifically stated in plaintiff's replication to said plea No. 5 or in the statement filed as notice of the waiver of the matters set up in plea No. 5." One of the objections to this instruction is rather a play upon the word "offered," which, of course, the jury would take with its proper meaning as "given." Plaintiff's counsel say that it has reference to all the evidence offered by plaintiff, whether admitted or rejected by the court, thereby making the jury the judge of the relevancy or irrelevancy, and each juror to judge for himself what evidence was properly admitted and what not. We see nothing in this objection, but it does seem that the instruction is rendered unintelligible to the jury by the last part of the instruction, when they are told they must not consider any evidence offered by plaintiff as an excuse for not giving the notice or rendering the statement in writing required, "Except such matters as are specifically stated in plaintiff's replication to said plea No. 5, or in the statement filed as notice of the waiver of the matters set up in bill No. 5." This refers the jury for information to papers which were not in evidence before them, and instruction No. 7 is liable to the same objection, and both were properly refused.

Instruction No. 8, offered by the defendant and rejected by the court, is as follows: "The court instructs the jury that, if after

the appraisalment made by R. H. Bell, T. J. Boyd, and J. L. Richardson, the plaintiff repudiated said appraisalment and refused to accept the amount thereof claimed to be chargeable to the defendant, then the defendant had the right afterwards to insist upon an appraisalment to be made by two competent and disinterested appraisers, the plaintiff to select one and the defendant one, and the two so selected to name an umpire, as provided in lines 86 to 91, both inclusive, of the policy, and if the jury find that the plaintiff for any cause refused to accept the result of said appraisal, and that after the knowledge of such refusal the defendant called upon the plaintiff by letter dated January 28, 1899, to submit to such an appraisal as is provided to be made by lines 86 to 91, both inclusive, of the policy, and if the jury further find that the plaintiff has failed or refused to enter into such an appraisal as demanded by said letter, then the plaintiff cannot recover." This instruction is based upon the letter of defendant to plaintiff dated January 28, 1899, asking for an appraisal under the provisions of the policy. If the plaintiff had, after the award, repudiated the appraisalment and refused to accept the amount thereof claimed to be chargeable to the defendant thereunder, and the defendant accepted plaintiff's repudiation, it had the right afterwards to insist upon an appraisalment under the provisions of the policy, and the plaintiff was bound under its terms to submit to an appraisalment. The instruction should have been given.

The instruction No. 10, rejected by the court, reads as follows: "The court instructs the jury that, if they find from the evidence that the 'defendant' has not made and rendered to the defendant a statement in writing, signed and sworn to by her, stating all other insurance, whether valid or not, covering any of the property insured by the defendant, the cash value of each item of property insured and the amount of loss thereon, then the plaintiff cannot recover, unless the jury shall further find that the defendant waived the furnishing of such statement by such conduct of the defendant as would reasonably cause the plaintiff to fairly conclude that such requirements or statements had been dispensed with and excused." The principal objection urged against this instruction is the use of the word "defendant" instead of "plaintiff," where the word first occurs in the instruction. This is evidently a clerical error. The instruction seems to be otherwise good and, as the case must go back for a new trial, it can be then amended if it should become necessary to ask the court to give it upon another trial.

The fifth assignment of error is in refusing to set aside the verdict of the jury and grant the defendant a new trial because the verdict was contrary to the law and the evidence as set out in bill of exceptions No. 4. As the case must be remanded for a new trial, this court will not take up the question

of the evidence and its sufficiency to sustain the verdict. The weight of the evidence to be given when the case is retried is a matter for the jury.

For the reasons herein stated, the judgment will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had therein.

(58 W. Va. 197)

ALLEN v. WILKINSON et al.

(Supreme Court of Appeals of West Virginia. Oct. 31, 1905.)

1. EQUITY—PLEADING—DEMURRER.

On demurrer to a bill, all facts well pleaded are taken as true.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 494.]

2. PARTNERSHIP—ACTION—PLEADING.

Where parties are sued in chancery in their own right, and as partners doing business in the firm name by which the partnership is known, a demurrer filed in the name of the firm is the demurrer of all such defendants in their partnership capacity.

3. EQUITY—PLEADING—DEMURRER.

If a bill in equity shows right to any relief, a general demurrer thereto must be overruled.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 508, 509.]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by William H. Allen against J. N. Wilkinson and others, partners trading under the firm name of the South Penn Coal Company. Decree for defendants, and plaintiff appeals. Reversed.

Rehearing denied January 9, 1906.

S. B. Griffith, S. V. Woods, and Harry H. Byrer, for appellant. J. Hop Woods, for appellees.

McWHORTER, J. William H. Allen filed in the circuit court of Barbour county his bill of complaint against J. N. Wilkinson, Buy N. Wilkinson, D. M. Willis, W. W. Rainey, and J. Truman Nixon, partners trading under the firm name of the South Penn Coal Company, alleging that prior to the 19th of April, 1902, he was negotiating with the defendants through the defendant J. N. Wilkinson, attorney in fact for said partners, concerning the purchase of certain coal lands, on which the defendants had or were about to secure options to purchase; that the lands so to be purchased are described in a general way in a paper filed with the bill, marked "Exhibit, Option and Acceptance," as follows:

"This agreement made this 19th day of April, 1902, between the South Penn Coal Company, by J. N. Wilkinson, its attorney in fact, party of the first part, and Wm. H. Allen of Pittsburg, Pa., party of the second part.

"Witnesseth, that the said party of the first part, in consideration of one dollar in hand paid, the receipt whereof is hereby

acknowledged, does hereby agree to grant and option unto the said party of the second part, the sole and exclusive option of purchasing all the coal under those certain tracts of land locally known as the Freeport and Kittanning or Kanawha River coals, located in the county of Barbour and the district of Phillippi, state of West Virginia, and which coal lands contain about eight or ten thousand acres more or less, and to include all the farms on which the coal has been optioned and purchased in the name of the South Penn Coal Company, which options are to be given to Wm. H. Allen, upon the depositing of the hereinafter mentioned ten thousand dollars (\$10,000), and which coal is optioned to said optionee on the following terms and at the following prices: For the surface of the front land containing about three hundred acres, and all the coal underlying the same in fee, except the M. A. Price 25 acres (under which the coal is owned by J. N. B. Crim), at the sum and price of thirty-five dollars (\$35.00) per acre, and for all the coal underlying other than the surface land mentioned, at the price of eighteen dollars (\$18.00) per acre.

"But this option is to be absolutely null and void and of no effect whatever, unless the said coal is accepted by the optionee or his assignees on the date of this contract; and all rights and claims whatsoever, in and under this agreement, are voidable absolutely if the said coal and land are not accepted in writing on the date of this contract.

"It is further agreed, that, if the optionee in this agreement assigns his rights under this option, the said optionee herein shall be responsible that the assignee shall carry out his contract, and the said optionee covenants that the contract will be carried out by his assignee if he assigns over this option to some third party.

"It is further agreed, that, if the coal and lands are accepted under this contract at the prices named, the said optionee or his assignee will, upon the day the coal is accepted, place to the credit of the said Attorney J. N. Wilkinson, the optionor in this contract, the sum of ten thousand dollars (\$10,000), in the Traders' National Bank, of Clarksburg, W. Va., as a partial payment on the coal and lands so purchased or optioned in and by this contract, or, upon failure to do so, then this contract is absolutely null and void and is of no effect between the parties; but if said option is closed, and said coal accepted, then the parties making purchase of same, in addition to the prices herein named, shall pay the expenses of surveying the said coal and surface lands.

"It is furthermore stipulated and agreed to by the optionor, that, in event of the title to said three hundred acres more or less of front lands, and at least twenty-five hundred acres of coal, not being good, the optionor

will return the ten thousand dollars above mentioned, to the optionee, on demand by the optionee.

"But only such part of the tract of coal and part of the surface owned by the Smokeless Coal Co., as was owned by W. W. Rainey, and by him assigned to the South Penn Coal Company, is to be included in this option.

"Witness the following signature and seal.

"South Penn Coal Company,

"By J. N. Wilkinson, Atty. in Fact.

"Witness: John L. Johnston."

"Clarksburg, W. Va., April 19th, 1902.

"Mr. J. N. Wilkinson, Atty. for South Penn Coal Co.—Dear Sir: I hereby accept the options on ten thousand (10,000) acres coal and three hundred and thirty-six (336) acres in fee in Barbour county, West Virginia, at Lillian Station on the B. & O. R. R.

"Wm. H. Allen."

That this agreement was the result of the negotiations between the plaintiff and the said Wilkinson, acting for and on behalf of the partners known as the South Penn Coal Company; that the \$10,000 was paid by plaintiff to defendant under the agreement; that, on the 23d of May, 1902, upon the false and fraudulent representations made by said Wilkinson that an additional payment made by the plaintiff on account of the said options would expedite the securing of the field, plaintiff caused to be paid to him the further sum of \$10,000 on account of said purchase price of said property, making the entire sum of \$20,000 paid on account of said lands; that, on the 30th day of July, 1902, plaintiff having become convinced that the defendants had no title to, and could not get title to and deliver to him, at least 300 acres of surface and coal designated as front land, and did not and could not secure title to at least 2,500 acres of mineable and marketable coal, or Freeport and Kittanning or Kanawha River coal in a compact and contiguous body lying adjacent to said front lands and mineable therefrom, notified the defendants by letter to Wilkinson, attorney in fact, that he would decline to accept a tender of the field as then controlled by them, and demanded the return of his \$20,000, which they declined to refund, and prayed that the defendants might be required to refund to him the \$20,000, with interest from the dates of the two payments of \$10,000 each, respectively, and that he have a personal decree against the defendants for the same, with interest, and that, on default of the payment thereof, he have a decree directing a sale of the options held by defendants, and also have sale of the abstracts, to secure to him the payment of said sum of money, and that he have an order, in default of the payment of said money, directed to the defendants, to deliver to plaintiff the deeds to all of said several tracts of coal, the title of which was taken by defendants

in the name of plaintiff, as alleged in the bill, and for general relief.

To which bill the defendants, the firm of South Penn Coal Company, filed their demurrer, assigning the following grounds: "(1) There is no equity in the bill, the same setting up merely an alleged contract existing between the plaintiff and the defendant J. N. Wilkinson, member of the defendant company, and the breach thereof by said defendant, and accruing damages to the plaintiff by reason thereof, to the extent of \$20,000. This is purely a legal demand, for which there is a complete and adequate remedy at law, as shown by 'Plaintiff's Exhibit, Option and Acceptance,' dated April 19, 1902, filed with the bill. (2) There is no averment in the bill that said defendant committed, or attempted to commit, any fraud upon the plaintiff, or that he acted within the scope of his authority as the attorney in fact of defendant company. (3) There is no averment that defendant company was advised of the alleged negotiations between said defendant and plaintiff, as to the object of plaintiff in contracting with said defendant, or of the extent and character of his negotiations, or that said defendant pretended or claimed to act for it in this respect. (4) There is no allegation that defendant himself even agreed to transfer any options to plaintiff, or to abstract and transfer to him the abstracts of titles thereunder, or to convey or cause to be conveyed to him any deeds therefor, or to make any particular application or appropriation of the money received by him of plaintiff, or to account for the same. (5) There is no allegation that said defendant, or any of the members of the said defendant company acting for it, or the company itself, drilled upon the land embraced in said options, or located the drilling, as any part of any contract made by plaintiff with said defendant, nor that plaintiff had any authority from defendant company, the said defendant Wilkinson, or any other member of defendant company, or had the consent of them, or either of them, to drill upon the land embraced in said options, or any of them. (6) There is no averment made or reason given in plaintiff's bill which imposed upon said defendant Wilkinson any obligation to transfer options to plaintiff, or take title to him for land embraced therein, and there is, therefore, no premise to predicate the prayer of the bill that the options be sold and the deed surrendered to plaintiff; neither is there any allegation upon which to predicate the prayer that said abstracts be sold. (7) The bill is multifarious, in that it avers that subsequent to the 9th of April, 1902, the date of the alleged contract between the plaintiff and said defendant, the plaintiff, on the 30th day of July, 1902, declined, in a letter to said defendant, to comply with said contract, and yet prays substantially, in default of the repayment of said \$20,000, for a compliance therewith on the part of said defendant.

This prayer is inconsistent with said averment. (8) There is no imputation of fraud upon the part of said defendant company, no prayer for discovery, and no averment of the ground of equitable jurisdiction."

On the 10th of November, 1903, the plaintiff joined in said demurrer, and the same, being argued, was sustained, and the plaintiff given leave to amend his bill.

The plaintiff filed an amended bill, making parties thereto the same parties defendant as in the original bill, and also T. Moore Jackson, surviving partners of themselves, and C. Sprigg Sands, in his own right, and also as partners doing business under the firm name of South Penn Coal Company, and Lulu Sands, executrix of C. Sprigg Sands, deceased, and Edward H. Compton, clerk of the county court of Barbour county, alleging that the defendant J. Neuton Wilkinson represented himself to plaintiff as the agent and attorney in fact for all of the other defendants, including the said coal company, and having full power and authority to act for them in his representations and negotiations in respect to said coal and lands; that he falsely and fraudulently represented to the plaintiffs that the South Penn Coal Company owned, or had under its control by contract of purchase, the said lands and coal; that the land was underlaid throughout its extent with the Freeport and Kittanning or Kanawha River coal of a merchantable and marketable character, ranging in thickness to from four to six feet, with good title thereto, and free from incumbrances and litigations and other legal entanglements, which defendants could sell to the plaintiff and deliver to him speedily; that there were 300 acres of front land, at least, under the control of said defendants, which they could sell to the plaintiff in fee at \$35 an acre, and that, adjacent thereto and contiguous therewith, was not less than 2,500 acres of coal under their control, which could be made speedily available, and adjacent to that another large body of 8,000 acres of coal, which the company controlled and could deliver to plaintiff, underlaid with the said coals, without unreasonable delay, and free from litigation; that said Wilkinson, with a large plat which he had before him for the purpose, embracing all that section of Barbour county comprising the land which he pretended to be under the control of the South Penn Coal Company, and including those upon which the said company had contracts and for which he represented it had titles, pointed out to plaintiff upon said plat the 300 acres of front land, and pointed out the several tracts going to make up said 300 acres, and upon which he represented there was a side track, coal tippie, mine openings, and facilities already in use for marketing the coal; that Wilkinson was then the agent and attorney in fact, with full power and authority to act for all the defendants in respect to the said representations and proposal, and had full power to act for all the defendants,

including the said coal company, of which representations all the defendants had notice; that the said 300 acres of front land was necessary and indispensable to such a mining and coking plant as plaintiff desired to establish, for mining and removing the coal thereunder and under the said 2,500 acres; that the defendants did not, nor did any of them, nor did the said coal company, own or control the 300 acres of front land, or any part thereof, except the O'Neal 8-acre lot, and the interest of said Rainey in the Snyder land, containing about 36 or 37 acres (which interest in fact, was only one-fifth thereof), which the said defendants, and all of them, and the said coal company, knew at the time of said representations to the plaintiff, and also knew on said 19th day of April, 1902; that after all the foregoing representations had been made to him, and when he supposed he was dealing with an honorable and trustworthy man, in whose representations for himself and all of the defendants, plaintiff had implicitly relied, the said South Penn Coal Company, through Wilkinson, its attorney in fact, made to plaintiff the proposition of the 19th day of April, 1902 (and which is hereinbefore copied); that plaintiff deposited the said \$10,000 in the bank as provided, and was received by the South Penn Coal Company upon the terms of said conditional acceptance through its agent, Wilkinson, who fraudulently withheld said options from plaintiff; that the coal, called in said proposition 2,500 acres, and the front land, called 300 acres, and the coal lands referred to therein as containing 8,000 or 10,000 acres, are the same pointed out on said plat by Wilkinson, and which he, for himself and other defendants, proposed to sell to plaintiff with good titles and free from litigation and entanglements; that the said coal company did not have the title or the options to all of the said lands or the coal at the time of said proposition, or since that time, nor did they have the 300 acres of front land, nor the options thereto, nor the control thereof, nor the 2,500 acres of coal as contemplated by the said proposition or the acceptance thereof, or as contended by the parties thereto, or as understood by the plaintiff, or as represented to him by the defendant Wilkinson, of which the defendants had notice; further alleging that the defendants, fraudulently and without plaintiff's knowledge used of the \$10,000 to the extent of \$7,000 thereof for the purpose of buying out and hushing up the claims of title held by George M. Price & Co. upon about 4,000 acres of the coal proposed to be sold to plaintiff; that defendants, without plaintiff's knowledge, after receiving said money from him, brought suit in Barbour circuit court and filed a bill against George M. Price & Co., seeking to enjoin and restrain them from taking title under their option to the said 4,000 acres upon which the South Penn Coal Company had afterwards taken option at \$10 an acre, and which alleged, among other things, that

the contract of said Price & Co., the landowners, were invalid and of none effect as against the South Penn Coal Company, in which such proceedings were had that on the 15th of May, 1902, the court enjoined both the South Penn Company and the Price Company from taking title, until the further order of the court, to any of said coal in respect to which there was conflict and litigation between them, and filed with plaintiff's bill a copy of said bill and order, which proceeding was unknown to plaintiff; that said Price & Co. entered into a written agreement with the South Penn Company by which their differences were settled and the suit dismissed, which contract was in possession of defendants, or some of them, and the contents unknown to plaintiff, and the same was fraudulently concealed from him and had never been recorded; that on the 19th of May, 1902, George M. Price and the several persons composing the firm of Price & Co., executed a deed conveying to plaintiff, William H. Allen, four parcels of land, the N. M. Phillips 115-acre tract, the Ella V. Haller 85-acre tract, the Ida B. England 60-acre tract, and the Cordelia J. Boyles 20-acre tract, which said deed was signed, sealed, and acknowledged by George M. Price and his wife, W. F. Merrill and his wife, E. H. Hout and his wife, E. F. Hout and his wife, and Joseph McElfresh, who composed the firm of George M. Price & Co., and, being so acknowledged, was delivered by W. F. Merrill to J. N. Wilkinson; that, after said deed was so delivered by the grantors, the defendant J. N. Wilkinson fraudulently removed one sheet of the typewritten paper upon which the original deed was drafted, and inserted in lieu thereof another sheet of paper, in which J. N. Wilkinson was made the grantee, and also removed the wrapper from said deed and replaced it by a new wrapper, which was indorsed in the handwriting of Wilkinson, which deed was fraudulently concealed until after this suit was brought, and then, as so changed and altered, on the 23d day of October, 1903, was filed in the office of the clerk of the county court of Barbour county for recordation, of which all the defendants had notice; that the South Penn Coal Company on the 29th of April, 1902, took from Marietta Lance and her husband a deed for the coal under a tract of 113 acres of land owned by them, for the consideration of \$1,138, which was paid to Lance out of the money furnished by plaintiff; that said deed conveyed the land to plaintiff, Allen, and was delivered into the possession of J. N. Wilkinson, who fraudulently removed one of the typewritten pages of said deed and inserted another in the room thereof, and removed the cover with a typewritten indorsement, and caused another cover to be placed thereon, by which change the name of J. N. Wilkinson was made the grantee therein, which deed was also fraudulently concealed until the 23d of October, 1903, when it was recorded, all of which was well known to the defendants; that said

deeds had been falsely and fraudulently changed for the purpose of defrauding the plaintiff of his title to said coal, which, plaintiff charged, was paid for with the money so furnished by him; that said original deeds bear upon their face the unmistakable evidence of the said fraudulent alterations, and plaintiff called upon the said Wilkinson and other defendants to produce the said deeds, which were then in the custody of Compton, clerk of the county court of Barbour county, for the inspection of the court; that after the money of the plaintiff was so obtained said J. N. Wilkinson obtained from John F. Woodford a deed, on the 23d day of July, 1902, for 115 acres of land at the price of \$3,000, one-half of which was paid, and the residue in one and two years with interest, and on the 15th of March, 1903, he obtained a deed from John B. Pitman and wife for the coal under 25 $\frac{1}{4}$ acres of land at Lillian for \$221.62 paid, and on the 3d of April, 1903, he obtained a deed from Hayes Howel and wife for \$533.12 in hand paid for the coal under 59 acres of land, which deeds were filed for record by him on said 23d of October, and copies of the said five deeds were exhibited with the bill.

Plaintiff charges that all of the said lands so conveyed and pretended to be conveyed to said Wilkinson were paid for out of the money and property of plaintiff and were held in trust for him by the said Wilkinson, whether he took the title for the fraudulent purpose of deceiving the plaintiff by concealing his ownership, or whether he took the title in his own name in order to hold the same as trustee for himself and the other defendants composing the said South Penn Coal Company; that a large part of the money so furnished by plaintiff was in fact used and expended by the defendants in small payments upon options from landowners unknown to plaintiff, in making surveys of said coal lands, and in abstracting the titles thereof for the benefit of plaintiff, not at his request, but which were intended, as he was informed, to be delivered to him, that he might know the true state of the title of said several tracts and the location and boundaries of the several parcels of coal, which he charged were fraudulently concealed and withheld from him by the defendants. Plaintiff further alleged that at the request of defendants, and in order to facilitate their work in perfecting the titles to said lands and learn the quality of said coal, plaintiff sent out upon said land a competent and capable diamond driller, and directed the said driller and the defendants to begin on the land with the drilling near the front at Lillian and thence drill toward the turnpike on a line running S. 45° E., giving particular directions where the holes were to be put down; that the defendants, through the defendant Nixon, without plaintiff's knowledge, upon the arrival of the drillers, took charge of them and began to drill the

land, contrary to plaintiff's instructions, on the eastern extremity of said coal field, upon lands under contract to George M. Price & Co., where they found but 18 inches of coal, and then drilled westward toward Lillian, and no place finding any coal that was marketable and merchantable, or four or six feet in thickness, and which drilling the defendants procured to be contrary to plaintiff's instructions, for the purpose of ascertaining what coal was lying below the level of Bill's creek and Sugar creek, in respect to which levels they had made some contracts for coal, with which plaintiff had nothing to do and in which he was in no wise interested, for which said drilling plaintiff was obliged to pay and did pay \$3,600, which the defendants fraudulently expended and appropriated to serve their own ends and not for the benefit of plaintiff; that on the 30th of July, 1903, after being fully satisfied by unreasonable delays, defects of title, conflicts of claims, the fraudulent action of said drillers, the inability of defendants to obtain the titles proposed to be sold, etc., plaintiff notified the defendants, through their attorney in fact, Wilkinson, that he refused to accept said coal field, and demanded the return of the \$20,000 and the \$3,600, all of which the defendants and all of them fraudulently failed and refused to refund, and likewise refused to deliver to the plaintiff any of said contracts or evidences of title or of the title to any of the coal proposed to be sold; that the defendants, through J. N. Wilkinson and W. W. Rainey, who were acting for them and with their knowledge and approval, for the purpose of deceiving and cheating plaintiff and fraudulently procuring from him said moneys, and knowing their representations to be untrue, and knowing themselves to be unable to make good their representations or to deliver to plaintiff the property to be sold to him, falsely represented that the said front 300 acres at Lillian was underlaid with Kittanning Freeport coal of six feet in thickness, and that the said thickness extended through the said 300 acres and the land contiguous thereto; that the plaintiff relied upon the truth of said representations, and was cheated and deceived by the defendants, and so induced to part with his money, and, relying upon the truth of said representations, plaintiff had arranged to borrow and to have furnished to him and made immediately available, in order to pay for said lands and to install thereon a large mining and coking plant, the sum of \$400,000, and made contracts to furnish coal and coke from said lands, and made traffic contracts for the shipping thereof, the truth being that the said coal did not underlie said lands as represented to plaintiff, and did not show three veins, from four to six feet in thickness, of merchantable and marketable coal, underlying all of the lands proposed to be sold to the plaintiff.

Plaintiff prayed for a rescission of the

proposition and acceptance made on the 19th of April, 1902, and that defendants be required to answer and disclose the dispositions made by them of the \$10,000 paid on the 19th day of April, 1902, and the \$10,000 paid on the 24th of May, 1902, and the parts thereof paid upon options, to any of the landowners, and that they be required to disclose all purchases and payments made in the name of plaintiff, and all the titles to land or coal taken in the name of plaintiff, and to surrender all the contracts, deeds, and title papers in respect thereto; that they disclose their purchases and contracts for lands or coal taken in the name of Wilkinson, or any other defendants, and of the said several tracts purchased by the defendants, or any of them, in his name, or in the names of any of them, or in the name of plaintiff, from George M. Price & Co., and to disclose the said contract made with George M. Price & Co.; that the said Wilkinson might be required to disclose the said power of attorney shown by him to the plaintiff, and all the title papers in his possession, and to produce and disclose the said map and plat and the deeds and contract for coal or land purchased or in part paid for with the money of plaintiff, and to disclose and surrender all of the abstracts, surveys, plats, and options relating to the said land and coal under the control of the said defendants or any of them; that he have a decree against the defendants for the sum of \$20,000 and for the \$3,600, and that the same be decreed to be considered alien upon the said options, plats, abstracts, and liens in the possession of the defendants or any of them, paid for in whole or in part with the money so obtained from plaintiff; that the defendants be required to produce, and file in court with their answers, the contract in writing of George M. Price & Co., and the original deeds from George M. Price et al. and Marietta Lance and her husband to J. N. Wilkinson, dated on the 19th day of May, 1902, and on the 29th of April, 1902, respectively, for the inspection of the court, and that the defendant J. N. Wilkinson be required to answer and say who changed said deeds, and why the same were concealed and not recorded, instead of being held until the institution of this suit, and that the other defendants be required to answer and say whether they authorized or directed the said J. N. Wilkinson to take title to himself, or for any of the said coal, and who paid the purchase money therefor and what money was applied in payment therefor, and especially whether any of the defendants contributed any of the money paid to Price & Co., Marietta Lance, Hayes Howel and wife, Joseph Pitman and wife, or John F. Woodford and wife, for the coal so purchased from them; that Compton, clerk of the county court, be restrained from delivering to Wilkinson or any other person, until the further order of the court, the said original deeds of Price et al. to Wilkinson,

dated May 19, 1902, and Marietta Lance to him, dated April 29, 1902, and for general relief.

The defendants, by counsel, entered their demurrer to the plaintiff's amended bill, assigning the same grounds assigned in writing to the plaintiff's original bill, in which the plaintiff joined, and same, being argued, was sustained by the court, and the plaintiff's bill and amended bill were dismissed, and decree for costs; the dismissal being without prejudice.

It is contended by appellees that there is no equity in the bill, the same setting up merely an alleged contract existing between the plaintiff and the defendant J. N. Wilkinson, a member of the firm, and that the same is purely a legal demand and there was complete and adequate remedy at law. This would be a proper legal proposition if plaintiff was suing alone to recover the \$20,000 which he shows by his bill was fraudulently procured from him by the defendant J. N. Wilkinson, acting for himself and the other defendants, all of whom together constituted the firm or partnership of South Penn Coal Company, and which fraudulent acts on the part of defendant J. N. Wilkinson were on behalf of himself and the other members of the company, of which they all had notice, and it is distinctly alleged that the said Wilkinson, as agent and attorney in fact, had full power and authority to act for the other defendants in his representations and negotiations in respect to the coal and land properties mentioned. The bill, and especially the amended bill, is not brought to enforce the contract of April 19, 1902, but to rescind the same, and for a discovery as to the disposition made of the \$20,000 so fraudulently obtained from the plaintiff, and to disclose all the purchases and payments made in the name of plaintiff with his money, and all the titles to all land or coal taken in his name, and to require them to surrender the contracts, deeds, and title papers in respect thereto, and for a discovery as to the purchase and contracts and deeds for coal lands, whether taken in plaintiff's name, or the name of the defendants, or any of them, and paid for wholly or in part with the money of plaintiff. The bill distinctly charges the fraudulent changing of deeds executed to plaintiff as vendee and delivered to Wilkinson, and changed to the name of Wilkinson, as grantee, with the knowledge of the defendants, for whom he was acting in such fraudulent transaction.

The demurrer interposed in the name of the South Penn Coal Company was the demurrer of all the defendants in their partnership capacity, and is an admission of the truth of the allegations of the amended bill. In *Shaw v. Allen*, 184 Ill. 77, 56 N. E. 403, it is held that: "On demurrer to a bill all the material facts well pleaded are taken as true." *Grieg v. Russell*, 115 Ill. 483, 4 N. E. 790; *Clark v. Assurance Association*, 14 App.

D. C. 154, 43 L. R. A. 390. The meaning of a demurrer is that, admitting the allegations of the bill or declaration to be true, they are not sufficient to sustain the action. It will hardly be contended that in an action at law for the recovery of money the plaintiff could recover the lands which were conveyed to him, nor the possession of the deeds for the same, which were fraudulently withheld from him; nor could it charge with plaintiff's debt the land purchased and paid for with the money of plaintiff, so fraudulently obtained from him by false representations of the defendants and their agent and attorney in fact, the title to some of which lands was claimed to be taken in the name of said Wilkinson. It is well settled that, if a bill in equity shows any cause for relief, the general demurrer thereto must be overruled. In *Moore v. Harper*, 27 W. Va. 362 (Syl., point 1), it is held: "A bill in equity, notwithstanding it contains many vague and irrelevant allegations, will not be held bad on demurrer, if, taken as a whole, it states facts which entitle the plaintiff to relief." And in *Miller v. Hare*, 43 W. Va. 647 (Syl., point 1), 28 S. E. 722, 39 L. R. A. 491: "A general demurrer to a bill in equity is properly overruled, if the bill as a whole states facts which entitle the plaintiff to relief." And in *Whitlock v. Duffield*, 2 Edw. Ch. (N. Y.) 365: "If a right to any relief be shown by a bill, a demurrer will be overruled." *Gay v. Skeen*, 36 W. Va. 582, 15 S. E. 64. In *Chrislip v. Teter*, 43 W. Va. 366, 27 S. E. 288, it is held: "When fraud is sufficiently alleged, with proper parties to a bill, a demurrer will not lie." And "when a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved, to avoid a multiplicity of suits." *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. 423; *Watson v. Watson*, 45 W. Va. 290, 31 S. E. 939. "A court of equity in all cases of actual fraud has concurrent jurisdiction with a court of law in remedying the fraud," and, being more flexible, often gives a more certain and complete remedy "by means of its power to compel discovery and to cause fraudulent deeds and securities to be canceled, or conveyances to be made, thus effectually putting an end to further litigation. In those cases of actual fraud equity follows the law, and gives relief to the full extent to which a court of law could give relief." *Garland v. Rives*, 4 Rand. 282, 307, 15 Am. Dec. 756, citing *Bennett v. Musgrove*, 2 Ves. Sr. 51. In 1 Story's Eq. Juris. (13th Ed.), at section 191, it is said: "One of the largest classes of cases in which courts of equity are accustomed to grant relief is where there has been a misrepresentation or suggestio falsi. It is said, indeed, to be a very old head of equity that, if representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that

representation good if he knows it to be false." And cases are there cited. Appellees contend that they are not required to answer the written proposition because it was not specifically filed with the amended bill; that it is not certain that it is the same paper called "Exhibit Option" and filed with the original bill. It is made sufficiently clear by the amended bill that the "written proposition and acceptance" is the same paper as that filed with the original bill, as large portions of it are quoted, including the written acceptance signed by the plaintiff; and, having been filed as an exhibit with the pleadings, it continued a part of the cause, and the reference to it in the amended bill is sufficient. The amended bill is good on demurrer, and the court erred in sustaining the demurrer.

The decree of the circuit court is therefore reversed, and the cause remanded for further proceedings to be had therein according to the rules governing courts of equity.

(58 W. Va. 340,

SIERS et al. v. WISEMAN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 21, 1905.)

1. ESTOPPEL IN PAIS.

One who, assuming to act for another in respect to his property, performs an act necessarily detrimental to himself and beneficial to such other person, and not such in its nature as, under the law, can confer any right upon himself, is estopped from denying that, in performing such service, he acted for and on behalf of such other person.

2. TAXATION—PAYMENT OF TAXES BY VOLUNTEER.

Payment of taxes on land by one who has no color or claim of right to do so on his own behalf, inures to the benefit of the owner, if he elects to claim it.

3. PRINCIPAL AND AGENT—AGENCY—EVIDENCE.

Agency may be established in favor of the principal by the admissions of the agent, or by proof of acts of the alleged agent, from which no inference, other than that of the relationship of principal and agent, can be consistently deduced.

4. SAME.

Agency of one person for the purpose of paying taxes on the land of another is sufficiently shown by proof of his having paid the taxes on the land for a long period of time, without any claim of title or right in or to it in himself, allowed it to become delinquent for one year, purchased at the sale for such delinquency, failed to take a deed under such purchase, continued to pay taxes on the land in the name of the owner for another long period of time and until his death, and failed to take possession thereof at any time.

5. TAXATION—TAX DEED TO AGENT.

A deed taken by the heirs of such agent, after his death, under the purchase so made, vests no title in them as against the person for whom the taxes were so paid.

6. SAME—SUBSEQUENT PAYMENT OF TAXES.

If, in such case, the heirs of the agent take a deed under the tax purchase, and cause the land to be entered upon the landbooks for taxation in their own names, and to be dropped from said books in the name of the true owner, payment of the taxes on the land, as so enter-

ed and charged, will inure to the benefit of the true owner, and prevent forfeiture of his title to the state under section 39 of chapter 31 of the Code of 1899, for failure to keep his land charged with taxes.

7. SAME — SUIT TO CANCEL TAX DEED — LACHES.

An adverse claim of title under such tax deed for less than nine years before suit brought to cancel it, but without notice thereof, and possession under such deed and claim for less than three years before the institution of such suit, do not subject the plaintiffs to the bar of laches.

8. SAME—REIMBURSEMENT OF PURCHASER.

One who seeks cancellation of a tax deed must do equity by reimbursing the purchaser for his outlay in payment of taxes and proper charges.

(Syllabus by the Court.)

Appeal from Circuit Court, Fayette County.

Bill by Amanda D. Siers and others against W. A. Wiseman and others. Decree for plaintiffs, and defendants appeal. Reversed.

Rehearing denied January 9, 1906.

Dillon & Nuckolls, Payne & Hamilton, and St. Clair, Walker & Summerfield, for appellants. A. N. Campbell, for appellees.

POFFENBARGER, J. The decree appealed from in this cause dismissed two bills relating to a tract of land in Fayette county, containing 50 acres. The first suit was brought by Amanda D. Siers and others against W. A. Wiseman, administrator and heir at law of Amos K. Wiseman, and other heirs of said A. K. Wiseman, for the purpose of setting aside a deed made by the clerk of the county court of said county to the heirs of said A. K. Wiseman, on two grounds, the first of which was invalidity of said deed on its face, and the second, alleged relationship on the part of the said decedent which precluded his making, as to the complainants, a valid purchase of said land. The deed was made on the 5th day of April, 1891, under a purchase at a tax sale made in December, 1879. By reason of the long lapse of time, the clerk had no authority, under the law, to make said deed. The land had been conveyed to Amanda D. Siers, whose name was then Amanda D. Burgess, and her children by deed dated October 15, 1859. Thereafter for about four years she resided on the land. On leaving it in 1862, her uncle, A. K. Wiseman, paid the taxes until 1878, for which year it was returned delinquent for nonpayment of taxes, and sold in 1879 as aforesaid; but the purchaser took no deed. In 1890, he died, having paid all the taxes on the land until the date of his death, in the name of Amanda D. Burgess. For the year 1891, the land was taxed in the name of said Burgess, but, after that year, it was kept on the landbooks in the name of the widow and heirs of A. K. Wiseman, and the taxes thereon paid by them. After the year 1891, the land did not appear on the landbooks in the name of Amanda Burgess. Immediately

after the death of A. K. Wiseman, Mrs. Siers wrote a letter to William A. Wiseman, one of the heirs of said decedent, concerning the land and the taxes thereon, to which he replied as follows, under date of July 27, 1890: "Well in regard to your land, it has been sold by the sheriff twice and bought in by father, but is still taxed in your name. I cannot tell the exact amount against the land without going up to mother's, but I think it is about (\$40.00) forty dollars. If you want me to give you the exact amount, write back immediately, and I will go and examine the papers and get the amount." Under date of March 13, 1895, he wrote her again, saying: "In reply to your letter of the third of December in regard to that piece of land would say that it is in such a fix at this time that it would take 20 years to straighten out if the heirs are contrary, which some of them are. We have been paying taxes on the place for the last 30 years, and it has been sold by the state twice, and father bought it in both times, and at last we had to take a deed for it from the state to protect ourselves. I do not exactly know what we have spent on the land, but would suppose some \$300 to \$400. I come down to Charleston some times, but am most always busy. I will come and see you sometime if I can." On December 27, 1896, he wrote again in reply to a letter from Mrs. Siers, repeating what he had said in former letters about the payment of taxes, sale, and purchase and the taking of the deed and saying further: "You can see just what condition the land is in, the heirs are scattered from Missouri to Virginia, and I have nothing more to do with it than one of the other heirs. You can readily see that the land would not pay, if sold, what it has cost the heirs since the war (say for 35 years). I am very sorry for you, would help you if I could, but times are very dull here, and I cannot get money enough to keep my bills paid at maturity." On March 23, 1897, he wrote as follows: "I suppose you think it quite a while about me coming down, but I cannot leave home just when I want to. When the weather gets a little better, I will get all the papers together in the case and come down and spend a day or so, and see what we can do. I have been talking with the heirs, and I think that I probably can do something with them." A statement of agreed facts filed in the case shows that, in April, 1897, the month following that of the date of said last letter, the Wiseman heirs took possession of the tract of land. Prior to that time it had not been in the actual possession of any one, since Mrs. Siers left it in 1862. This suit was brought August 3, 1899.

The other suit was brought by the commissioner of school lands of said county to sell the land as forfeited for nonentry on the landbooks for taxation, on the theory that the Wiseman heirs had no title, and that the title of Mrs. Siers was forfeited, under section 39 of chapter 31 of the Code

of 1899, which makes it the duty of the owner of land to keep it taxed in his name, and forfeits it to the state for failure to have the same taxed for a period of five successive years. Mrs. Siers and S. L. Walker, who claimed as grantee of her and of J. M. Richards, who had previously purchased the interests of the children of Mrs. Siers, were made defendants to said suit brought by the commissioner of school lands, and answered the bill, denying the forfeiture, but claiming the right to redeem in case the court should determine that there had been such forfeiture. After said suit was brought, the bill in the other one was amended so as to set forth the proceedings in the suit brought on behalf of the state, and a prayer added for leave to pay into court the amount of taxes and interest necessary to redeem the land, as ascertained by the commissioner to whom the suit brought on behalf of the state had been referred for that purpose.

For superiority of title, the defendants rely upon section 3 of article 13 of the Constitution, by which the title to land forfeited is, under certain conditions, transferred to and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees), for so much of said land as such person shall have had claim to, and actual, continuous possession of, under color of title for any five successive years after the year 1865, and have paid all taxes charged or chargeable thereon for said period. They do not rely upon the tax deed as a valid deed passing title, but they rely upon it as color of title and say that, at the time the decree was pronounced in these causes, they had had possession under said deed for the period of five years and had paid all taxes charged and chargeable thereon. They took possession in April, 1897, and the decree in these causes was made on the 16th day of October, 1903. They had not had five years' possession at the time of the institution of either of these suits, but they insist that the commencement of these suits did not stop the running of time under this constitutional provision, and that, upon the completion of said period of possession, the title of the plaintiffs, having been forfeited and taken up by the state, under section 39 of chapter 31 of the Code of 1899 was transferred to, and vested in, them, by force of this constitutional provision.

The question of agency on the part of A. K. Wiseman is of controlling importance. If, from the year 1862, until the time of his death, he was the agent of the owners for the purpose of paying taxes on the land, his purchase inured to their benefit, and though a purchaser, he was a trustee, holding the legal title, while the equitable title remained in the owners, and his heirs took no greater or other estate than he held, and their entry upon the land under the deed, founded upon the purchase of their ances-

tor, was likewise for the benefit of the owners.

It is asserted in the brief that the answers deny everything alleged, except that the defendants are the heirs of said A. K. Wiseman, that the deed under which they claim was executed by the clerk of the county court, and that the land had been conveyed to A. D. Burgess and to her children; but this is not strictly accurate. Neither of the answers denies payment of the taxes by A. K. Wiseman while they were charged in the name of A. D. Burgess, but they do deny that the payments were made for her benefit. They do not deny the fact of payment, but only the legal effect thereof. The answer to the original bill denies "that the said A. K. Wiseman as such agent did continue in charge of the said premises and did pay the taxes thereon for the said plaintiff until the time of his death which occurred in the year 18—." The answer to the amended bill says the allegation of payment of taxes is false and untrue, "so far as it states that A. K. Wiseman in his lifetime paid any taxes, or that W. A. Wiseman since his death paid any taxes that in any way could inure to the benefit of the plaintiffs or any of them." These answers further deny that A. D. Burgess or any of the defendants or any person under whom they or any of them claim, paid any taxes on the land. But all this falls short of denying that A. K. Wiseman paid the taxes while they were charged in the name of A. D. Burgess. On the whole, the denial is carefully and expressly qualified, so as not to extend to payment only by the appellees and their ancestor. Neither is the genuineness of the letters of W. A. Wiseman, copies of which are exhibited with the bill, denied. Nor is the correctness of the dates of the purchase and deed denied.

In paying these taxes from 1863 up to 1878, a period of 15 years, A. K. Wiseman undoubtedly acted for A. D. Burgess and her children. The land was theirs, and the taxes were charged in her name. No person on earth had the right to pay them except the owners. No person on earth could pay them without assuming to act for her, and it is well settled that where one person assumes to act and does act on behalf of another, he is estopped to deny the benefit of that act to such other person, and to claim the benefit thereof for himself as against such other person. *Schedda v. Sawyer*, 4 McLean (U. S.) 181. Fed. Cas. No. 12,443, holds that a person who assumes to act as agent in redeeming land sold for taxes, is held to have acted in that capacity; and if he so take advantage of such act as to obtain a title in his own name, he is responsible in the character assumed, and will be held to answer to those in whom the title was vested. In the opinion the court, said: "It is argued that the bill does not charge an agency in redeeming the land

from the tax sale. The bill declares that he represented himself as agent for complainants. Unless he acted in that capacity, having no interest in the land, he had no right to redeem it. He is not only alleged in the bill to have acted as agent, but the act itself shows that he so acted." "Where a person assumes to act as agent for another, it will be presumed as against him that the relation existed, so as to cast upon him the burden of proving that it did not exist, if he afterwards takes such a position." *Clark & Skyles on Agency*, § 63. In treating of evidence and proof of agency, as shown by the acts of the agent, *Mechem on Agency*, at section 100, says: "His acts and statements cannot be made use of against the principal until the fact of the agency has been shown by other evidence. His statements and admissions would, however, in any proper case be admissible against himself." This principle was applied in *Knupp v. Syms*, 200 Pa. 489, 50 Atl. 210. *Hodges* claimed the land by purchase at a tax sale, and an old journal of the treasurer was produced, showing that *Hodges* had paid the taxes on the land from 1842 to 1849, and in 1849, had paid to the treasurer the taxes for the year for the delinquency of which the land had been sold and purchased by him. Upon this evidence alone, the court determined that he was the agent of the owner, and disqualified to take the benefit of delinquency by purchase. Proof of payment of the taxes made a *prima facie* case of agency which was not rebutted or overthrown in any manner. *Gamble v. Hamilton*, 31 Fla. 401, 12 South. 229, was a case similar to this in many respects. There was no evidence of prior agency on the part of Branch, the testator of the plaintiff, who claimed under a tax deed, but it did appear that he had previously paid taxes for the owner, the amount of which, however, had been repaid to him. Soon after this transaction, the land became delinquent, was sold, and Branch purchased it, and, under that purchase, he claimed title. After the purchase, he wrote the owner, in response to an inquiry about the land, saying he had purchased, but that it was all right and should not prejudice. Afterwards, there were negotiations between the parties looking to a sale of the land to Branch, but none was ever consummated. In the meantime, he had taken a tax deed under his purchase made in 1875, without the knowledge of the owner. Under these circumstances, the court held that his purchase was a fraud upon the owner, and that whatever title he took under the purchase inured to the owner's benefit.

But, for delinquency for the year 1878, Wiseman purchased the land in 1879. If nothing else appeared, this act would not necessarily be deemed an act on behalf, and for the benefit, of the owners. It was an act

which any stranger might have done on his own behalf. It may be said here that payment of the taxes in the name of the owner for the preceding 15 years, though inconsistent with any other view than that of agency, as regards payment for those years, is not evidence of agency, binding Wiseman to pay taxes for future years, or disabling him from purchasing for delinquency, for subsequent years. This position may be sound. But he took no deed under that purchase and continued to pay the taxes for the years 1879 to 1889, inclusive, and his heirs or his administrator paid for the years 1890 and 1891, in the name of Amanda D. Burgess. After the expiration of five years from the date of the purchase there was no authority in the clerk to execute, nor right in Wiseman to demand, a deed under that purchase. Acts 1872-73, p. 320, c. 117, § 24; Acts 1882, p. 399, c. 180, § 24; Code 1890, c. 81, § 24. This Wiseman knew, yet he neglected to take a deed and continued to pay the taxes in the name of the owner, all of which is inconsistent with intent on his part to act for himself and not for the owners of the land. His conduct is irreconcilable with any theory other than that of intention to act for their benefit.

It was not necessary that there be an express formal appointment to create the relationship of principal and agent, nor that there be direct evidence of appointment of the agent, or of a contract of agency. It may sufficiently appear from circumstances and the conduct of the parties. If it be shown that one person continues to act for another and his action is acquiesced in by such other, the relationship or contract of agency is sufficiently sustained by evidence. "An agency may be created by express words or acts of the principal, or may be implied from his conduct and acquiescence. The nature and extent of an agency may be implied and inferred from the circumstances." *Ruffner v. Hewitt*, 7 W. Va. 585. In that case, the agency was established against the principal by implication arising from conduct shown. Here the question is the kind and quantum of evidence, sufficient to establish the contract or relation against the agent, and in favor of the principal; and, for that purpose, evidence of admissions and conduct of the agent is freely allowed everywhere. A person cannot, by his testimony and acts alone, prove his agency against his principal, nor can strangers do so, but it is universally admitted that he may thus prove it against himself, and in favor of his principal.

To the application of this principle it may be objected that the evidence falls short of showing, on the part of the owners, knowledge of the acts of Wiseman, or recognition thereof. If this position be conceded, the principle of estoppel applies. Wiseman's heirs claim under, and are bound by, his acts. They do not pretend to have title otherwise than by inheritance from him. They claim and have such right and title as

he had and no more. In the attempt to repudiate his acts, clearly done for the benefit of Mrs. Siers and her children, they are met with the assertion, on the part of the owners, of a claim to the benefit of what was done for them. But is it apparent that the evidence is insufficient to afford a foundation for the finding as a matter of fact that Wiseman's acts in reference to this land were unknown, unrecognized, and unacquiesced in by the owners? Owners of property subject to taxation, as all private property is, are presumed to know that the taxes accrue thereon annually and that nonpayment thereof results in loss of the property. No great distance intervened between the residence of Mrs. Siers and the location of the land and she and Wiseman were close relatives. It is highly probable, to say the least, that she did know of his payments and acquiesced therein, for he continued to make them, and strong probabilities arising from admitted facts are everywhere held to have weight and force as evidence. It is sometimes asserted by the courts that owners of property will not be allowed to plead ignorance of the status and condition thereof or of the vicissitudes to which it is subject. *Broderick's Will*, 21 Wall. 519, 22 L. Ed. 599; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. If they cannot absolve themselves from duty on the ground of such ignorance, will it be presumed, in order to defeat a right or title which must exist but for it?

So far as the competent evidence discloses, no money was ever furnished Wiseman with which to pay the taxes, and he was never reimbursed for payments made by him. But is the contrary to be assumed? For aught that appears in the evidence, or admissions by the pleadings, some money may have been furnished to him for that purpose. He is dead, and Mrs. Siers not permitted to testify. Does not the fact of payment of the taxes for 15 years argue that there may have been some money furnished for that purpose? But suppose none was furnished, and the payments, in view of the relation of the parties, should be deemed to have been gratuitous, is that fact inconsistent with the position that the payments were made for the benefit of the owners? By no means. The motive which prompted the payments is immaterial, for there was no right in Wiseman to pay the taxes, or in any way interfere with the property except on behalf, and for the benefit, of the owners, and neither he nor his heirs can be permitted to claim the benefit of such acts against the owner. He may have expected or intended to claim a lien upon the land for the amount of his expenditures, and having the power to do so, by taking the title in his own name, was willing to advance the money and charge it to the owners. This is not at all inconsistent with the relation of agency, nor with the existence of a perfect equitable title

to the land in Mrs. Siers and her children. Failure to supply an agent with money for payment of taxes does not absolve him from duty to abstain from buying the land. *Bowman v. Officer & Pusey*, 53 Iowa, 640, 6 N. W. 28. It may be said, however, that, under this principle, every tortious act which a stranger may do upon the land of another or with reference to it will operate beneficially to the owner, if he sees fit to claim the benefit of it, and is therefore inconsistent with the principles of the law of adverse possession. Adverse possession is exceptional in its nature and principles, being founded upon the statute of limitations, and can only be predicated upon acts of such nature as are hostile, so openly and notoriously hostile, as to be inconsistent with any admission of right or title in any other person. Mere payment of taxes is not such an act. Title by adverse possession rests not upon common-law principles, but upon the statute of limitations, which professedly, and for reasons of public policy, gives the party the benefit of his own wrong in defiance of common-law justice and right. Ordinarily, the owner of property may found a right upon any tortious act of a stranger, respecting it. If beneficial, he may claim the whole of the benefit, and, if injurious, he may waive the tort, adopt the act and sue upon it, as upon a contract. But the whole course of the conduct of A. K. Wiseman in its nature and effect is detrimental to himself, and beneficial to the owners, necessarily and unequivocally so, and nothing to the contrary can be inferred from it.

Counsel for the appellees relies upon the case of *Day v. Fay* (decided Feb. 20, 1906) 51 S. E. 1013, and quotes at some length from the opinion therein; but it differs from this in material respects. The deed was taken as soon after the purchase as the law would permit, and the purchase itself was not made until after the death of the alleged principal. From what has been said here, the importance of these circumstances must be apparent.

Having concluded that agency in Wiseman is sufficiently shown, it follows that his heirs succeeded to only such right and title as he had. Their payment of taxes on the land in their own name from 1892 down to the present time inured to the benefit of the Siers title, and there has been no forfeiture of that title to the state. They held in privity with the Siers title, and, in such case, no other payment on the land is required. Double payment is required only in the case of hostile titles. *Sturn v. Fleming*, 26 W. Va. 54. The claim of forfeiture is predicated solely upon failure to keep the land on the landbooks and cause the same to be taxed as the property of Mrs. Siers and her children and those who claim under them. As the Wiseman heirs held the Siers title, if at all, in trust, having the legal title only, while the equi-

table title remained in the adverse parties, the payment of taxes in their names inures to the benefit of the appellants, and prevents forfeiture under the statute; and as there has been no forfeiture of that title to the state, there could have been no transfer of it under and by force of section 3 of article 13 of the Constitution. Forfeiture is a condition essential to such a transfer. It never can occur without a contemporaneous or precedent forfeiture. *State v. Harman* (W. Va.) 50 S. E. 828.

Agency on the part of the ancestor of the appellees renders it equally unnecessary to say whether the deed executed by the clerk is good or bad. Though it were absolutely free from defect, the appellees would hold the title under it as trustees for the appellants. *Battin v. Wood*, 27 W. Va. 58; *Williamson v. Russell*, 18 W. Va. 612; *Curtis v. Boreland*, 35 W. Va. 124, 12 S. E. 1113; *State v. Eddy*, 41 W. Va. 95, 23 S. E. 529. Upon showing their equitable title, they may demand conveyance of the legal title, and, in this view, the better it is the clearer their right to it, for, if it operates to strengthen the title of the cestuis qui trustent, they are entitled to the benefit of such additional strength.

Laches is relied upon as a defense, but the lapse of time from the date of notice of the adverse claim is too short. The appellees took possession of the land in April, 1897. This suit was commenced August 3, 1899, less than three years after notice of intent to deny the claim of the appellants. As late as March, 1897, W. A. Wiseman, the only one of the heirs who had any communication with Mrs. Siers, so far as the bill discloses, promised in writing to call upon her, and see what could be done. Within five years preceding that date, he had written her three letters, in response to inquiries about the land, and failed to give notice of an adverse claim, except for the purpose of securing the money due the estate, in any of them. He did tell her they had taken a deed to protect themselves, but in immediate connection with that statement he mentioned the money due them. He further said some of the heirs were contrary, but in what respect he did not indicate; and, in the last letter, he said he thought he could probably do something with them. This necessarily imported belief on his part in the possibility of an adjustment with her and acquiescence in her demand. His failure to disclose the amount of taxes paid, and intimation that it was large, and more than the value of the land might have excited suspicion, but he continued to assure her of his intention to come and see her, and evidently about the land, for, in his final letter, he apologized for his long delay and promised to get "all the papers together in the case, and come down and spend a day or so." This correspondence began immediately after the death of the ancestor, and several months before the acquisition of the tax deed; the

first act signifying hostility, but not communicated for four years, and then with the assurance that it had been taken for protection as above stated. There is a dead witness, it is true, but if he were living, he would be estopped to deny the legal force and effect of admitted and incontrovertible facts, and his testimony, if consistent with them, would overthrow rather than sustain the position of claimants under him, in a controversy which they have brought on since his death. Under these circumstances, no such lack of diligence is perceived as amounts to laches. Less than nine years intervened between the date of the deed and the institution of this suit, and delay for that period, even if long enough to be prejudicial, is sufficiently excused.

Though entitled to the land, the appellants must do equity by reimbursing the estate of A. K. Wiseman and the appellees to the extent of their respective payments, on account of taxes on the land, together with costs and expenses properly incurred. *Morris v. Roseberry*, 46 W. Va. 24, 29, 32 S. E. 1019; *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509.

As the state had no title by forfeiture, its bill should have been dismissed, but without an adjudication in its favor, and, as the appellants had the equitable title to the land, the tax deed should have been set aside and annulled on reimbursement as aforesaid, as to the taxes paid.

Therefore these causes will be remanded to the circuit court of Fayette county with direction to ascertain the amount due the estate of A. K. Wiseman and his heirs for taxes paid on the land, with interest thereon, and other proper charges, and then to enter a decree in conformity with the conclusions above expressed.

(58 W. Va. 388)

BALTIMORE & O. R. CO. v. ALLEN,
Justice, et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1905.)

1. GARNISHMENT — FOREIGN RAILROAD CORPORATIONS.

Railroad corporations, chartered by other states, but owning and operating railroads in this state, have the status of residents of this state, although they are not citizens of it, within the meaning of clause 1 of section 2 of article 3 and clause 1 of section 2 of article 4 of the Constitution of the United States, nor domiciled in this state in the technical sense of that term.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, §§ 144, 146.]

2. SAME—SITUS OF DEBT.

Such corporations may be proceeded against as garnishees, without reference to the jurisdiction in which debts due from them were contracted or are payable.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, §§ 144-147.]

3. SAME—DEBT FOLLOWS PERSON OF DEBTOR.

For the purposes of garnishment, a debt is annexed to the person of the debtor and

subject to garnishment wherever he is found, unless expressly made payable elsewhere.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, §§ 143, 145-147.]

4. SAME—VENUE.

A debt may be attached by garnishment at the place of residence of the debtor, although it be expressly made payable elsewhere.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, §§ 143, 145-147.]

(Syllabus by the Court.)

Error from Circuit Court, Ohio County.

Application by the Baltimore & Ohio Railroad Company for writ of prohibition against James Allen, justice, and others. From an order denying the writ, plaintiff brings error. **Affirmed.**

Robert White, J. B. Somerville, and D. C. Westenhaver, for plaintiff in error. Caldwell & Caldwell, for defendants in error.

POFFENBARGER, J. Upon a writ of error to a judgment discharging a rule in prohibition and dismissing plaintiff's petition, the inquiry is whether a justice of the peace has jurisdiction to proceed with an attachment against a railroad company, chartered by the Legislature of Maryland, and permitted by an act of the Legislature of Virginia, before the division of the state, to build and operate its railroad through what is now West Virginia, as garnishee, for the subjection of a debt contracted by the same railroad company in the state of Pennsylvania, and payable there, to the satisfaction of a demand due from the creditor of said company to a third party; such creditor being a nonresident and not having appeared in the action. The supposed lack of jurisdiction is predicated upon two grounds: First. That the situs of the debt sought to be subjected is in the state of Pennsylvania, where the creditor resides, where it was contracted, and where it is payable. Second. That, though the situs of the debt be not in the state of the residence of the creditor, it is not in this state, because the garnishee is domiciled in another state and found here only temporarily. H. F. Putnam, an employé of the Baltimore & Ohio Railroad Company on part of its line in Pennsylvania, to whom said company was indebted for services, was himself indebted to J. D. Miller & Son, also residents of Pennsylvania. Miller & Son assigned their claim against Putnam to W. W. Rogers, of Wheeling, who brought an action on it before Allen, a justice of the peace of Ohio county, making the railroad company a garnishee. Thereupon the company presented its petition for a writ of prohibition to a judge of the circuit court of that county, who, after awarding a rule, discharged it on motion, and dismissed the petition. The petition alleged, in addition to the facts already stated, that the debt due Putnam was contracted and payable in Pennsylvania.

Great conflict and confusion characterize

the decisions of the courts of the several states respecting the right to proceed by garnishment against debts due from corporations to nonresidents and made payable in a foreign jurisdiction. Many of them rest their decisions on the theory that the debt follows the person of the creditor, and can be subjected only in the jurisdiction in which he resides. Others take the opposite view, saying it follows the person of the debtor, and belongs to the jurisdiction of his residence. Still others give the idea of situs no peculiar force, holding that it may be subjected wherever the debtor may be sued. The adherents to the first proposition defend it upon the ground that the ownership of the debt is of necessity in the creditor, for no man can have property in a debt that he owes to another. Thus, in *National Bank v. Furtick*, 2 Marv. (Del.) 35, 42 Atl. 479, 44 L. R. A. 115, 69 Am. St. Rep. 99, the court says: "This inquiry could present no difficulty in respect to real estate, and little or none in regard to tangible personal property, having an actual situs. But, for the purpose of jurisdiction, the situs of a debt or chose in action is a question upon which there has been some diversity of opinion. There is, of course, no actual or visible, but only constructive, situs. Does the debt follow the creditor and his domicile, or the debtor and his domicile? The legal right and title are clearly in the creditor, and, by analogy to the principle that constructive possession is with the rightful owner, we should expect that the chose in action, particularly a debt, follows the person of the creditor for the purpose of attachment, as well as for many other purposes. And such seems to us to be the law, especially where there is no stipulation to the contrary." In his very able note to this case, in 69 Am. St. Rep., Mr. Freeman says, at page 117: "By the great weight of reason and authority debts are considered as the property of the persons to whom they are due, and their situs to be at the domicile of the creditor for the purpose of garnishment, as for all other purposes." Mr. Freeman does not mean to say, however, that the decisions in all the cases cited for the foregoing proposition were controlled by it. It is merely stated as a sort of basic principle, which has been modified in several ways. In the next subdivision of his note (page 118) he says many of the leading cases cited hold that the rule has been dispensed with by statutes. "In states whose courts recognize the authority of the general rule that the situs of a debt is at the domicile of the creditor, it is sometimes admitted that 'this fiction always yields to laws for attaching the property of a non-resident, because such laws necessarily assume that the property has a situs distinct from the owner's domicile.'" *Wyeth Hardware, etc., Co. v. Lang*, 54 Mo. App. 147, affirmed in 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 628. Statutes

and the custom of London may, and often do, for the purposes of attachment or garnishment at the suit of a third person, give the debt a situs at the domicile of the debtor. *Swedish-American Nat. Bank v. Bleecker* (May, 1898) 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492; *Williams v. Ingersoll*, 89 N. Y. 508; *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 275. Compare *Root v. Davis*, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445. "We conceive it to be well settled by authority," said the court in *Reimers v. Seatco Mfg. Co.*, 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364, 37 U. S. App. 426, "that while, generally speaking, the situs of a debt is constructively with the creditor to whom it belongs, it is within the competence of the sovereign of the residence of the debtor by reason of its control over its own residents to pass laws subjecting the debt to seizure within its territorial sovereignty." See *Pomeroy v. Rand*, 157 Ill. 176, 41 N. E. 636; *Bragg v. Gaynor*, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161; *Newland v. Circuit Judge*, 85 Mich. 151, 49 N. W. 544." *National Bank v. Furtick*, 69 Am. St. Rep. 118, 119, note. In a number of the cases referred to in these portions of the note the decisions stand upon the view that neither debtor nor creditor resided in the state in which it was attempted to subject the debt, and whether it was with the debtor or creditor was wholly immaterial. *Swedish-American Bank v. Bleecker*, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492; *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448; *Bank v. Furtick* (Del.) 42 Atl. 479, 44 L. R. A. 115, 69 Am. St. Rep. 99; *Railroad Co. v. Dooley*, 78 Ala. 524; *Railroad Co. v. Ohumley*, 92 Ala. 317, 9 South. 286; *Central Trust Co. v. Chattanooga, etc., Co.* (C. C.) 68 Fed. 685.

Though a great deal is said in the reported cases in support of the doctrine that the debt follows the person of the creditor, few decisions in attachment cases stand upon it. It is usually referred to as a general principle having more or less bearing upon some other proposition which forms the basis of the final disposition of the case. *Missouri Pacific Railway Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430, 8 L. R. A. 385, 389, 19 Am. St. Rep. 143; *Railway Co. v. Sturm and Railway Co. v. Campbell*, reversed by the Supreme Court of the United States, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, however, adopt and apply that rule. It is manifestly at variance with a fundamental principle of the law of attachment, and the conception of the nature of the rights to be vindicated and wrongs to be redressed, which originally called the remedy by attachment into being and has made its use indispensable in modern jurisprudence. All courts characterize it as a

special, anomalous, and harsh remedy, authorizing the seizure of the debtor's property in advance of an adjudication against him. It is based upon and deals with circumstances and conditions which put it beyond the power of the court to do justice and work out the substantial rights of the parties by the use of the ordinary legal remedies. Total want of remedy at law and inadequacy thereof, in view of the peculiar situation of the parties, respecting property and personal rights, necessitated the establishment of the system known as equity jurisprudence for the vindication of equitable rights of which the law courts could take no notice, and for relief against fraud and mistake. Under this system authority is generally exercised over the persons of the parties in respect to their rights, rather than over the property which is the subject-matter of their differences, although in many instances the property itself is the subject of the direct and immediate action of the court. But the circumstances are often such that the remedies in equity are not broad, flexible, and swift enough to prevent the impending wrong, or save the endangered right of the party. Hence the necessity for the special statutory remedy by attachment, substantially in the form in which it was exercised by the courts of London under a custom, as a jurisdiction peculiar to those courts, unknown throughout the balance of the kingdom, and giving relief under practically the same conditions and of the same kind as that afforded by attachment by the custom of London. The extraordinary circumstances calling for its exercise create a right which in fact, and in its nature, is equitable rather than legal, as tested by legal and equitable rules and principles, unaffected by any custom or statute. Fraud in some form, or nonresidence of the debtor, renders the ordinary common law remedies unavailing. Fraud, so far as they are concerned, may wholly deprive the creditor of his rights, and nonresidence of the defendant makes it impossible for the creditor to sue in his own state, and unjustly compels him to pursue the fleeing debtor into a foreign jurisdiction, although he has left property behind him, amply sufficient to pay the debt, against which the creditor cannot proceed by any form of action known to the common law. Instead awaiting such further development of equity jurisprudence as to enable it to give the creditor under these circumstances what he has a clear moral right to exact, the Legislature adopted as a legal remedy that which has existed for centuries by the custom of London, and allowed a legal proceeding against property of the defendant as well as against his person. If, by giving a remedy against the resident debtor of the nonresident creditor, who is the debtor of the plaintiff, the Legislature has impliedly said the plaintiff may, by a legal process, resort to the man in whose hands the money

belonging to the absent defendant is, and thereby make him hold the fund as a trustee, or deliver it to an officer of the court, all the right which the defendant may have to that fund shall be deemed to be within the jurisdiction of the courts of this state for the purposes of the attachment, can the court say it shall not be so? The statute is founded upon a recognition of the plaintiff's moral right to treat him as a trustee, and declares that he shall be so treated in the law courts. But for the statute, the legal right and property in the debt would undoubtedly be with the absent creditor. As the statute exists, however, we must keep our eyes upon the conditions it has wrought out, and not wander into a field of speculation, from which we are fenced out by the plain intent and inevitable force and effect of the statute, in the ultimate achievement of the end for the accomplishment of which the statutory remedy is given, namely, seizure of the debt at the residence of the debtor, prevention of its withdrawal by either party from the territorial jurisdiction of the court, extinguishment of the creditor's interest in it by adjudication, and application of it to the payment of the plaintiff's debt.

To the anticipated suggestion that this line of argument assumes the determination of the very point in controversy, the reply is that one of the declared and primary objects of the remedy is to reach and subject the property and effects of nonresident debtors. Nonresidence is the basic fact of the jurisdiction and the remedy. Are we to assume that it was not the intention to subject debts due the defendant, but only tangible property? Is it possible that the lawmakers of all the states have stood by in silence and watched the courts for centuries misapply the remedy, to the detriment and injury of thousands of people, without inserting a simple exception in the statute? As already indicated, the attachment system of law had its origin in the custom of London. By that law it determined and announced that, for its purposes, the debt was annexed to the person of the debtor, and not to that of the creditor. "By this custom a debt contracted without the jurisdiction of the city may be attached, if the debtor is found within the jurisdiction, for every debt follows the person of the debtor." 3 Bac. Abr. 54. "Neither is it necessary to aver that the plaintiff in the principal case was indebted to the plaintiff below within the jurisdiction of the mayor's court, for it is not necessary that the debt should arise, or the defendant reside, within it, or that he should be actually summoned." *Id.* 56. The position here adopted was taken by the Supreme Court of the United States in *Railway Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144. Mr. Justice McKenna, delivering the opinion, said: "Our attachment laws had their origin in the custom of London. Drake, § 1. Under it a debt was regarded as being where

the debtor was, and questions of jurisdiction were settled on that regard. In *Andrews v. Clerke*, 1 Carth, 25, Lord Chief Justice Holt summarily decided such a question, and stated the practice under the custom of London. The report of the case is brief, and is as follows: 'Andrews levied a plaint in the sheriff's court in London, and, upon the usual suggestion that one T. S. [the garnishee] was debtor to the defendant, a foreign attachment was awarded to attach that debt in the hands of T. S., which was accordingly done; and then a diletur was entered, which is in nature of an imparlance in that court. Afterwards T. S. [the garnishee] pleaded to the jurisdiction, setting forth that the cause of debt due from him to the defendant, Sir Robert Clarke, and the contract on which it was founded, did arise and was made at H., in the county of Middlesex, extra jurisdictionem curiæ; and, this plea being overruled, it was now moved [in behalf of T. S., the garnishee] for a prohibition to the sheriff's court aforesaid, suggesting the said matter [viz.], that the cause of action did arise extra jurisdictionem, etc., but the prohibition was denied, because the debt always follows the person of the debtor, and it is not material where it was contracted, especially as to this purpose of foreign attachments; for it was always the custom in London to attach debts upon bills of exchange and goldsmith's notes, etc., if the goldsmith who gave the note or the person to whom the bill is directed liveth within the city, without any respect had to the place where the debt was contracted.' The idea of locality of things, which may be said to be intangible, is somewhat confusing, but, if it be kept up, the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do it he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the res, and gives character to the action as one in the nature of a proceeding in rem. *Mooney v. Buford & George Mfg. Co.*, 72 Fed. 82, 18 C. C. A. 421; *Conflict of Laws*, § 549, and notes."

Does the additional circumstance, that the debt is payable in the foreign state, vary the law in this respect? The affirmative of this proposition is predicated upon the supposition that a debt made payable to a person in the state in which he resides is

thereby specially annexed to him, and withdrawn from the jurisdiction in which the debtor resides, if they are in different states. It is not pretended that it can have a situs irrespective of both debtor and creditor. If it can be said to have a situs at all, it must be with one or the other of them. It has no tangible existence. Hence the only conceivable effect that could result from making the debt payable at the residence of the creditor in this connection would be the more effectual binding of it to his person. Can it be said that the circumstance of the place at which a debt is made payable makes it more effectually or sacredly the property of the creditor? Suppose it did; is it not the very object and purpose of the attachment to extinguish his right and property in the debt so far as may be necessary to effectuate satisfaction of the plaintiff's debt? Does it depend upon whether the debt is bound to him tightly or not? If it were attached to his person at all, would it not defeat the jurisdiction? If this consideration could have any force, it would be necessary to give it some effect when the debt is payable at a place in which neither party resides. What possible effect could it have. Would it put the debt beyond reach through either debtor or creditor? This would be a bald absurdity, in which everything of substance would be sacrificed to a bare technicality. Place of payment has nothing to do with the place of enforcement. No action can be maintained for the debt by anybody until after default. Action does not produce payment at the place named. It exacts damages for the breach, payable in the jurisdiction of the forum. There can be no action until after breach of the contract, and then it may be maintained wherever the defendant can be sued. That the garnishment prevents compliance with all the terms of the contract is no valid objection, because its primary office is to break asunder the contractual relations between the debtor and creditor to the extent of substituting the plaintiff to the beneficial interest of the creditor in the debt.

Having no doubt about the untenableness of the position, that the proceeding must be at the place of residence of the defendant, the next inquiry is whether the garnishee is within the jurisdiction of the court. In the case of *Pennsylvania, etc., Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, this court held that a foreign railroad corporation, operating no line of road, nor carrying on its ordinary business, within the state, is not subject to garnishment in respect to a debt due from it to a nonresident, not agreed to be paid to him within the state. If, notwithstanding the different situation of the plaintiff, which built and operates its road within the state, under legislative authority specially conferred, its legal status is the same as that of the *Pennsylvania*

Railroad Company, the conclusion will be the same. The difference in that respect, if any, is the only ground upon which the two cases can be distinguished, except as to service of process. This case differs from Mahany v. Kephart, 15 W. Va. 609, and Stevens v. Brown, 20 W. Va. 450, in only one important particular, namely, that in each of those cases the defendant, creditor of the railroad company, appeared, but did not appear in this. As asserted in Pennsylvania, etc., Co. v. Rogers, by way of marking the distinction between it and Mahany v. Kephart, this court, in the latter, most assuredly decided the status of the Baltimore & Ohio Railroad Company to be such as made it liable to the process of garnishment, at the instance of a resident assignee, of a debt contracted by the defendant in another state on account of wages due the defendant from the assignee for services rendered in such other state. In delivering the opinion of the court Haymond, J., said: "I am unable to see, if the said railroad company can be sued for debts contracted in this state, why it may not also be sued in this state for debts contracted in other states. It would be strange, indeed, if residents of this state could sue and enforce the payment of their debts contracted in this state against said railroad company and its property in this state, through the courts thereof, and nonresident creditors and resident creditors of said railroad company, where contracts are made in another state, should be denied the same rights and privileges, and thus be left without remedy in our courts. I do not feel at liberty to so hold under my convictions of the law with us touching the question. Certainly, if Kephart could have properly sued the railroad company for said \$105 in the county of Harrison at the time this action was brought, the plaintiff in this suit had a right to sue Kephart there and garnishee the railroad company there as the debtor of Kephart." Following this is the assignment of the reasons for his conclusion. In this part of his opinion he makes no reference to the appearance of the defendant as having aided the jurisdiction of the court. It is alluded to only upon the inquiry as to the power of the court to render a personal judgment against him. However, it may have been in law a waiver of defects which would otherwise have been held fatal, in consequence of which it could now be relied upon as showing the decision to be sound in principle. Whether it would have made any difference in the opinion and conclusion of the court, no person can possibly know, since it cannot be ascertained from the report of the decision.

The Baltimore & Ohio Railroad Company is undoubtedly a foreign corporation, as tested by the jurisdiction of the federal courts. Baltimore, etc., Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; Marshall v. Baltimore

& O. R. R. Co., 16 How. 329, 14 L. Ed. 953; O. & M. R. R. Co. v. Wheeler, 1 Black, 297, 17 L. Ed. 130; Railway Co. v. Whitton, 13 Wall. 270, 20 L. Ed. 571. This court, in Rece v. N. N. M. & V. Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572, came to the same conclusion, under the federal authorities above cited and others. But the test of jurisdiction in the federal courts is not residence, but citizenship, under section 2 of article 3 of the federal Constitution, extending the judicial power to all cases "between citizens of different states." The distinction between citizenship and residence, as applied to corporations, is observed by the courts. "It should be observed that the corporation, although it may have a quasi habitat or residence in another state than that which created it, yet cannot be a citizen elsewhere, and therefore cannot claim the benefit of that clause of the United States Constitution (article 4, § 2) which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'" Upon applications for removal of causes from state to federal courts, as in Rece v. N. N. M. & V. Co., cited, and perhaps a few other instances, the state courts are called upon to notice and observe this distinction, but in the ordinary actions by and against corporations, jurisdiction is tested by the fact of residence, except when it is acquired under special statutes. Though a corporation is incapable of having a residence in the sense in which that term is applied to an individual, just as it is not in fact a citizen, it may be, and is often, deemed to have a residence or the equivalent thereof in a state other than that of which it is a citizen.

There is no conflict between this view and the conclusion expressed in Pennsylvania, etc., Co. v. Rogers. The garnishee in that case was only temporarily or casually in the state. It had an agent here for a special purpose. Its situation was analogous to that of a nonresident individual temporarily or casually in the state, having no usual place of abode at which service could be made in his physical absence therefrom. Here the case is radically different. The corporation actually operates its road through the state, having agents along its line permanently, upon whom service may be had at any time, owning property of immense value and carrying on a business of vast proportions, in view of which the statute contains special provisions applicable to such foreign corporations and to no other, as will be shown. By the great weight of judicial authority this gives it the equivalent of residence in the state, and as a resident it may be proceeded against as garnishee, just as a resident individual may. "Accordingly the doctrine of the court now is that several states may, by competent legislation, unite in creating the same corporation or in combining several pre-existing corporations into a

single one; that one state may make a corporation of another state, as thus organized and conducted, a corporation of its own, as to any property within its territorial jurisdiction; and that a state may, by an enabling act, authorize a corporation created in another state to build and use a railroad within its own limits, without creating a new corporation. Illustrations of these conclusions are now seen every day in the passage by states of enactments making foreign corporations doing business within the domestic jurisdictions domestic corporations, and amenable in all respects to the domestic laws and police regulations, notwithstanding the provisions of their foreign charters. But it remains equally true that, for many purposes of legal procedure and practical convenience in the administration of justice, each one of the bodies so created remains a domestic corporation within the state under whose Legislature it has been called into existence. Clearly such a corporation is a domestic corporation within each of the states whose legislation has created it, for the purpose of local jurisdiction to the application of local police regulations. Such a corporation is a resident of each of such states for the purpose of the ordinary jurisdiction of its courts, and consequently may be subjected to garnishment in any one of them, provided the situs of the debt is there, although its principal office or place of business be not there." 10 Cyc. 170, 171. In *Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663, the court holds that "a corporation is capable of having several domiciles, and of being sued at the same time in more than one jurisdiction." The opinion in that case reviews many decisions, English and American, holding this doctrine. Though not accrediting the foreign corporations with a domicile in the state, the following cases hold it liable as garnishee: *Mooney v. Buford*, 72 Fed. 32, 18 C. C. A. 421; *Pomeroy v. Rand*, McNally & Co., 157 Ill. 176, 41 N. E. 636; *Mooney v. Railroad Co.*, 60 Iowa, 346, 14 N. W. 343; *Bank v. Insurance Co.*, 83 Iowa, 491, 50 N. W. 53, 32 Am. St. Rep. 316; *Railroad Co. v. Thompson*, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497; *Harvy v. Railroad Co.*, 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84; *Hardware Co. v. Lang*, 127 Mo. 242, 29 S. W. 1010. In some of them it is done on the theory of a quasi residence in the state by the corporation, thereby holding the situs of the debt to be in the state. In others the courts proceed upon the assumption that a debt has no situs, and that the debtor may be proceeded against wherever service upon him may be had, without regard to his residence. This doctrine is contrary to the principles underlying the decisions in *Pennsylvania Co. v. Rogers*, cited, which are believed to be sound, and supported by the great weight of judicial authority. A nonresident may be summoned as garnishee, but upon his showing that he has nothing in the state belonging to the defendant, and is not bound to deliver or

pay him anything in the state, he must be discharged.

There are decisions, however, which hold foreign corporations, having the right to do business and consenting to be sued in the state, not liable as garnishees, unless they have property of the defendant in their possession within the state, or are bound to deliver property or pay him money in the state. *Railroad Co. v. Dooley*, 78 Ala. 524; *Railroad Co. v. Chumley*, 92 Ala. 317, 9 South. 236. In the last-named case the court held a judgment rendered in Tennessee against an Alabama railroad company, operating its road through the former state, as garnishee, for wages earned in the latter state, void on the ground that the Tennessee court had not acquired jurisdiction, saying: "Plaintiff being a resident of Alabama, and defendant an Alabama corporation, the debt, being contracted and payable in this state, could not be subjected by process of garnishment by a court of Tennessee." Similarly, in *Douglass v. P. Ins. Co.*, 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 113, 34 Am. St. Rep. 443, it was held that "the right of a creditor of a corporation to prosecute an action to recover the debt in the courts of his own state cannot be defeated by the pendency of attachment proceedings against him in another state by a creditor there, when the only claim of jurisdiction by the foreign court rests upon authority given by the statutes of its state to seize the debt by and through process proceedings against an agent of the corporation in that state. (2) While a state may authorize the seizure and sale, by means of appropriate legal proceedings, of property of nonresidents in the jurisdiction for the payment of their debts, it cannot subject to its laws either their real or personal property out of the jurisdiction. (3) In attachment proceedings the res must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction. (4) A domestic corporation has at all times its exclusive residence and domicile in the jurisdiction of origin, and it cannot be garnished in another jurisdiction for debts owing by it to home creditors, so as to make the attachment effectual against such a creditor in the absence of jurisdiction acquired over his person. (5) The law of a state cannot make a debtor, who is actually a nonresident, a resident by so declaring, at least so as to bind another jurisdiction by the declaration. (6) The legal proceedings or judgments of another state are recognized here only where jurisdiction has been acquired according to the course of the common law in the foreign forum; and this, although the statutes of that state purport to give its courts jurisdiction, in disregard of the principles and rules of general jurisprudence, which this state is bound to recognize." *Bank v. Furtick* (Del.) 42 Atl. 479, 44 L. R. A. 115, 69 Am. St. Rep. 99, holds that a foreign corporation cannot be summoned as garnishee in one state to reach a debt payable by it in another state. This proceeds upon the

theory of situs at the residence of the creditor. *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492, embodies the same conclusion, based upon a different ground, namely, nonresidence of the garnishee corporation, the same as that upon which we put the decision in *Railroad Co. v. Rogers*. The syllabus says: "Our statute requires a foreign insurance company, before doing business in this state, to file a stipulation agreeing that any legal process affecting such company, served on the insurance commissioner, shall have the same effect as if personally served on the company. Held, such a stipulation, filed by the garnishee, does not give it a domicile in this state for all purposes, or bring into this state the situs of a debt which it owes elsewhere by reason of business transacted elsewhere, and such a debt cannot be seized in an action in rem in this state."

Aside from the Alabama decisions, none of these were railroad cases. In *Railroad Co. v. Chumley*, the Alabama court says: "Several statutes of Tennessee, regulating proceedings of garnishment and service of process upon corporations, were introduced in evidence, but we fail to find among them any statute providing for service of process upon foreign corporations in garnishment suits. It may be that the language is comprehensive enough to include proceedings by garnishment when the property sought to be reached is in the jurisdiction of the state, though the garnishee may be a nonresident; but, in the absence of evidence of any construction by the courts of Tennessee, we cannot interpret the statutes as intending to place within the jurisdiction of the state property which has no locality there." Upon examination of the Tennessee statutes it discovered no purpose or intent to make the foreign corporation in any sense a resident of Tennessee, and therefore the situs of the debt could not be, upon either theory of that subject, within the state of Tennessee. As to the other cases, we might reach the same conclusion under our statutes, and be in perfect accord with *Railroad Co. v. Rogers*, for the statute confers upon foreign railroad corporations rights and powers materially different from those conferred upon other foreign corporations. As to the latter, section 30 of chapter 54 of the Code of 1899 says that, upon complying with certain requirements, they "shall have the same rights, powers and privileges, and be subject to the same regulations, restrictions and liabilities that are conferred and imposed" on corporations chartered under the laws of this state. In construing this language we must not lose sight of other provisions concerning and affecting the status of foreign corporations. A ground of attachment in this state is "that the defendant, or one of the defendants, is a foreign corporation, or a nonresident of this state." Code 1899, c. 106, § 1. This

evinces an intent to deny to them residence within the state. The statute has been so construed, not only here, but in Virginia also. They are subject to the attachment laws. *Quesenberry v. Building Association*, 44 W. Va. 512, 30 S. E. 73; *Savage v. Building Association*, 45 W. Va. 275, 31 S. E. 991; *Cowardin v. Life Ins. Co.*, 32 Grat. 445. These decisions are probably sound in principle. The provision of means of obtaining jurisdiction of the person may well be held to have been intended to give a cumulative remedy, and not to take away any of those already in existence.

But the language of that section applicable to railroads is much broader, indubitably subjecting them to the liabilities and according them all the rights of residents, except in so far as it has been qualified by the decision in *Rece v. N. N. M. & V. Co.*, 32 W. Va. 164, 9 S. E. 212, 8 L. R. A. 572, namely, that it does not deprive them of their rights in respect to federal jurisdiction. The language is: "Every railroad corporation doing business in this state under the provisions of this section, or under charters granted or laws passed by the state of Virginia or this state, is hereby declared to be, as to its works, property, operations, transactions, and business in this state, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation." In view of this, can it be treated as a nonresident, and its property made liable to attachment in every county through which it passes for every sort of attachable claim that might arise? No such unreasonable assumption seems ever to have entered the mind of any person. Legislative intent to the contrary is made too plainly manifest. That would violate rights plainly conferred by the express language of the statute. It would not be treated as to its property, business, operations, and transactions within the state as domestic corporations are. While conferring upon it all the privileges and immunities incident to residence, the Legislature endeavored to impose the liabilities incident thereto. Accordingly the statute says they shall be held to be, and treated as, domestic corporations in all suits and legal proceedings which may be commenced or carried on by or against them. Garnishment is a legal proceeding, though possibly not a suit directly against the garnishee, as to which we need not determine. Nor are such suits and proceedings limited by the place of origin of the cause of action. In *Humphreys v. N. N. M. & V. Co.*, 33 W. Va. 135, 10 S. E. 39, the cause of action was damages for a personal injury, which occurred in another state. This court held that the action was maintainable because service of process could be had in this state,

but it did not note any distinction between citizenship and residence. It was unnecessary to do so, since service of process alone gave the requisite jurisdiction. To hold a railroad to be a nonresident for one purpose and a resident for another would be, not only inconsistent with, but violative of, the manifest purpose and intent of the Legislature, disclosed by the statute above quoted.

The Baltimore & Ohio Railroad Company, and other corporations of its class, at the time of the decision of the case of Mahany v. Kephart were distinguished in their status from other foreign corporations by a statute passed December 27, 1873. Acts 1872-73, p. 724, c. 227, § 16. It declared that "All railroad companies doing business in this state under charters granted or laws passed by the state of Virginia or this state, are hereby declared to be domestic companies or corporations, and shall be treated as such in all cases." The Baltimore & Ohio Railroad Company was necessarily included among those doing business under laws passed by the state of Virginia. This provision, modified and combined with others enacted from time to time, finds a place now in section 30 of chapter 54 of the Code of 1899. In view of it and of the reasoning of Judge Haymond in that case, we cannot say the decision is wrong or would have been wrong, had there been no appearance on the part of the defendant. Nor can we say now, in view of the existing statutory provisions adverted to, that the status of a railroad company doing business in this state, within the meaning of those statutes, is not equivalent to that of a resident of the state. On the contrary, we think it is, and for that reason it may be proceeded against as a garnishee to the same extent, and in respect to the same classes of debts, as natural persons residing in this state. Just here it is proper to say the use of the word "domicile" in the case of Railroad Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, is inaccurate, as it is in some other cases, discussed in the opinion in that case and in this, and is to be taken and applied in the sense of "residence." Nor can the Pennsylvania Railroad Company, upon the facts disclosed by the record in its case against Rogers, be consistently held to have the status of the Baltimore & Ohio Railroad Company, since it operates no line of road here, and has not put itself within the letter or spirit of the statute by merely having a soliciting agent in the state.

That this ruling may deprive the employees in other states of foreign railroad companies, doing business in this state, of the benefit of exemptions allowed them in such other states, cannot be permitted to alter the principles of law governing the case. *Stevens v. Brown*, 20 W. Va. 450, presented that feature to this court without avail. It went up to the Supreme Court of the United States in *Railroad*

Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, with the same result. The doctrine of *Stevens v. Brown* is too well settled by authority of the highest character to permit any disturbance of it. Should the garnishee be compelled to make a double payment on account of the services rendered it, the fault will be, as we think, with the court of some other state, which can only compel the second payment by refusing to give the judgments of the courts of this state the full faith and credit to which they are entitled under the federal Constitution. For that there is a plain remedy.

For the reasons aforesaid, the judgment will be affirmed.

On Rehearing.

The correctness of the conclusion, above stated, as to the status of a foreign railroad corporation doing business in this state, is vigorously resisted on the rehearing. As that is the pivotal question in the case, the argument demands attention. First, it is said the case of Mahany v. Kephart, 15 W. Va. 609, does not treat the Baltimore & Ohio Railroad Company as a domestic corporation, and that this view is precluded by certain expressions in the opinion, one of which is the reference to the *E. & O. R. R. Co. v. Gallahue's Adm'rs*, 12 Grat. 655, 65 Am. Dec. 254, saying: "However, it was not necessary to decide in that case whether the said railroad company could be sued or garnished upon contracts made in another state." That was because the contract sued on was a Virginia contract. But in Mahany v. Kephart the contract on which the main action was predicated was made in Baltimore, Md., and had come into the hands of a citizen of this state by assignment, and the labor, for the value of which the railroad company was garnished, was performed in Maryland. No matter, therefore, what the Virginia court had decided, this court did decide that the Baltimore & Ohio Railroad Company could be sued here for a debt arising out of a contract made in another state, and could be held as garnishee as to wages due for labor performed in another state; and Judge Haymond said of the Gallahue Case: "But I think, on close examination of the opinion of the court, it was not intended to restrict the right to sue or garnishee the said railroad company to Virginia contracts." The other expression relied upon has no reference whatever to the question now under consideration, as will appear from the connection in which it was used. Judge Haymond did say: "But I do not now definitely pass upon that question, as it does not fairly arise in the case." The question referred to is whether, if the debt garnished had been expressly made payable in Maryland, this circumstance would have called for a different decision. The sentence immediately preceding the one last above quoted reads as follows: "Neither the facts agreed nor the answer of the gar-

nishee shows or pretends that there was any express agreement that the said \$105 due Kephart should be paid in the state of Maryland; and, if they did so show, I am not now prepared to decide that it would or should affect the case, or change my conclusion therein." What we decide here now is just what Judge Haymond then intimated as his opinion, namely, that such stipulation does not affect the case, and we say so because the garnishee is to be dealt with as a resident individual would be. The effect of such stipulation, when the garnishee is a resident, has been determined in the discussion of the question of situs, which need not be here repeated. In *Pennsylvania R. R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, we said it did make a difference, because the garnishee was a nonresident. The contention here is that a railroad company doing business in this state is to be treated as a domestic corporation quoad only "its works, property, operations, transactions, and business in this state," and therefore cannot be sued on a contract or obligation arising out of, or pertaining to, its business in another state; and the contrary of this, we repeat, has been expressly decided in *Mahany v. Kephart*, as well as in other cases referred to in the opinion. Whether a resident may be discharged from garnishment by showing the debt to be payable in another state is an entirely different question now, and was such in *Mahany v. Kephart*.

A further contention is that by alteration of the statute governing foreign railroad corporations doing business in the state, since the decision in *Mahany v. Kephart*, the status of such corporations has been changed. The act of December 27, 1873, quoted in the opinion, was too broad. Its purpose went beyond the limits of legislative power, as was soon revealed by decisions of the federal Supreme Court. The Legislature could not deprive the federal courts of their jurisdiction by declaring a foreign corporation to be a domestic one. It probably occurred to our legislators that in some other respects such corporations could not be domesticated. We could not annul or alter the charter of a corporation of another state, or dissolve it. All we can do is to exclude it from the state or limit its powers and privileges here, and impose burdens and liabilities. We cannot have or exercise any extraterritorial power over them. Realizing this, and seeing the excessive and futile breadth of our statute, the Legislature modified it. For what purpose and to what extent? Simply for the purpose of reducing it within the limits of its legitimate powers over the subject-matter, and to no greater extent. The evil intended to be overcome by the change is perfectly apparent. That is the best measure or standard by which to determine the extent of the change intended, and it falls far short of the subject-matter of this discussion and contention. Surely it was never intended to de-

prive citizens of this state of the right to sue such corporations for debts due them, or for debts which they have the right to acquire by a legal proceeding, such as garnishment. Nothing in the language of the statute suggests this, and it is not within the reason for the alteration made. Such a debt or right, held by a citizen of this state, no matter where it arose, is a matter relating to such corporation, and the statute says it shall be held to be, and treated as, a domestic corporation in all suits and legal proceedings which may be commenced or carried on by or against it, "as well as in all other matters relating to such corporation."

Having carefully re-examined the case and considered the argument on the rehearing, we are convinced that the conclusions set forth in the opinion filed on the former hearing are correct, and the judgment then rendered will be now re-entered.

(53 W. Va. 281)

RAINEY v. FREEPORT SMOKELESS COAL & COKING CO.

(Supreme Court of Appeals of West Virginia. Nov. 28, 1906.)

1. MECHANICS' LIENS—ACCOUNT AND AFFIDAVIT—SUFFICIENCY.

A substantial compliance with the provisions of the statute is all that is required in the account and affidavit filed for record, for the purpose of asserting a lien under section 7 of chapter 75 of the Code of 1899.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 208.]

2. APPEAL—FINAL DECREE—REFERENCE.

A decree of reference founded upon the following expressed opinion: "The court is of opinion that the plaintiff and the defendant George Shanabarger have mechanics' liens against the real estate owned by the defendant corporation, the Freeport Smokeless Coal & Coking Company, as alleged in the plaintiff's bill"—but not otherwise adjudicating the principles of the cause, is not final or appealable.

3. MECHANICS' LIENS—ENFORCEMENT—APPEAL—REVERSAL.

Where, upon an appeal from a decree for the sale of real and personal property to satisfy liens, under section 7 of chapter 75 of the Code of 1899, the decree is reversed as to a lien which is in amount the larger part of all the liens decreed, and such lien held invalid, and the value of the property decreed to be sold does not appear, it is proper to reverse that part of the decree directing the sale, and to remand the cause with directions to ascertain the amount of property necessary to satisfy the lien or liens not held invalid, and, in default of payment, to order a sale of such amount necessary.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County. Bill by W. W. Rainey against the Freeport Smokeless Coal & Coking Company. Decree for plaintiff, and defendant appeals. Affirmed in part.

Rehearing denied January 9, 1906.

Ice & Ice and Fred O. Blue, for appellant. J. Hop Woods, for appellee.

COX, J. W. W. Rainey filed his bill in equity in the circuit court of Barbour count-

against the Freeport Smokeless Coal & Coking Company, a corporation, to enforce a lien, under section 7 of chapter 75 of the Code of 1899, against the property of said corporation. The account filed charges the said corporation with salary as its general manager for 15 months, from August 1, 1900, to November 1, 1901, at \$75 per month, aggregating \$1,125. Certain credits are allowed, bringing the aggregate down to \$955.50. Of this latter sum only \$675 is claimed to be a lien for services rendered within nine months preceding the recordation of the account. The bill also sets up a laborer's lien on the same property, in favor of George Shanabarger, for a balance of \$160.72, and makes him a defendant thereto. The cause was referred to a commissioner to ascertain liens, set-offs, etc. Upon the hearing of the cause upon the commissioner's report, a decree was entered declaring liens in favor of plaintiff and defendant Shanabarger as alleged in the bill, and giving a recovery therefor and for the balance of the plaintiff's claim which was not a lien, and directing sale of the real and personal property of said corporation to satisfy the liens and debt. From this decree the said corporation appealed.

The appellant complains of the decree and of the report of the commissioner, and of the overruling of its exceptions thereto, for a number of reasons, among which is that the commissioner erred in finding, and that the court erred in decreeing, that appellant was indebted to either the plaintiff or Shanabarger. In other words, appellant contends that there was nothing due either of them for which a lien might be asserted. We have examined the evidence, and, while a decree based upon a commissioner's report should not be set aside unless plainly wrong, yet a consideration of the evidence and facts appearing compels us to say that this decree is plainly wrong so far as the plaintiff's claim is concerned. Before there can be a lien there must be a debt, a liability, something due or to become due, for which the lien may be asserted. It appears from the record that the appellant corporation was organized on the 16th day of August, 1900, by the plaintiff, living in Barbour county, and certain other persons living in Baltimore, Md. At the meeting for organization, plaintiff was elected a director and general manager. The other officers elected were Frank H. Sloan, president; J. P. Wade, vice president; George B. Wade, treasurer; George B. Clifton, secretary. All the officers except plaintiff resided in Baltimore, and all so elected were stockholders of the company. The appellant corporation began the development of certain coal lands conveyed to it, and continued to a limited extent the mining and shipping of coal until some time in May, 1901, when mining practically ceased; but little, if any, coal being shipped after that time until the following year. The mining and shipping of

coal at no time was extensive; only about 100 cars being mined and shipped from the time of the organization of the corporation until May, 1901. Some of the witnesses for appellant, the majority of whom are the officers thereof, testified that the purpose of the corporation was to develop the property for sale and not to mine extensively, and that the shipping mentioned was principally to prospective purchasers of the property.

Plaintiff claimed an express contract for wages as general manager, at the rate of \$75 per month. In one part of his testimony he says that the express contract was made with W. A. Wade as agent of the appellant; but Wade in his testimony denies this, and it is shown conclusively that Wade had no authority to make such contract. In another part of plaintiff's testimony, he says the express contract was made with W. A. Wade, George B. Wade, and Frank H. Sloan; but this is also denied, together with the authority of those persons to make such contract. In another part of his testimony, plaintiff says that the express contract was made with Frank H. Sloan, and this is likewise denied. No express contract is shown by the evidence. Plaintiff contends, however, that an implied contract is shown by proof of the performance of the services and the value thereof. This contention is fully refuted by the evidence. Three witnesses, W. A. Wade, attorney for the corporation, George B. Wade, its treasurer, and Frank H. Sloan, its president, testified positively and certainly that it was agreed on the day the corporation was organized, at a meeting of the board of directors at which plaintiff was present and when the general manager and other officers were elected, that they were to receive no compensation whatever for their services, and, especially, that it was understood and agreed with the plaintiff that he was to have no compensation as general manager of the corporation, and that a resolution was adopted by the board of directors in accordance with such agreement and understanding. See *C. & O. Ry. Co. v. Deepwater Ry. Co. et al.* (W. Va.) 50 S. E. 890. Against this testimony, plaintiff testified that there was no such agreement or understanding as to him; and he also produced four monthly pay rolls made out and sent by him to the appellant, upon one of which the following appears: "I would like to have \$50 on salary to pay board and room rent." Upon another appears the following item: "W. W. Rainey on time \$100." Upon another appears: "I am almost compelled to have \$50 this pay to meet some expenses. Do the best you can." Upon another the following item appears: "W. W. Rainey \$75." With the return of one of these pay rolls to plaintiff, a letter was received by him, with a postscript signed by G. B. Clifton, in which he says: "We could only allow you \$25 this month on account of scarcity of cash." Plaintiff testified

that of these demands upon the pay rolls he received the \$25 and \$50 mentioned above. W. A. Wade testified that the payments of these sums were made pursuant to an arrangement between plaintiff and him to have Wade, Sloan & Co., a different company from the defendant corporation, advance to plaintiff small sums to meet his board, which he was to repay to Wade, Sloan & Co. when the property of appellant was sold. It is shown that these sums were advanced by checks of Wade, Sloan & Co. The plaintiff allowed certain credits on his account filed for the lien, amounting to \$169.50, which he did not claim were payments knowingly made by appellant on his salary, but credits or set-offs evidenced by checks given on appellant's funds under his control, in payment of his individual liabilities. It was not shown that the \$25 above mentioned was included in said credits. The \$50 above mentioned was certainly not included, and no item of credit for that amount appears. The account of the plaintiff filed and recorded was sworn to, and the bill in this cause was sworn to, both of which say in effect that the defendant corporation is indebted to the plaintiff in the sum of \$955.50 after allowing all credits. Now, if the \$50 and \$25 had been actually received by plaintiff from appellant as payments on his salary as general manager, the plaintiff should have known this when he filed his account and affidavit and when he filed his bill in this cause. The fact that plaintiff did not allow the \$50 and \$25 as payments or credits on his claim very strongly corroborates the theory that these items were not received by plaintiff from appellant on salary, but on some other account or for some other purpose. Plaintiff also testified to many demands for payment of salary, but this is denied by the testimony for appellant. Other facts and circumstances appear which in our judgment tend to corroborate the contention of the defendant that there was no indebtedness or liability to the plaintiff, but we deem it unnecessary to detail them. It seems plain to us that there was no implied contract, and no indebtedness or liability to the plaintiff from the appellant, by reason of the matters alleged in the bill, and therefore no lien to plaintiff.

What we have said does not dispose of the claim of defendant Shanabarger to a lien for work and labor. His account filed runs from June to November, 1901, including a small item in November. While it is true that plaintiff, being a stockholder and director of appellant, acted as its general manager without compensation, yet it is shown by all the testimony that he had power and authority to employ labor for the corporation. He testified that he employed Shanabarger for the corporation as pit boss and for other labor, at the prices charged in his account,

and made the payments for the corporation therein credited. Shanabarger testified to the same effect. Some testimony was offered tending to show that Shanabarger had notice that the mines were ordered to be shut down in May, 1901, but this evidence does not show that he had notice that they were to be shut down permanently; and, if he had such notice, he did not have any notice that the authority of the general manager to employ labor had been revoked, and he had a right to rely upon his contract of employment in that regard. We think the account of defendant Shanabarger was proved.

Appellant objects to Shanabarger's claim for a lien because his account is not sufficiently specific. The account shows that it is in favor of Shanabarger and against appellant. It is composed of various items, specific in amount, and, when taken with the affidavit, we think that it reasonably appears that the necessary requirements of the statute have been complied with. Substantial compliance with the provisions of the statute is all that is required in the account and affidavit, and the account and affidavit are to be considered together. We think no one could be misled as to the nature, purpose, or amount of the account, although it could have been much more formal and full in its recitals. It would seem to us that it is sufficient to give notice, which is one of the principal purposes of requiring the account and affidavit to be recorded. *U. S. Blow Pipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769; *Phll. Mech. Liens*, § 350; *Wilvert v. Sunbury*, *81 Pa. 57, 27 Leg. Int. 357.

Appellant complains of the overruling of its exceptions to the commissioner's report. The first and second exceptions of appellant thereto are to the effect that the commissioner failed to report whether or not there were any credits or set-offs against said alleged liens, and failed to report whether or not there were any liens other than those to plaintiff and Shanabarger, as directed by the decree of reference. The commissioner reported the liens of plaintiff and Shanabarger, but reported no other liens and reported no credits or set-offs other than those stated in their respective accounts. Therefore we must presume that the commissioner found neither other liens nor other set-offs, or he would have reported them. The third and fourth exceptions of appellant to the commissioner's report are disposed of by what we have already said. The third exception should have been sustained as to plaintiff's alleged lien, and overruled as to Shanabarger's lien. The fourth exception should have been sustained.

The decree of reference to a commissioner contains the following expressed opinion of the court: "The court is of opinion that the plaintiff and defendant Shanabarger

have mechanics' liens against the real estate owned by the defendant corporation, the Freeport Smokeless Coal & Coking Company, as alleged in the plaintiff's bill." The decree of reference to a commissioner is founded upon this expressed opinion, but the decree does not otherwise adjudicate the principles of the cause. It is claimed by plaintiff that the part of the decree quoted was a final adjudication of the rights of the plaintiff and Shanabarger, and that it should have been followed by a decree of sale, and not by a decree of reference. This part of the decree was not a final adjudication of the rights of plaintiff and Shanabarger, but a mere recital, after a prima facie case had made proper a decree of reference. This part of the decree was merely interlocutory, and not appealable. Cases in point are *Hill v. Cronin*, 56 W. Va. 174, 49 S. E. 132; *Armstrong v. Ross*, 56 W. Va. 16, 48 S. E. 745. The decree complained of directed the sale of the personal and real property of the appellant mentioned in the bill, without ascertaining its value or the kind or items of personal property. The statute provides that, after a lien is established in favor of any of the creditors whose claims are presented, the court shall order a sale of the property on which the lien is established, or so much thereof as may be sufficient to satisfy such claims, in like manner as other suits in chancery. In this case it is necessary to reverse the decree so far as the plaintiff's claim is concerned, which is by far greater in amount than the lien of Shanabarger, thus leaving the amount for which appellant's property is liable comparatively small. It would seem inequitable to permit the decree for sale of all the property to stand when it does not appear that a sale of all is necessary to satisfy the Shanabarger lien, especially when there has been no ascertainment of the kind and amount of the personal property or of the value of either the real or personal property. The personal property alone may be more than sufficient; we cannot say.

For the reasons stated, so much of the decree of the circuit court entered in this cause on the 31st day of May, 1904, as declared that plaintiff's claim alleged in his bill, or any part thereof, is a lien against the property of the appellant, or any part thereof, and as gave a recovery in favor of the plaintiff against appellant for the amount of the claim alleged in the bill or any part thereof and for costs, and as directed a sale of the property, real and personal, of the appellant, is reversed; and so much of the report of the commissioner as finds a lien or an indebtedness in favor of the plaintiff against appellant, is set aside; and this cause is remanded with directions to ascertain the amount of property of appellant mentioned in plaintiff's bill necessary to satisfy the lien of defendant Shanabarger

and the costs to which he may be entitled, and, in case of default in payment thereof, to order a sale of the amount necessary, and to be further proceeded with according to the principles herein announced and the rules governing courts of equity.

(58 W. Va. 414)

STATE, to Use of ZELL GUANO CO., v. CHRISLIP et al.

(Supreme Court of Appeals of West Virginia. Nov. 28, 1905.)

INJUNCTION—ACTION ON BOND—DECLARATION.

In an action on an injunction bond, where the sale of personal property levied on under execution alone was enjoined, the condition of the bond being that plaintiffs "shall pay all such costs as may be awarded against them and also such damages as shall be incurred and sustained by the persons enjoined in case the injunction be dissolved," a declaration alleging liability to pay the judgments upon which the executions issued, there being no condition to pay the judgments, is bad on demurrer.

(Syllabus by the Court.)

Error to Circuit Court, Barbour County.

Action by the state, for the use of the Zell Guano Company, against E. G. Chrislip and J. N. B. Crim. Judgment for plaintiff, and defendants bring error. Reversed.

Rehearing denied January 9, 1906.

M. Peck and W. T. Ice, Jr., for plaintiffs in error. S. V. Woods, for defendant in error.

McWHORTER, J. This is an action of debt brought by the Zell Guano Company, a corporation, in the circuit court of Barbour county at February rules, 1892, against E. G. Chrislip and J. N. B. Crim, defendants, on an injunction bond executed on the 25th day of February, 1889, by E. G. Chrislip, Fannie J. Chrislip, and J. N. B. Crim, the said Fannie J. Chrislip being a married woman. The bond in question is as follows:

"Know all men by these presents, that we, Ervin G. Chrislip and Fannie J. Chrislip, principals, and Joseph N. B. Crim, security, are held and firmly bound to the state of West Virginia, in the sum of five hundred dollars, to the payment of which to the said state we bind ourselves, jointly and severally, and each of us binds his heirs, executors, and administrators. Witness our hands and seals this 25th day of February, 1889.

"The condition of the above obligation is such, that whereas, the above bound E. G. and F. J. Chrislip have obtained from J. M. Hagans, Judge of the 2d Judicial Circuit of West Virginia, an injunction against the Zell Guano Company and others, enjoining and restraining the defendants in said injunction and every other person under them from selling the goods in said bill mentioned, and compelling said defendant Simpson to turn over to said plaintiff, the key, storehouse and personal property in said bill mentioned, until further order of court. Now

if the said E. G. and Fannie J. Chrislip shall pay all such costs as may be awarded against them, and also such damages as shall be incurred or sustained by the persons enjoined in case the injunction be dissolved, then this obligation shall be void, otherwise to remain in full force and effect."

This bond was duly signed, sealed, and acknowledged. The defendants appeared on the 3d day of June, 1893, and demurred to the declaration, which demurrer was overruled by the court. After the overruling of the demurrer, the pleadings were made up and a jury impaneled, and after all the evidence was in the plaintiff demurred to the evidence of the defendants, in which the defendants joined, and the jury returned a conditional verdict in favor of the plaintiffs against the defendants, E. G. Chrislip and J. N. B. Crim, for the sum of \$975.28, the amount ascertained as damages by the said special verdict. The defendants moved to set aside the verdict of the jury and the judgment of the court rendered thereon, which motion was overruled, and the defendants objected and excepted to such ruling and obtained from this court a writ of error to such judgment, and assigned as error the overruling of defendants' demurrer to the plaintiffs' declaration, and in sustaining plaintiffs' motion to reject and strike out defendants' plea of nil debet, and in overruling the motion made by the defendants to set aside the verdict of the jury, and in sustaining the plaintiffs' demurrer to the defendants' evidence.

The first question to be disposed of is that of the demurrer to the declaration, and, if the declaration is insufficient, it will not be necessary to look into the further assignments of error. The pleader in preparing his declaration seems to have misconceived the scope of the conditions of the bond sued upon. Section 10, c. 133, Code 1899, provides that: "An injunction (except * * *) shall not take effect until bond be given in such penalty as the court or judge awarding it may direct, with condition to pay the judgment or decree (proceedings on which are enjoined) and all such costs as may be awarded against the party obtaining the injunction and also such damages as shall be incurred or sustained by the person enjoined in case the injunction be dissolved," etc.

It will be observed from the language of the bond itself that the purpose of the injunction was not to stay proceedings on the judgments set forth in the declaration, but was for the purpose of restraining the Zell Guano Company and others from selling the goods in the bill of injunction mentioned, and compelling the defendant Simpson, who was constable and had the goods in charge

under executions, "to turn over to said plaintiffs the key, storehouse, and personal property in said bill mentioned until the further order of court." The condition of the bond was not that the obligors therein should pay the judgments alleged in the declaration to have been lost by reason of the injunction awarded to prevent the selling of the goods mentioned in the bill. It is not made to appear from the declaration what goods were inhibited by said injunction from being sold, or the value thereof, and no bill of particulars describing the property and its value is filed with the declaration, nor does it appear how the judgments were lost by reason of the injunction, the judgments were not destroyed thereby, nor any liens on real estate which attached by virtue of the judgments. Upon the dissolution of the injunction, the measure of damages sustained by the plaintiffs which might be recovered on the bond, and only to the extent of the penalty thereof, would be the value of the property threatened to be sold by the defendant constable, Simpson, and the sale of which was enjoined, and the possession required, by order in the injunction case, to be turned over to the plaintiffs in said injunction bill. The declaration alleges the dissolution of the injunction "by the order of said court entered in said cause on the 28th day of October, 1889, sitting as a court of chancery, and that costs against the said E. G. Chrislip and Fannie J. Chrislip have been awarded the said Zell Guano Co. therein to a small amount, to wit, the sum of \$19.25, as taxed by the clerk of said court according to law." The declaration fails to show in any manner, or anywhere, in what court the said injunction suit was pending, and neither does it appear from the bond sued upon. The allegation in regard to the liability of E. G. Chrislip and Fannie J. Chrislip, plaintiffs in said injunction suit, for damages in the amount paid by the plaintiffs, Zell Guano Company, for moneys paid, laid out, and expended for attorney fees by reason of said injunction and defense of the same, fails to particularize the sums paid and to whom paid for that purpose. It is not a condition of the bond that plaintiffs should pay the judgments set out in the declaration, as provided in section 10, c. 133, Code 1899, in case of dissolution of the injunction.

The declaration of the plaintiffs being fatally defective, the demurrer should have been sustained. Therefore the verdict is set aside, the judgment reversed, and the case remanded to the circuit court of Barbour county, with leave to plaintiffs to amend their declaration, if they be so advised, and for a new trial of the case.

(58 W. Va. 431)

MILLER et al. v. MITCHELL et al.(Supreme Court of Appeals of West Virginia.
Dec. 5, 1905.)**1. APPEAL—REVIEW—DISCRETION—CONTINUANCE.**

A trial court has a wide judicial discretion in passing upon a motion for a continuance; and, unless its action appears to be plainly wrong, it will not be reversed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3837.]

2. PLEADING—AMENDMENT—WHEN ALLOWED.

"Before a court should allow an amended answer to be filed, it ought to be satisfied that the reasons for it are cogent and satisfactory, that the mistakes to be corrected or facts to be added are made highly probable, if not certain, that they are material, that the party has not been guilty of negligence, and that the mistakes have been ascertained and the new facts have come to the knowledge of the party since the original answer was filed." *Foutty v. Poar*, 12 S. E. 1096, 35 W. Va. 70.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 783, 803.]

3. MORTGAGES—TRUST DEED—PAYMENT TO TRUSTEE.

The powers of a trustee are limited by the instrument creating the trust; and, where a deed of trust is given to secure a debt, the trustee, as such, has no power to receive payment of the debt and discharge the debtor, where the deed has not expressly conferred such power.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 837.]

4. EXECUTORS AND ADMINISTRATORS—MORTGAGE—FORECLOSURE—APPLICATION OF PERSONALTY.

Where, after the death of the grantor, it is necessary to invoke equity jurisdiction to foreclose a deed of trust upon specific real estate given to secure a debt, the court ought to require the personal estate in the hands of the administrator to be first ascertained, and determine how much of it is applicable to the payment of the trust debt, and should require it to be so applied before it decrees a sale of the land in satisfaction thereof.

(Syllabus by the Court.)

Appeal from Circuit Court, Roane County.

Bill by Warren Miller and others against S. E. Mitchell and others. Decree for plaintiffs, and defendants appeal. Reversed.

J. A. A. Vandale, for appellants. Walter Pendleton, for appellees.

SANDERS, J. This is a suit in equity, brought by Warren Miller and others, executors of R. S. Brown, deceased, against the estate of C. T. Mitchell, deceased, B. M. Hensley, and others, to enforce the lien of a trust deed. In the bill it is alleged that on the 28th day of January, 1888, C. T. Mitchell executed to Thomas Ferrell and R. S. Brown five notes, four of which were for \$100 each, payable at one, two, three, and four years respectively, and the other for \$97.50, payable at five years; that Ferrell assigned his interest in the notes to Brown; that afterwards, on the 4th day of June, 1888, Mitchell and wife executed to A. B. Wells, trustee, a deed of trust on 49½ acres of land, in Roane county, to secure the pay-

ment of said notes; that Mitchell, in his lifetime, and subsequent to the execution of the deed of trust, conveyed 10 acres of said land to B. M. Hensley, and the residue thereof to J. C. Dillard; that both Brown and Mitchell had died before the institution of the suit. Mitchell left surviving him his widow, and four children, infants, who, together with Wells, trustee, W. B. Mathews, sheriff of Roane county, and as such administrator of C. T. Mitchell, deceased, J. C. Dillard, and B. M. Hensley, are made defendants to the bill. Jurisdiction is predicated upon the fact of the removal of Wells, the trustee, to the city of Washington, and that he declines to act as such trustee, the death of C. T. Mitchell, and the unsettled condition of the accounts. The bill was filed at July rules, 1900, and at the August term following Dillard and Hensley tendered their joint demurrer, and Wells, trustee, and Mathews, sheriff, and as such administrator, tendered their separate demurrers to the bill, all of which demurrers were overruled. Thereupon Dillard and Hensley tendered their joint answer, in which it is alleged that the trustee, Wells, was the attorney for Brown, and that Mitchell had, at various times, paid him sums of money, and, in addition thereto, had turned over to him several notes as collateral security, to be applied on said trust debt, which notes were collected by Wells, and the proceeds turned over to Brown, but the amounts thereof were never accounted for to Mitchell, and the answer further alleged that the payments and collections aforesaid were sufficient to pay off and discharge the lien of the trust deed, and that, in fact, a greater amount than necessary for that purpose was paid. There were filed with said answer several receipts, given by Wells to Mitchell, for money which, it is stated therein, was to be applied on the trust debt. At the same term the administrator, Mathews, filed his answer, setting up substantially the same facts. The trustee, Wells, filed no answer. A. E. Kenney was appointed guardian ad litem for the infant defendants, and by another order, entered at said term, was appointed a commissioner, to take and state an account between the parties. Kenney being guardian ad litem for the infants, and therefore incompetent to act as commissioner, on November 26, 1902, a decree was entered appointing S. E. Boggess commissioner in his stead. The commissioner gave notice that on the 18th day of February, 1903, he would proceed to execute the decree of reference, which notice was accepted by all the parties to the suit. After several continuances the report was closed on the 9th day of March, the commissioner allowing credits of \$60, and reported a balance due on the trust debt of \$681.82. Said report was returned and filed on the 24th day of March, 1903, and on the 7th day of April following the defendants Dillard and Hensley tendered and asked

leave to file their amended answer, to which plaintiffs objected, which objection was sustained. Thereupon said defendants moved for a continuance of the cause, and tendered in support of their motion the affidavit and supplemental affidavit of J. A. A. Vandale, their attorney, which motion was resisted by plaintiffs, who filed in opposition thereto the affidavit of the commissioner, Boggess. The court refused to continue the cause, and entered the decree complained of.

The first assignment of error is to the action of the court in refusing to continue the cause. In the affidavit filed in support of said motion it is stated that on the 15th day of March, 1903, the affiant prepared a notice to take the deposition of A. B. Wells in the General Land Office at Washington on the 23d day of March, and that said notice was accepted by plaintiffs; that on the 20th day of March he received a letter from Wells, stating that his deposition could not be taken in the General Land Office, inasmuch as he had no office therein, and that he knew of no special place where it could be taken, and that, as J. G. Schilling was his attorney, he would not take any steps in the matter without his advice; that not being acquainted in the city of Washington the time was too short since receiving the letter from Wells for affiant to ascertain a suitable place for taking his deposition, and give notice thereof as required by law. The affidavit further stated that affiant was informed and believed that the defendants would be able to prove by Wells that he was the agent and attorney for R. S. Brown, and was acting as such when the payments were made to him on the trust debt, and that Wells paid over the same to Brown and his personal representatives, and took receipts therefor, and that affiant and the defendants did not know of any one else by whom said facts could be proven until the 21st day of March, 1903, when affiant was first informed, and believed, that the fact of the said A. B. Wells being the attorney and agent of the said R. S. Brown at the time aforesaid could be proven by several other witnesses, named, who reside in said Roane county, some 15 miles from the courthouse, whose depositions could not be taken in time to be read as evidence in behalf of the defendants at the term at which the affidavit was filed. The affidavit sets forth the materiality of the evidence, and states that, if the parties are given time, the affiant has no doubt but that it will be obtained. As has been noted, Wells entered his demurrer to the bill at the August term, 1900, and while the affidavit for continuance sets forth the reasons why it was impossible to take his deposition between the 15th day of March, 1903, the time at which notice was given, and the time at which the motion for a continuance was made, yet it does not offer, or attempt to offer, any reason or excuse why his deposition was not taken within the

period which elapsed between the time of filing his demurrer and the time of giving such notice. It nowhere appears in the affidavit that any diligence whatever was used to secure the deposition of Wells during the time the cause was pending. From the very nature of the pleadings filed by the defendants, they were bound to know that his evidence was material to their defense—in fact, of the most vital importance to them. And, while the affidavit states that the other parties named therein will testify that Wells was the agent and attorney of Brown, yet it omits to state that they will testify that he was such agent as to the matter in controversy here. "Upon any ground, and under all the circumstances surrounding the case, the matter of continuance rests in the sound discretion of the trial court, and, unless it clearly appears that such discretion has been abused, the action of the court in overruling a motion for a continuance will not be disturbed." *Coal Co. v. Railroad Co.* (W. Va.) 50 S. E. 606. In the light of all the circumstances, we cannot say that the court erred in overruling the motion; the affidavit, taken altogether, not showing that the defendants had used that degree of diligence in preparing their defense which entitled them to a continuance.

The second assignment of error is to the action of the court in refusing to permit the amended answer of the defendants Dillard and Hensley to be filed. This answer was tendered after the report of the commissioner had been returned, and at the same term at which it was filed. In this answer it is alleged that Wells was the attorney for R. S. Brown, and received the payments made to him by Mitchell in that capacity, and that, after the death of Brown, said Wells was the attorney for his executors. The only new matter in the amended answer, which was not contained in the original answer, is that Wells was the attorney for the executors of Brown. "Before a court should allow an amended answer to be filed, it ought to be satisfied that the reasons for it are cogent and satisfactory, that the mistakes to be corrected, or facts to be added, are made highly probable, if not certain, that they are material, that the party has not been guilty of negligence, and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was filed." *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. 1096. There is no apparent reason why the fact of Wells being attorney for the executors, if such were the fact, could not as well have been known to the defendants at the time of the filing of the original as at the time of filing the amended answer. Brown died on February 16, 1891, and some of the receipts filed with the original answer are dated before, and some after, his death. The defendants certainly knew in what capacity all of these receipts from Wells were given at

the time they were filed, and, knowing this, it should have been alleged in the original answer.

The defendants excepted to the commissioner's report, on the ground that the commissioner, in making the same, refused to hear or consider the evidence offered by the defendants to show the payment of the debt reported therein. In returning his report, the commissioner, speaking in regard to said exceptions, says it is not true, as stated, that he refused to consider any evidence offered by the defendants to prove the credits claimed, but that he refused to allow credits claimed as set forth in the exhibits filed with the answer of the defendants Dillard and Hensley, "for the reasons that said exhibits was the only evidence offered by any of the defendants to prove said payments, and your commissioner was of the opinion that said exhibits, considered alone, was improper, incompetent, and insufficient evidence to prove the payments and credits claimed by the answers filed in this cause." We do not think that the court erred in confirming the report of the commissioner. The burden of proof was upon the defendants to show that Wells was the attorney for Brown, and that in receiving the payments he was acting as such attorney. This they nowhere attempt to show, but content themselves by filing, as exhibits with their answer, the several receipts from Wells. As trustee, he had only such powers as are conferred upon him by statute and by the terms of the instrument creating the trust, and the power to receive payment of the trust debt is not included in them. "As a general rule a trustee's authority over the trust property is defined and limited by the instrument creating the trust, and he should be guided strictly by its provisions." *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. 717.

And it is claimed as error that the commissioner calculated the interest on all four of the notes from their date to October 26, 1899, and to that added the principal of the notes, and then deducted the \$60 payment therefrom. The defendants claim that the commissioner should have applied the \$60 credits on the note on which they were indorsed, and not upon all of them. This contention is correct, and it was error to calculate the interest in the manner in which it was done, but for this error we cannot reverse, because the erroneous amount is only \$22.58, and not sufficient to give this court jurisdiction; but, as the case must be reversed for other errors, it should be corrected by the lower court in the future progress of the case.

It is also assigned as error that the commissioner failed to give credit for the item of \$5, stated on the back of the first note as having been paid to Rohr for printing notice of sale. This amount does not affirmatively appear to be a payment on the indebtedness.

Before the commissioner should allow it, it must so appear. The burden is upon the defendants to show payments. We cannot say that this amount should have been credited, and therefore cannot hold that it was error for the commissioner to disallow it.

Counsel for the defendants make the further claim that the administration accounts of the decedent, Mitchell, should have been settled, and the personal assets first applied to the discharge of the indebtedness. Where the grantor is dead, and it is necessary to invoke equity jurisdiction to enforce a deed of trust upon specific real estate given to secure a debt, it is necessary, before decreeing a sale of the real estate, to have settlement of the administration accounts, and first apply the personal assets to the discharge of the debt secured by such deed of trust. It is held in *Bierne v. Brown's Adm'r et al.*, 10 W. Va. 748, that in a suit brought to enforce a vendor's lien against the estate of a vendee, after his death, the court ought to require the personal estate in the hands of the administrator to be first ascertained, and to determine how much of it is applicable to the payment of the purchase money, and should require it to be so applied before it decrees a sale of the land to pay the lien. And Judge Green, in delivering the opinion of the court in that case, said: "And, though a debt so contracted be a lien on particular real estate by a mortgage, or a vendor's lien, this general rule would still be applicable, because the debt was originally a personal obligation on the intestate and the lien on the particular real estate should be regarded merely as a collateral security." *Laidley v. Kline*, Adm'r, 8 W. Va. 218; *Williams v. Buster*, 5 W. Va. 342; *Sommerville v. Sommerville*, 26 W. Va. 484.

The decree being erroneous, it is reversed, and the cause remanded.

(38 W. Va. 438)

McNEELY et al. v. SOUTH PENN OIL CO.
(Supreme Court of Appeals of West Virginia.
Dec. 5, 1905.)

1. TENANCY IN COMMON—WASTE—ACCOUNTING—EXTRACTION OF OIL.

The basis of accounting, between tenants in common, joint tenants, and coparceners, for waste effected by the extraction of petroleum oil from the common property under circumstances which make it reasonably certain that the party so taking oil acted without fraud and under the belief of good title in himself to the whole of the property, though not without notice of defect of title, is the value of all the oil produced from the land, less the whole cost of its production, including the cost of drilling producing wells.

2. OIL LEASE BY CO-TENANT.

If one co-tenant execute an oil lease purporting to cover the whole of the common property, under which the lessee produces oil, delivering to the lessor part thereof as royalty, it is proper to require the lessor and lessee jointly to make reparation to the injured co-tenant, and

to order satisfaction of the decree against them to be made out of proceeds of the oil in the hands of the special receiver in the cause.

3. SAME—DAMAGES—ELEMENTS.

In such case, rentals received by the co-tenant in possession for delay in drilling, under a provision of the lease, constitute no part of the damages and should not be included in the decree; nor are they to be accounted for as rents and profits, unless the lease is ratified or acquiesced in by the other co-tenant.

4. SAME—RATIFICATION OF LEASE.

A mere demand for discovery as to and accounting for such rentals, in a bill expressly denying the title of the lessor and validity of the lease, does not amount to a ratification or adoption of the lease.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County.

Bill by G. B. McNeely and others against the South Penn Oil Company and others. From the decree defendant oil company appeals, and plaintiffs file cross-appeal. Modified and affirmed.

See 46 S. E. 499.

Thos. P. Jacobs, Edward A. Brannon, Frank V. Iams, and T. R. Horner, for plaintiffs. A. B. & R. F. Fleming, Erskine & Allison, C. Powell, J. W. Newman, and R. W. McCoy, for defendants.

POFFENBARGER, J. In this, the second appeal in *McNeely v. South Penn Oil Company*, the disposition of the first appeal in which is reported in 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562, where all the facts out of which the questions then presented arose, are fully stated, the principal question is the basis on which the accounting for the oil produced shall be made. After the case went back to the circuit court, the South Penn Oil Company filed its second amended and supplemental answer, claiming the right to account on the basis of the value of the oil in place, which, it was averred, was the value of one-eighth of all the oil produced. Upon exception to the answer, so much of it as set up this claim was stricken out by the court. Then the cause was recommitted to commissioner Basil T. Bowers to take further testimony and to ascertain and report the amount and value of all the oil obtained from the land occupied by said company with its oil operations, the amount and value of such part thereof as had been received by John W. Starkey, the lessor, and the amount of money expended by said oil company in operating for and producing the oil so obtained by it. The special receiver in the case and the Eureka Pipe Line Company were required to report the amounts of oil received by them, respectively, and the disposition made thereof, and the prices at which any of it had been sold. The commissioner reported that the South Penn Oil Company had taken, from the 74 acres of land occupied by it, oil amounting in value to \$47,800.75, of which amount \$3,592.11 had been paid by it to J. W. Starkey, the lessor, as royalty, and that the cost of producing the whole amount of oil thus obtained had

been \$35,698.24, making the sum of \$12,102.51 the value of the production from said land, less the cost thereof. To this report both the plaintiffs and the South Penn Oil Company excepted, the former because the commissioner had allowed the cost of production to be taken out of the value of the oil, and the latter because the commissioner had refused to find and report, as the amount due the plaintiffs, the one-half of one-eighth of all the oil produced. The court overruled all the exceptions and decreed to the plaintiffs, on account of oil produced, the sum of \$8,051.25, and, in addition thereto, \$138.67, one-half of the cash rentals which had been paid to Starkey, making a total of \$8,189.92. From this decree, the South Penn Oil Company appealed, assigning numerous errors in the decree, and McNeely and others, the plaintiffs, obtained a cross-appeal, on which they complain of the allowance out of the fund of the cost of production.

The court adopted the rule and principle declared and applied in *Williamson v. Jones*, 43 W. Va. 562, 27 South. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891. On both sides, the equity and legality of that rule is denied, and, for McNeely and others, it is asserted that the court never intended to prescribe in that case a general rule for the government of ordinary cases of this kind. In this connection, they point to the language used by the court in the syllabus, which is: "Under the circumstances, a party taking petroleum oil unlawfully is allowed all costs of production, including costs of boring productive wells, as a set-off against rents and profits." The phrase "under the circumstances" is made the basis of the argument, and the character of the sale, magnitude of the production, and the cost thereof, are relied upon as the circumstances which, in the opinion of the court, justified the formulation of the proposition above stated as a rule for the special case. As, in this case, the lessor and his tenant were not purchasers at a judicial sale, as in the case of *Jones*, and the production is not large, and the defect in the title of the lessor was disclosed by the records, it is insisted that this case cannot be assimilated to that of *Williamson v. Jones*, and that therefore the law of that case, on the subject of the basis of accounting, has no application here. Counsel for the South Penn Oil Company declare that the basis of settlement adopted is contrary to the great weight of authority, which is to the effect that when one co-tenant, acting in good faith, not fraudulently, but under a mistake, either of law or fact, commits waste in extracting oil or removing coal or other minerals, or timber, he is held responsible, not for the value of the finished product less the cost of production, but only for the value of the property in its natural state.

Aside from the difference in the volume of

production and magnitude of cost, but one circumstance is pointed out in this case as distinguishing it from the one in which the rule complained of was declared. That is the charge of fraud against Starkey. The court expressly held, in *Williamson v. Jones*, that Jones was not a purchaser without notice. He was declared to be a purchaser with notice, whom ignorance of law did not excuse. But it is said that Starkey not only had notice, but participated in a fraud perpetrated upon Mary Higgins by her husband. The only evidence of this is that he took possession of the tract of land, one-half of which was owned by her and the residue by her husband, under a deed executed by the husband alone. As it is not perceived how the quantity and value of the oil produced can have any material bearing upon the equity of the case, the charge of fraud is the only matter urged, as ground for distinction between the two cases, that need be considered. Mary Higgins was an invalid at the time the agreement for the exchange of land was executed by her husband and Starkey, in 1873, and died of consumption on the 12th day of February, 1875. Some testimony was taken for the purpose of showing her attitude toward the exchange, and an effort was made to prove that she was satisfied with it. One witness testified that she had said she was glad it had been effected. She did not sign the executory contract providing for the exchange, and the deed was not made until after her death. From these facts it is argued that she was unwilling to convey the land, that her husband clandestinely entered into the agreement with Starkey and had evil designs in postponing the execution of the deed. At that time, the land was probably regarded as not very valuable. No one then dreamed of its mineral wealth. The transaction took place probably 20 years before that section of the country developed into oil-producing territory. At variance with the charge of secrecy, circumvention, and fraud, is the fact that Starkey took possession of the land immediately after the signing of the agreement, and while Mary Higgins was yet alive. Another circumstance which indicates that negligence, and not fraud, was the origin of these troubles, is that the land was not the homestead, for Higgins and his wife had obtained it in that same year from Edgell, by deed dated April 4, 1873. In view of these facts and circumstances we do not think the charge of actual fraud is sustained, and therefore no substantial ground of distinction between this case and that of *Williamson v. Jones* is perceived.

Counsel for the South Penn Oil Company, in insisting upon the application of the common-law principles governing the relation of co-tenants, seem to overlook the important fact that our statute has altered that law in this respect. By section 2 of chapter 92 of the Code of 1891, tenants in common, joint tenants, and coparceners are made liable to

one another for waste. At common law there is no such liability. Reference is made to the statute which gives an action of account against a co-tenant for receiving more than his share of rents and profits—section 14 of chapter 100 of the Code of 1899, supplying a defect in the common law, and corresponding to a similar statute passed by practically all the states—but none to the statute which creates liability for waste. It was this statute which gave the court its serious trouble in *Williamson v. Jones* and prevented the adoption of the common-law basis of settlement contended for here. In view of it, the court, in order to allow any off-set whatever, was forced to adopt another principle, namely, that he who asks equity must do equity. In delivering the opinion of the court, Judge Brannon said: "We are in a court of equity, which often departs from dry legal rules in the interest of substantial, even-handed justice. It does not seem that there is any inflexible, ironclad rule in equity in this matter, unless our statute imposes it. This is not the case of a suit to impose upon the co-owner a personal liability, or a liability on his land, for improvements, nor to continue in possession till future profits shall reimburse them; but it is a case where the plaintiffs ask an account to charge Jones with rents and profits, and he seeks to set off improvements. Yea, more, it is a case where the plaintiffs ask to receive the benefit of the property in its improved condition—to have the benefit of those improvements; that is, they ask pay for oil flowing through these very wells, without which wells there would not be a gallon of oil for them or for Jones. The law is well settled that in account of rents and profits you must charge the party for the property in its condition before his improvements, and not with the profits of his improvements. *Hall v. Hall*, 30 W. Va. 789, 5 S. E. 265; *Freem. Co-Ten.* § 262; *Code* 1899, c. 91, § 2; *Moore v. Ligon*, 30 W. Va. 155, 3 S. E. 576; *White v. Stuart*, 76 Va. 566; *Early v. Friend*, 16 Grat. 21, 78 Am. Dec. 649; *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856. This is a strong factor in the solution of this question. The plaintiffs demand their oil, solely the fruit of the pluck and courage and energy of Jones, in hazardous enterprises, which might have involved him in ruin. They come into a court of equity, asking that we accord them their legal rights, and they are given unto them, but it is an adage that he who asks equity must himself do equity. He cannot, in every instance, eat the fruitage without sharing in the burden of the planting. I repeat that no immovable rule binds a court of equity in this matter. * * * If we give Jones his expenditures, still a large amount goes to the plaintiffs; otherwise Jones loses them, and this would violate a rule of equity which, translated from the Latin, says that 'by the natural law it is not right that any one should grow rich by the detriment and injury of another.'

Much authority can be shown to support this doctrine in addition to that given above. Story, Eq. Jur. § 1236, note; Corcoran v. Corcoran (Ind. Sup.) 21 N. E. 468, 4 L. R. A. 782, 12 Am. St. Rep. 390; Stewart v. Stewart (Wis.) 63 N. W. 886, 48 Am. St. Rep. 949; 11 Am. & Eng. Enc. Law, 1107. But for Jones' acts, this oil would not have been produced, so far as we can see; but for him perhaps this oil now enriching the plaintiffs would have been lost to them by being drained off by wells on adjoining lands. Under these circumstances, equity cannot be blind to the argument that Jones' acts have been to the plaintiffs a blessing, not even in disguise, but plain and apparent. We cannot be deaf to the argument that the labor, enterprise, and business ability of this man, though technically in the wrong, appeal to a court of equity with strong call for liberality so far as to repay him by set-off all outlay in producing oil, including cost of productive wells, and we resolve any doubt by so holding. A debt for such improvement could not be made against the plaintiffs, nor would we say that all their oil could be thus absorbed; but here is a large surplus."

But for the equitable principle thus declared, it is difficult to see how, in view of our statute, anything at all could be allowed by way of offset, against the value of the oil produced. It is not a question of accounting for rents and profits, but one of making reparation for a wrong, however innocently it may have been done, and the court seems to have gone to the utmost limit of equity jurisdiction to relieve from the rigors of the common, and statutory, law in allowing expenses incurred in the performance of a wrongful act to be set off against the benefits derived therefrom. To go further and limit recovery to the mere value of the oil in place would put the wrongdoer in the exact situation of one who enters upon land and takes the mineral therefrom rightfully. Courts of equity cannot ignore all property rights and fully exonerate from the consequences of legally wrongful acts.

An effort is made to obtain the same result, namely, an accounting on the basis of one-eighth of the oil produced as its value in place, by the contention that the plaintiffs, by the allegations of their bill, ratified and adopted the lease which provided for the payment of one-eighth of the oil as royalty. It does allege the receipt by Starkey of money as rental and bonus, sets up title in the plaintiffs to such money, prays a discovery as to the amount thereof and an accounting for, and payment of, the same by the lessors to the plaintiffs. But it attacks the lease on the ground of invalidity, and declares that the extraction of the oil is wrongful, unlawful, and wasteful, and denies that the lease confers upon the lessees any right or title to the oil, or justifies any entry upon the land, and denies any title or right

in Starkey authorizing him to execute the same. Its allegations are directly to the point that the lease is void, and that Starkey has no title to one-half the land, and its principal aim and object are to establish such invalidity and want of title. Although it sets up a demand derived from rents and bonus, which is apparently inconsistent with renunciation of the lease, all parts of the bill must be considered in seeking its true intent and purpose, and, if it appears that this demand rests upon some other ground than that of a ratification of the lease, it must be so regarded. There are no express words of adoption or ratification in the bill. On the contrary, the lease is repudiated and its validity denied most directly and emphatically. This is plainly sufficient to overthrow any mere inference of adoption arising simply from a demand for an accounting as to rentals and money paid as a bonus. The theory of the bill, as regards this demand, seems to be that this money, like the oil, has been derived from the land, and may be exacted notwithstanding the invalidity of the lease and want of title under it, as profit derived from the waste committed, and not as money obtained by virtue of the contract. Hence, our conclusion is that the bill does not ratify and claim under the lease.

The inclusion in the decree of the sum of \$138.67, one-half of the rentals paid to Starkey by the South Penn Oil Company, under the terms of the lease, is assigned as error. As to the appellant, it is clearly an improper charge. It is no part of the proceeds of the oil extracted, nor does it represent any element of injury to the land. It accrued to Starkey under a covenant in the lease, and arose wholly out of contract between Starkey and the South Penn Oil Company, and is in no sense connected with any waste or injury to the land. With this contract the plaintiffs have no connection whatever. It never was their contract, and they have emphatically refused to accept it or be bound by it. As they do not claim under the contract, and could not do so, without ratifying the same as a whole, and the money was received by Starkey on the contract and not out of the land, and was, as to the South Penn Oil Company, money paid out and not money received from the land, the inclusion of this sum in the decree was clearly erroneous.

Another contention is that it was error to render a decree against Starkey and the South Penn Oil Company, jointly, for the value of the entire one-half of the net sum realized from the oil, for the reason that Starkey had received \$3,592.11, and the contention is that this should have been deducted and the decree rendered for the balance, and a separate decree entered against Starkey for the amount which he had received. This position is untenable. As the South

Penn Oil Company actually took from the earth the oil in question, retaining seven-eighths thereof and delivering the residue to Starkey, or to the pipe line company for him, it was responsible for the whole amount thereof and could not discharge itself by payment or delivery to anybody except the rightful owners. It was the actual despoiler of the property. Its drills, machinery, appliances, agents, and employees actually pierced the soil of the plaintiffs and severed and brought up their oil unlawfully and wrongfully. Starkey's unauthorized and void contract did not do that. But for the acts done under it by the lessee, it would have been harmless. Having done this injury, the oil company cannot discharge itself by making reparation to any one but the injured party. It cannot say to him: "You must look to my partner in wrongdoing, because some of the benefits thereof accrued to him." The decree is therefore not erroneous in this respect.

On the 3d day of October, 1903, the court decreed that partition of the land be made, and appointed commissioners for that purpose, after having ascertained that C. H. Ice and G. B. McNeely were entitled to 45 acres of the tract, Waitman, Ida, and Martha Higgins to five acres, John W. Starkey to 24 acres, and Hezekiah Hood to 26 acres, but no actual partition appears to have been reported or decreed. In this state of the record, it is said the court erred in decreeing partition of the land. To this it suffices to say the decree is not appealable. It makes no partition, and does not settle the principles of the cause. Evidently this ascertainment was made merely for the purpose of determining the basis for a division of the proceeds of the oil produced. Only to that extent does it seem to have been made effective or fruitful. An actual partition would not ordinarily be by the acre without regard to value. In this we see no error.

In pronouncing its decree, however, the court erred in one other respect. Three infant children of Louis Higgins, a son of Mary Higgins, are defendants in the cause and are entitled to $\frac{5}{74}$ of the amount ascertained to be due from Starkey and the South Penn Oil Company. Their interest was overlooked and the whole amount decreed to the plaintiffs. Of this the South Penn Oil Company justly complains, because these infants may hereafter demand payment of their share, and in that case there would be a double recovery to that extent. Deducting from the amount of the decree the sum of \$138.67, the money arising from rentals paid, the whole amount due is ascertained to be \$6,051.25. Of this, the plaintiffs are entitled to a decree for the sum of \$5,642.38, $\frac{69}{74}$ thereof, with interest thereon from the 23d day of September, 1904, the date of the decree appealed from.

It is said the court erred in directing the receiver to pay, out of the proceeds of

oil in his hands, the amount decreed to the plaintiffs. The ground of this suggestion is not stated. It seems to have been put in by way of precaution, to broaden the objection to the personal decree so as to make it reach specifically that part which requires satisfaction out of the fund in the hands of the receiver. No independent ground of exception is perceived. The fund arose from the oil unauthorizedly taken from the land and sold. Plaintiffs had the right to follow it up and assert a lien upon it. But the amount to be so paid should have been limited to the sum of \$5,642.38, with interest as aforesaid.

The Corning Oil Company, operating upon 26 acres, the residue of the 100-acre tract in controversy, did not appeal from the decree against it, but the plaintiffs did, and it filed a brief in which error might have been cross-assigned, but seems not to have been. The same proceedings were had against this company as against the South Penn Company, and the same defenses were interposed, up to the point of taking the decree. There, the court made a distinction. Instead of allowing, against it, one-half of the value of the production after deducting the cost, the court decreed one-half of the value of one-eighth of all the oil produced. The production amounted in value to \$26,646.60, and the cost to \$24,095.66, making the difference \$2,550.94. The one-eighth of the value of the entire production was \$3,330.82, and the decree was for \$1,704.41, one-half of \$3,330.82, plus one-half of \$78, the amount received from rentals by Hezekiah Hood, the lessor. Under the principles hereinbefore applied, on the appeal of the South Penn Oil Company, the amount that would have been decreed is \$1,275.47, one-half of \$2,550.94. But counsel for the Corning Oil Company do not, in their brief, complain of this. Their sole contention is that the basis of the accounting adopted in their case is correct and is the proper rule for the government of all similar cases. They do not ask to have the amount decreed reduced, and the only ground of complaint against it by the plaintiffs is that it is too small. They claim from this company the value of the entire production, \$26,646.60, without any deduction on any account. Nobody asks that the amount of the decree be cut down. The Corning Oil Company is satisfied with it, apparently willing to pay it, and the plaintiffs only ask that it be increased. Under such circumstances, the court is clearly not bound to disturb it. Errors of this kind may always be waived. If the decree is erroneous in allowing more than the said sum of \$1,275.47, the question would be whether the court, on its own motion, could, and, under the circumstances, ought to, correct it. But is it clearly erroneous? The sum of \$1,275.47 is less than the value of the oil in place. The allowance of cost of production proceeds not upon a legal right, but

an equitable one, as has been shown. It may be taken off of the profits derived, but may it be deducted from the value of the property taken? Does not the value of the oil in place stand upon a different footing from that of the added value, consequent upon its removal? Did not the trial court distinguish between the two cases upon this ground, and is it not a substantial ground for such discrimination? This question has not been discussed or raised in this court. Conceding that the court might, on its own motion, correct a palpable error of this kind, in the absence of any request for such action, it does not follow that it should, or could, do so, when the question of error is doubtful. For this reason, the decree against the Corning Oil Company will not be disturbed.

For the reasons above stated, the decree complained of will be so modified and corrected as to require the appellant, the South Penn Oil Company, and J. W. Starkey to pay the plaintiffs the said sum of \$5,842.38, with interest thereon from the 23d day of September, 1904, to be paid by H. B. Furbree, special receiver, out of the funds in his hands, instead of the sum of \$6,189.92, and, as so modified and corrected, the same will be affirmed; but costs in this court will be allowed the appellant, the South Penn Oil Company.

(53 W. Va. 449)

WALLACE v. ELM GROVE COAL CO.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1905.)

1. MINES AND MINERALS—CONVEYANCE OF UNDERLYING COAL—EFFECT.

A conveyance of the underlying coal, with the privilege of its removal from under the land of the grantor, effects a severance of the right to the surface from the right to the underlying coal, and makes them distinct corporeal hereditaments. The presumption that the party having the possession of the surface has the possession of the subsoil also does not exist when these rights are severed.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 158, 161.]

2. SAME—ADVERSE POSSESSION.

The owner of the surface, when the underlying coal has been so conveyed, can acquire no title to the coal by his exclusive and continued possession of the surface; nor does the owner of the coal lose his right or his possession by any length of nonusage. To lose his right he must be disseised, and there can be no disseisin by an act which does not actually take the coal out of his possession.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 185.]

3. QUIETING TITLE—POSSESSION.

A bill in equity to remove a cloud over title to land cannot be maintained, unless the plaintiff have both good title and actual possession.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, §§ 8, 36.]

(Syllabus by the Court.)

Appeal from Circuit Court, Ohio County.

Bill by James Y. Wallace against the Elm

Grove Coal Company. Decree for defendant, and plaintiff appeals. Affirmed.

Rehearing denied January 9, 1906.

Hubbard & Hubbard, for appellant. Handlan & Wiedenbusch, for appellee.

McWHORTER, J. John Blayney and John McCoy were the owners of two contiguous tracts of land making together 165 acres. On the 17th day of June, 1859, they conveyed to Joseph Connelly, Joseph Ford, Otho W. Heiskell, and John Handlan, all the coal underlying the two tracts of land. By regular conveyances the title to both tracts became vested in John Blayney, who conveyed the same to Samuel Roney on October 4, 1870; Samuel Roney and wife conveyed the same by deed of trust to L. F. Jones, trustee, who, by deed dated August 22, 1877, conveyed the same 165 acres to James Y. Wallace. It seems that the conveyances made after the coal deeds of June 17, 1859, purported to convey the whole property without reference to the said conveyances of the coal underlying the said tracts of land. By deed dated the 6th day of February, 1902 the heirs at law of the said Connelly, Ford, Heiskell, and Handlan, the grantees of the coal in the deeds of June 17, 1859, conveyed the said coal and mining privileges to the Elm Grove Coal Company, a corporation. On the 1st Monday in August, 1903, the said James Y. Wallace filed his bill in equity in the circuit court of Ohio county against the Elm Grove Coal Company, alleging the various deeds of conveyance of said property, and also the said deeds conveying the underlying coal to the said Connelly and others; that the said coal interest had become forfeited to the state by reason of nonentry on the land books for purposes of taxation, that the title of the grantees to said coal had become vested in the state by reason of such forfeiture, and that up to the year 1902 no redemption of said property, nor was any release or other disposition of said property or of any part thereof, made by said state of West Virginia; that the conveyance made by John McCoy to John Blayney in the year 1864, and by John Blayney and wife to Samuel Roney in 1870, created in the said Roney a title to said coal, which was adverse to that of the said Connelly, Ford, Heiskell, and Handlan, and that after the said year, 1870, no payment, by the said Roney or his successors in title, of any taxes, assessed upon said coal or which should have been assessed thereon, could inure to the benefit of said Connelly, Ford, Heiskell, and Handlan as privies in title to the said Samuel Roney; that the conveyance of said property by Roney to Jones, trustee, in 1870, and the conveyance thereof to plaintiff by said Jones, trustee, in the year 1877, were also conveyances adverse to the said Connelly and his co-vendees; that no payment of taxes by the said Jones or by the plaintiff could inure to the benefit of the said Connelly and his co-vendees as privies

in title to the said Jones, or to the plaintiff; that the plaintiff had actual, adverse, exclusive, and constructive possession of said property under claim of title from 1877 to the present time, and had paid the said taxes thereon from year to year for each year after the year 1877, and that those under whom the plaintiff claimed had like possession and claim and had paid taxes for more than 20 years next previous to the conveyance to plaintiff; that since the 9th of April, 1873, no person excepting the plaintiff had had actual continuous possession of the said coal property under color or claim of title for 10 years, and no person except plaintiff and said Jones, under whom plaintiff claimed, had paid the state taxes on said property or any part thereof for any five years since the last-mentioned date; and alleging that by operation of law and in pursuance of the Constitution of the state the title to said coal so forfeited to the state and not having been redeemed, released, or otherwise disposed of had been transferred to and vested in the plaintiff; that the defendant at the time the said conveyance was made to it by the heirs at law of the decedent vendees of the coal, on the 6th day of February, 1902, had full and actual, as well as constructive, knowledge, that the title to the said coal privileges vested in its grantors had become forfeited, and had become vested in plaintiff; that the deed constitutes a cloud upon plaintiff's title to his said property, that he ought to have a clear and undisputed title thereto, that defendants took by its said deed no estate or interest whatever in any of the coal underlying plaintiff's farm; that the said deed so far as it undertakes as purported to convey any interest in said coal ought to be set aside and annulled; that plaintiff had no adequate remedy at law in the premises; that the defendant be required to answer the bill, and that upon the final hearing of the cause the said deed to the defendant might be declared to be absolutely void and of no effect, so far as it undertakes to convey any interest in the coal underlying plaintiff's farm, and for general relief.

Defendant filed its demurrer in writing to plaintiff's bill, in which demurrer the plaintiff joined and on the 21st day of April, 1905, the following order was entered: "The defendant, Elm Grove Coal Company, at a former term of this court, filed its demurrer in writing to the plaintiff's bill, and the said demurrer having at said term been argued and submitted to the court (it being admitted in the oral argument that there had been no actual possession of the underlying coal as distinguished from the constructive possession resulting from the conveyance of the land to the plaintiff and his grantors and from the occupancy of the surface by the plaintiff and his grantors, and a willingness was expressed that the matters arising should be passed upon as if the averments were modified accordingly), the court now

adjudges the law upon said demurrer to be with the defendant, and the plaintiff's bill to be insufficient in law. The demurrer is sustained. And the plaintiff not desiring to amend, it is adjudged, ordered, and decreed that the bill of complaint be dismissed, and that the defendant recover from the plaintiff its costs in this suit expended to be taxed by the clerk." From which decree plaintiff appealed and in his petition says: "The main question presented to this court is, has the title of the defendant been forfeited to the state?" and, second, "the remaining question is, has the forfeited title vested in the plaintiff?"

Counsel for plaintiff in their petition say: "In arguing the demurrer the plaintiff's counsel conceded that there had never been any actual possession of these veins of coal by any one. That the averments of the bill with respect to the plaintiff's possession must be modified in accordance with this admission is shown by the decree complained of. Since that time it has been learned that this concession should not have been made, but, for the purposes of this appeal, it is to be considered as binding." We are unable to see how this concession is prejudicial to the plaintiff, under the great weight of authority he could acquire no title to the coal underlying the farm by his actual and exclusive possession of the surface. In 1 Cyc. 994, it is said: "It is a general presumption that one who has the possession of the surface of the land has possession of the subsoil also. But when, by conveyance or reservation, a separation has been made of the ownership of the surface of the land from that of the underground minerals, the owner of the former can acquire no title to the latter by his exclusive and continued enjoyment of the surface; nor does the owner of the minerals lose his right or his possession by any length of nonusage. He must be disseised to lose his right, and there can be no disseisin by an act which does not actually take the minerals out of his possession." A conveyance of the underlying coal with the privilege of its removal from under the land of the grantor "effects a severance of the right to the surface from the right to the underlying coal, and makes them distinct corporeal hereditaments. The presumption that the party having the possession of the surface has the possession of the subsoil also, does not exist when these rights are severed." *Armstrong v. Caldwell*, 53 Pa. 284. And in *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436, it is held: "Possession of the surface for more than 21 years does not carry with it the possession of coal below it, where the title to the mineral rights had been severed from that of the surface, by deed." And it is there further held: "When the owner of the surface seeks to establish title to a mine, by adverse possession under the statute, in opposition to his deed, he must prove possession of the mine as such, independent of the surface, or there can be no question of adverse holding

to submit to the jury." 1 A. & E. E. L. 875 (2d Ed.); 2 Snyder on Mines, §§ 971, 972, and authorities cited. See, also, *Coal Co. v. Kelly* (Va.) 24 S. E. 1020; *Preston v. White* (W. Va.) 50 S. E. 236; *Peterson v. Hall* (W. Va.) 50 S. E. 603; 5 Cur. Law, 57, note 11; *Huss v. Jacobs*, 210 Pa. 145, 59 Atl. 991.

It is claimed by appellee that this case is governed by the case of *State v. Low*, 46 W. Va. 451, 33 S. E. 271. In that case the title of Low and others was a defeasible title, the vendees could at their option under their contract omit to pay within a given time the sum of \$800, when upon such failure to pay their title was to become and be "as absolutely null and void as though it had never been made," and the title would thus revert to the grantor in whose name the whole property was charged for purposes of taxation. While in case at bar *Roney* in 1870 took a title hostile to that of the vendees of the coal, and as we have seen under the authorities he, nor those holding under him, never could have possession of the coal under his deed without entering into the coal in the way of mining the same or reducing the coal itself to physical possession, and that in an open manner so as to give notice to the world that he was claiming it as his own and hostile and adverse to all others.

Appellant claims that by reason of nonentry of the coal on the assessor's books, the title thereto became forfeited to the state and by virtue of section 3, art. 13, of the Constitution, and section 40 of chapter 31 of the Code, the title so forfeited passed to the appellant as a person of the second class described in said sections of the Constitution and statute. The appellant could not take by transfer under the second class mentioned in said sections, because, when he purchased the land, the coal had been severed by deed, and was distinct and apart from the surface; that held by appellant, and it is immaterial whether the title to the coal conveyed in 1859 was forfeited to the state or not for nonentry or otherwise; appellant had no claim to it because he had no title conveying it, and it is only he who has good title can maintain a suit to remove a cloud from his title. He certainly did not take good title to the coal when he purchased from the trustee, Jones, and he had no possession of the coal thereafter, the only thing that could ripen a mere color of title into a good title. In *Hitchcox v. Morrison*, 47 W. Va. 206, 34 S. E. 993 (Syl., point 2), it is held: "Those only who have a clear legal and equitable title to the land, connected with actual possession, have a right to claim the interference of a court of equity to give them peace, or dissipate a cloud on their title." *Orton v. Smith*, 8 How. (U. S.) 263, 15 L. Ed. 393; *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110; *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010. And in *Mills v. Oil Co.* (W. Va.) 50 S. E. 157 (Syl., point 4), it is held: "A bill

in equity to remove a cloud over title to land cannot be sustained unless the plaintiff have both good title and actual possession. The weakness of the adversary's title will not sustain the bill." We deem it unnecessary to decide in this cause whether the title to the coal was or was not forfeited to the state for nonentry, or otherwise, inasmuch as such title, if forfeited, did not pass to the appellant; hence do not pass upon that question.

For the reasons here stated the circuit court did not err in sustaining defendant's demurrer to plaintiff's bill, and the judgment of the circuit court is affirmed.

(53 W. Va. 455)

KING v. THOMPSON.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1905.)

1. ADVERSE POSSESSION—CONVEYANCE OF INTERLOCK.

Rader made a bond for the conveyance of land to White. Afterwards Rader made a deed conveying land to King, said to take in part of the land included in the title bond. Possession under the title bond of the interlock would not be adverse to Rader while holding the legal title, but would be adverse to King from the date of Rader's deed to him.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 344.]

2. EVIDENCE—PAROL TO EXPLAIN DEED.

Parol evidence cannot be admitted, in an action of ejectment, to prove that by mistake land was included in the deed not intended to be included in it.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1993, 1994.]

(Syllabus by the Court.)

Error from Circuit Court, Roane County.

Action by William R. King against Jeff Thompson. Judgment for defendant, and plaintiff brings error. Reversed.

Thos. P. Ryan and J. M. Harper, for plaintiff in error. Walter Pendleton, for defendant in error.

BRANNON, P. W. R. King brought ejectment against Jeff Thompson in Roane county, and the case resulted in a verdict and judgment for the defendant. Rader, it seems, made a bond in 1890, providing for the future conveyance to White of a tract of land. Derivatively under that title bond the defendant claims. A deed was made in execution of that title bond, 4th April, 1893, to Runner, its assignee. The plaintiff claims a tract under a deed from Rader and wife to him, 14th December, 1892. We suppose that Rader designed the tract sold to White and that sold to King to be coterminous. A parcel of land containing 23 acres and 23 poles is in dispute. King claims that his deed takes it in. Thompson claims that King's deed does not take it in, but that his deed does take it in. The case involves the true location of the lines of King's deed. Thompson claims that, if King's deed does take in this disputed land,

It is owing to a mistake in including within the deed from Rader to King land not intended to be included, and that owing to this mistake the land in dispute was included within the bounds of King's deed.

King claims that the court erred against him in giving an instruction to the effect that, if White purchased from Rader a tract including the land in dispute, and that if the deed from Rader to King included the land in dispute, and if White and others under him, including the defendant Thompson, had been in actual possession of any part of the land in dispute, or included in the interlock, claiming the same under said title bond or deed for more than 10 years, the jury should find for the defendant, although the plaintiff's deed was older and although the plaintiff might have had actual possession of his land outside the interlock. This instruction told the jury that all the possession under the title bond from Rader to White was adverse and would count under the statute of limitation; that possession before deed to Runner was not adverse and could not be counted under the statute of limitations in favor of Thompson. The reason is, that one in possession under an executory contract of purchase does not hold adversely to his vendor. Why? Because, at common law, the purchaser has no title. He has only an equity under courts of equity, but the law court knows only legal title. The purchaser enters under the vendor. He is a tenant. The purchaser may sue for nonconveyance to get damages, but the law court knows him not as to title. So much is this so before section 20, c. 90, Code 1899, that the vendor could, by ejectment or unlawful detainer, even if the purchaser has paid purchase money and were entitled to possession, turn him out. *Williamson v. Paxton*, 18 Grat. 475. Therefore, at law, possession of the vendee is possession of his vendor, not adverse until after deed. *McNeely v. Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562; *State v. Harman*, 57 W. Va. 448, 50 S. E. 828. It is not adverse in a court of equity. In its eye the vendor holds the legal title in trust for the vendee, and the vendee holds the equitable title in trust for his vendor to pay purchase money. The vendee recognizes the still subsisting right of the vendor; the vendor is trustee, the vendee beneficiary of the trust. Their relation is mutual and friendly, and forbids adversary possession. They claim under the same title, both at law and in equity. Therefore, while Rader held legal title, possession under the title bond was not adverse to Rader. But how after Rader conveyed legal title to King? The legal title was no longer in Rader in trust for White. There was no contractual relation between King and White or those claiming under White. King claimed for himself. His claim was adverse to everybody. He did not recognize White's

right, but claimed solely for himself. He was White's enemy. Having legal title, he is held to claim only in his own right against White, even against Rader. *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832. Hence any possession under the title bond would be adverse to King from the date of his deed from Rader. Said instruction 8 was erroneous in declaring the whole time of possession under the title bond adverse, instead of from the date of King's deed. And plaintiff's instructions 1 and 5 are erroneous in running adverse possession only from the deed to Runner under the title bond to White. If there was possession under the title bond within the interlock, it ran from the deed from Rader to King, and was not postponed to the date of the deed from Rader to Runner.

The court gave the defendant's instruction 3, saying that, if the part of the call in the deed from Rader to King running from the dogwood in the original long line to the ash and white oak pointers was put in the deed by mistake, and that the dogwood was intended to be the end of said long line in said deed instead of said points at the ash and white oak pointers, and that the line on the surveyor's plat running from the white oak N. 11 $\frac{1}{4}$ ° W. 22.29 poles, to three B. J. O. (now cut down), thence N. 7° E. 27.60 poles, to a dogwood, was the true line intended to be given in said deed, then they must find for the defendant. King's counsel complains of this instruction, because, as they claim, there was no evidence of such mistake. We need not discuss that matter for the reason that the instruction is plainly erroneous on another ground taken by King's counsel; that is, that even if such mistake was made, it could not be considered in an action of ejectment. How often is it necessary to reiterate that a solemn deed is the repository of what the parties intended, and so convincing and conclusive of what they intended that at law no evidence would be received to contradict it, except for fraud? *Western Mining Co. v. Peytona Coal Co.*, 8 W. Va. 406; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611. As a general rule, however plain the mistake in a deed, it cannot be reformed or disobeyed by court or jury in a court of common law. It speaks for itself, and its words must be literally followed, because: "Parol evidence cannot be admitted to vary or add to a deed, as a general rule." *Troll v. Carter*, 15 W. Va. 567; *Richardson v. McCaughy*, 55 W. Va. 546, 47 S. E. 287. It passes legal title to the land regardless of the mistake. If a deed, by mistake, includes land within its bounds not intended to go into it, the only remedy is in equity to reform the deed. A court of common law cannot reform a deed. If it were to attempt it, it could not be told afterwards that it had been reformed. All that could be done would be to introduce the law decision as *res judicata*; but it would not show the

reformation. Equity does this. *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094; 13 Cyc. 576; 24 Am. & Eng. Ency. L. (2d Ed.) 648. There are some instances where a line evidently mistaken has been taken as corrected at law. *Smith v. Davis*, 4 Grat. 50. But this instruction would let a jury correct several corners and lines, in effect make another deed. Our cases would not allow this. If the jury find that the ash and white oak pointers are a corner in King's deed, and its calls follow the line represented on the surveyor's plat from that corner, passing the small B. O., 3 B. O.'s (gone) to the W. O. (gone), hickory pointers, then the land in controversy is within that deed, and it passed to King legal title thereto, notwithstanding any such mistake.

Plaintiff's instruction 2 was properly rejected. It said that, if the defendant's deed did not cover the land in dispute, they should find for the plaintiff, unless the defendant had adverse possession for 10 years, under color of title. It omitted to say the jury must believe that the plaintiff's deed covered the land in dispute, and gave recovery solely on the fact that defendant's deed did not cover the land. A plaintiff must himself show title, and cannot recover on the weakness of defendant's title. With such modification, the instruction would be good.

We are of opinion that there was no error in allowing the field notes of Ross to be given in evidence as tending to show, in the absence of the title bond from Rader to White, its boundaries, to be considered by the jury.

For these reasons we reverse the judgment, set aside the verdict, and grant a new trial.

(53 W. Va. 464)

JOHNSON et al. v. LUDWICK et al.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1905.)

1. EQUITY—PETITION FOR REHEARING—WANT OF PROCESS.

Where a defendant has not been served with process in this state, and has not appeared in the cause, he has the right to file a petition for a rehearing, as provided in section 14, c. 124, Code 1890, and as a prerequisite to such right it is not required that he return to and appear openly in this state. This is only required in attachment proceedings, where a defendant is proceeded against by order of publication, and where he did not appear and make defense.

2. PROCESS—SERVICE—RETURN.

A return of service of process, which shows that it was served by posting at the usual place of abode of the defendant, the defendant not being found, is defective in not stating that the wife, or some member of the family of the defendant over 16 years of age, was not found at such usual place of abode.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, §§ 169-171.]

3. EQUITY—DECREE—WANT OF PROCESS—REVERSAL.

A personal decree, taken against one who was not served with process and who did not appear in the cause, is void, and upon a proper

bill of review, filed for that purpose, the decree will be reversed.

4. TRUSTS—RESULTING TRUST—CONVEYANCE TO WIFE—PRESUMPTIONS.

Where land is purchased and paid for by the husband, and the conveyance taken in the name of the wife, the prima facie presumption is that a gift was intended, and in such case no resulting trust will arise, unless the presumption as to intention, which in such case is one of fact, and not of law, is repelled by competent evidence; and the evidence required to rebut such presumption must be clear and convincing.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 116, 119.]

5. SAME—EXPRESS TRUST.

But, where land is purchased and paid for by the husband, and the conveyance taken in the name of the wife, pursuant to an understanding and agreement between them at the time of the purchase and conveyance that the land is to be held by the wife for the benefit of the husband, this creates an express trust, which will be enforced in favor of the husband.

6. EQUITY—BILL OF REVIEW—JOINT DECREE—REVERSAL AS TO ONE DEFENDANT—EFFECT.

A wife, holding the legal title to a tract of land, died, leaving surviving her husband and her heirs at law, a brother and two sisters. After her death the husband, claiming to have purchased the land and to have paid the purchase money therefor, and to have had the same conveyed to the wife, pursuant to an agreement between himself and wife that she would take the conveyance in her name and hold the land in trust for him, filed his bill in equity against the heirs for the enforcement of the trust. There was no legal service of process upon one of the defendants. The defendants being cotenants, and the decree against them being joint, a reversal of such decree, upon bill of review, as to the one not served with process, operates as a reversal as to all of them.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by John W. Johnson and others against Jacob M. Ludwick and others. Decree for defendants, and complainants appeal. Reversed.

Dent & Dent, C. M. Murphy, and W. R. D. Dent, for appellants. J. Hop Woods, for appellees.

SANDERS, J. On the 20th day of September, 1901, Mary E. Ludwick died, seised and possessed of a certain tract of land of about 100 acres lying in Barbour county, which was conveyed to her on the 25th day of June, 1887, by Morris W. Mauler and others. She left surviving her a husband, Jacob M. Ludwick, and her heirs at law, two sisters, Hannah Bryan and Susan Johnson, and one brother, John W. Johnson. In 1893 Jacob M. Ludwick instituted in the circuit court of said county a chancery suit against the heirs of his deceased wife, claiming to be entitled to hold in fee simple the said tract of land by reason of an understanding and agreement had between himself and wife at the time of the conveyance of the land to her by Mauler and others in 1887, to the effect that he was to pay the purchase money, and she was to take the conveyance in her

name and hold the land for him, thereby asking for the establishment and enforcement of a secret, express trust between himself and wife. Hannah Bryan was proceeded against by order of publication, and John W. and Susan Johnson were served by leaving the process at their usual places of abode. Neither of the defendants appeared, and a decree on the bill taken for confessed as to the resident defendants and order of publication as to Hannah Bryan was pronounced, holding that Mary E. Ludwick, the wife of the plaintiff, at the time of her death held the said land in trust for the plaintiff as her husband, and enforcing the trust by decreeing a conveyance of the land to plaintiff. As provided by the decree, the land was conveyed to the plaintiff Jacob M. Ludwick, by a commissioner appointed for that purpose, on the 23d day of November, 1903, and in May, 1904, Ludwick, for the consideration of \$1,338, one-third cash and the residue in one and two years, conveyed the coal underlying said land to James M. Guffey. The appellants, learning of said decree and the deed made in pursuance thereof, in April, 1905, filed their petition for rehearing, and bill in equity in the nature of a bill of review, and motion to correct for errors apparent on the face of the record, and filed with said petition a bond for costs as required by statute, and in May following Jacob M. Ludwick, by his counsel, moved the court to dismiss plaintiffs' bill and petition for want of equity, which motion was sustained and the bill dismissed, and this decree is now here, on appeal, for review.

In disposing of the questions arising herein, it will be first proper to determine whether or not Hannah Bryan, who was proceeded against as a nonresident by order of publication, and who did not appear in the cause, had the right, upon filing her petition and executing bond, to have a rehearing of the cause. "Any unknown party or other defendant, who was not served with process in this state, and did not appear in the case before the date of such judgment, decree or order, * * * may file his petition to have the proceedings reheard in the manner and form provided by section twenty-five of chapter one hundred and six of this Code, and not otherwise; and all the provisions of that section are hereby made applicable to proceedings under this section." Section 14, c. 124, Code 1899. "If a defendant against whom, on publication, judgment or decree has been or shall hereafter be rendered, * * * shall return to or appear openly in this state, he may, * * * petition to have the proceeding reheard. On giving security for the costs which have accrued and shall hereafter accrue, such defendants shall be admitted to make defense against such judgment or decree," etc. Section 25, c. 106, Code 1899.

It is submitted by counsel for the appellees

that before the plaintiff Hannah Bryan would be entitled to such relief under section 14, c. 124, she must proceed in the manner provided by that section—that is, file her petition to have the proceedings reheard in the manner and form provided by section 25, c. 106, and not otherwise—as all of the provisions of section 25 are made applicable to section 14, and by section 25 it is required that the person filing such petition shall return to or appear openly in this state, so that before she would be entitled to invoke the jurisdiction of the courts of this state in her behalf, or for the purpose of correcting an error against her, she must first place herself within its jurisdiction, in order that the court, if granting or refusing her relief, may have jurisdiction of her person and her property. Therefore, in dealing with this question, we are called upon to construe the meaning of the words "and not otherwise," found in said section 14, and the words "shall return to or appear openly in this state," in section 25, c. 106. It nowhere appears from the record that this petitioner has or has not returned to or appeared openly in this state, and therefore it is presumed that appellees' counsel claims that it should affirmatively appear in the petition filed for such rehearing that petitioner has returned to or appeared openly in the state, and that the petition not so stating it was proper for the court to refuse the rehearing and dismiss the petition. Under section 14, c. 124, it is provided that any unknown party or other defendant who was not served with process in this state and did not appear, etc., within a certain time, can file a petition to have the proceedings reheard. How? In the manner and form provided by section 25, c. 106, and not otherwise. The right to this class of persons is given to file the petition, but it must be done in a certain manner. This relates to the manner of proceeding. The absolute right is given to the party to file the petition, but it must be done under that section, and proceeded with as therein provided, as, for instance, before the defendant shall be admitted to make defense, he shall give bond for costs which have accrued and which shall hereafter accrue, but when this is done he has the right to make defense against the judgment or decree in the same manner as if he had appeared before the same was rendered. Under section 25, c. 106, it is not said that any unknown party or other defendant not served with process may file a petition to rehear, but it says: "If a defendant against whom, on order of publication, judgment or decree has been or shall hereafter be rendered * * * shall return to or appear openly in this state," he may, within a certain time, file such petition. The words "return to or appear openly in this state" are to classify the persons who can, under section 25, have rehearsings, and do not limit the persons referred to in section

14 to such persons thereby classified, but any unknown party or other defendant, who was not served with process in this state, and who did not appear, may file such petition, but must do so in the manner provided in said section 25. Therefore Hannah Bryan was entitled, upon the filing of her petition and the execution of bond, to make defense against the decree, and to deny her this right was error.

Then as to Susan Johnson, there was no legal service of process upon her. It purports to have been served by leaving a copy posted at her usual place of abode, but the return of service fails to show a compliance with the statute. It is in the following words: "On the 27th day of July, 1903, I executed the within summons on Susan Johnson by posting and leaving posted at the front door at her usual place of abode a copy, in Taylor county, West Virginia; she not being there or elsewhere found. J. W. Selvy, Deputy for B. F. Sayre, S. T. C." The statute provides that process may be served by delivering a copy to the person sought to be served, or, if he be not found, by delivering such copy at his usual place of abode, to his wife, or to any other person found there, who is a member of his family, and above the age of 16 years, and giving information of the purport of such copy to the person to whom it is delivered, or, if neither his wife nor any such other person be found there, and he be not found, by leaving such copy posted at the front door of such place of abode. So it will be seen that to make service process must be served upon the person, if found, and, if not found, upon his wife or some member of his family over the age of 16 years, and then, if neither be found, it can be served by posting. The return does not show that the wife, or some member of the family over the age of 16 years, was not found there. The return must show these facts, in order to constitute a valid return of service. This is substitutive service, and the statute must be complied with. It must be given to the wife or member of the family, if found at the usual place of abode, before the right exists to serve by posting. Service of process is necessary to a valid judgment or decree, and, when the service is substitutional, the statute must be strictly complied with. The process may have been regularly served, but the only evidence we have as to such service is the return of the officer, and, if it fails to disclose that the requirements of the statute have been complied with, the service is so defective that we must hold that it is equivalent to no service, and any decree rendered against the petitioner is therefore a nullity. *Adkins v. Insurance Co.*, 45 W. Va. 384, 82 S. E. 194. Therefore the petitioner Susan Johnson not having been served with process and the decree, for that reason, being void, she not only had the right to file her petition, under section 14 of chapter 124 of the

Code of 1899, for a rehearing, but she was entitled to have it treated as a bill of review, which was asked by her to be done, and the action of the court in refusing to so treat it was erroneous. A decree taken without the service of process, or where the return of process is so defective as not to show that the party was properly before the court, is such as should be reversed, upon a proper bill of review filed for that purpose. Therefore the court not only erred in dismissing her bill of review, but also erred in refusing to entertain her bill and reverse the final decree entered in the cause of Jacob M. Ludwick against the appellants. *McCoy v. Allen*, 16 W. Va. 724.

The summons upon John W. Johnson, as has been noted, was served by leaving a copy at his usual place of abode with his wife; he not being found. This service conforms to the statute, and is, therefore, good. But counsel presents that inasmuch as it is substitutive service, under section 14, c. 124, Code 1899, he should be accorded the privilege of a rehearing. It is true that the service is substituted for actual service, but, at the same time, it is, under our statute, regarded as personal service, and such as forms the basis for a personal decree or judgment. It may, in some instances, work hardships, but nevertheless our statute, said section 14, has provided for it, and only such persons as are unknown, or other defendants who were not served with process in this state, or who did not appear in the case, can file such petition for a rehearing under that section. This does not apply to one who was served with process in this state, although the service may be substitutional, and to so construe this section would be giving it a very elastic construction indeed. Not being entitled to have the pleading treated as a petition for rehearing, it is claimed on behalf of the petitioner John W. Johnson that it should be treated as a bill of review, for errors apparent. This, of course, is correct, as it sets forth all the requirements of a bill of review, and when this is done, as this court has repeatedly held, it is immaterial what the pleading is denominated, if it contains the necessary allegations to give the plaintiff relief. Then, treating it as such, the question arises, is there error in the decree or proceedings sought to be reviewed?

It is urged that the court below should have dismissed the original bill, on its own motion, because it showed, upon its face, that the plaintiff was not entitled to the relief asked. This contention cannot be sustained. The bill was taken for confessed as to the petitioner, and it contains allegations to the effect that the land which was conveyed to Mary E. Ludwick was purchased and paid for by Jacob M. Ludwick, with an express understanding and agreement between him and his wife, at the time, that she would take the conveyance in her own name, and hold the title in trust for him. This court has

held that where land is purchased and paid for by one person, and a conveyance taken to another, with the understanding and agreement that it will be held in trust for the purchaser, there arises an express trust, which will be enforced in equity; but it is also held that, if the person in whose name the conveyance is taken is the wife of the person who paid the purchase money, the prima facie presumption is that a gift was intended, and, in such case, a resulting trust will not arise. But this is only a prima facie presumption, and where the bill alleges, as it does here, that it was the express understanding and agreement between the one who purchased and the one in whose name the conveyance was taken that the land should be held in trust for the purchaser, there is a sufficient allegation upon which to compel its enforcement. But, if the allegations of the bill in this regard were denied, it would devolve upon the husband to show that it was not a gift, but that the land was to be held by the wife for his benefit. *Deck v. Tabler*, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837. Therefore, if the allegations of the bill are true, and, as the bill was taken for confessed, they are taken to be true, we see no error in this respect which calls for a reversal of the decree.

But it may be claimed by the plaintiff John W. Johnson that it was error to take the decree upon the original bill without having Susan Johnson before the court, she being a co-tenant with him and Hannah Bryan, and sued jointly with them, but whether this is such error as he could take advantage of it is not necessary to determine, because the reversal of the decree upon the part of Susan Johnson operates as a reversal of the entire decree. Upon the death of Mary E. Ludwick this land descended to the plaintiffs, and is held by them as co-tenants. Jacob M. Ludwick, under the allegations of his bill, is entitled to the whole tract, or no part of it, and any defense advanced by one of the heirs will redound to the benefit of the others. It cannot be a trust as to the interest of one, and not as to the interest of the others. It is not so claimed. The estate is joint, and the decree is likewise joint, and when reversed as to one it is reversed as to all. *Vandiver v. Roberts*, 4 W. Va. 493; *Lyman v. Thompson*, 11 W. Va. 427; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553; *Holderby v. Hagan*, 57 W. Va. —, 50 S. E. 437; *Dickenson v. Davis*, 2 Leigh, 401; *Lenow v. Lenow*, 8 Grat. 349; *Walker's Ex'r v. Page*, 21 Grat. 636; *Hogg's Eq. Pro.* 607.

For the reasons given, the decree dismissing the plaintiffs' petition and bill of review, and the decree rendered on the 31st day of October, 1903, upon the original bill filed by Jacob M. Ludwick against the plaintiffs, holding that the land conveyed to Mary E. Ludwick, his wife, was held in trust by her for Jacob M. Ludwick, are reversed, and this cause is remanded.

(58 W. Va. 482)

TOWN OF HARPER'S FERRY v. V. KAPLON & BRO.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1905.)

1. DEDICATION—PUBLIC STREET—EVIDENCE.

A dedication of land by the owner, for the purpose of a public street, may be established by evidence contained in a deed made by such owner to a private person, in which the rights of the public are recognized.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 33-38.]

2. SAME—ACCEPTANCE.

As between the owner so dedicating, or his alienees, and the public authority claiming the dedication, the acceptance thereof may be implied from the actual appropriation and use of the land, by such public authority, for the purpose of the dedication.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 73-76.]

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County.

Bill by the town of Harper's Ferry against V. Kaplon & Bro. Decree for defendants, and plaintiff appeals. Reversed.

J. M. Mason, Jr., for appellant F. W. Brown, for appellees.

COX, J. The town of Harper's Ferry filed its bill in the circuit court of Jefferson county against Victor Kaplon and Abraham Kaplon, partners, etc., for the purpose of enjoining them from constructing a building upon a strip of land alleged to be a part of a public street, called "Church Street," in said town, and thereby constituting a nuisance upon such street. The defendants demurred to the bill, and moved to dissolve the injunction before answering. Upon hearing a decree was entered by said circuit court sustaining the demurrer, dissolving the injunction, and dismissing the bill. From this decree, plaintiff appeals.

The question to be determined is the sufficiency of the bill. The plaintiff claims a dedication of the strip of land in controversy to public use. The material allegations to be considered on the question of dedication, other than the description of the strip of land, are as follows: "Plaintiff complains and says that by virtue of the dedication made by J. C. McGraw and Katie A. McGraw the town of Harper's Ferry had become the owner and possessor of a strip of land in Harper's Ferry, W. Va., lying on the south side of what is known as Church street, described as follows: * * * This strip of land was in a measure claimed by J. C. and Katie A. McGraw as part of lot 48, which was inherited by them from their father, Jas. McGraw, but it was always doubtful whether said strip of land was owned by said J. C. and Katie A. McGraw, as heirs of Jas. McGraw, their father, under the deed from Noah H. Swayne to the said Jas. McGraw, dated the 1st day of August, 1865, and recorded in the

office of the clerk of the county court of Jefferson county, in Deed Book 1, page 182, inasmuch as the deed from the said Noah H. Swayne to the said Jas. McGraw did not fully describe the said lot No. 48, and inasmuch as the town of Harper's Ferry had through its authorities occupied said strip of land as a part of said Church street for years, and so the said J. C. McGraw and Katie A. McGraw, as had their father, permitted the town authorities of Harper's Ferry to use said strip of land as a part of Church street and to improve the same by making a road or sidewalk along said strip of land. And to set at rest the matter and remove all possibility of doubt about the dedication as a matter of record on the 23d day of September, 1897, J. C. McGraw and Katie A. McGraw made a complete dedication of the whole of said strip of land by so bargaining and covenanting and agreeing with the Right Reverend A. Van de Vyver, the Bishop of Richmond, Va., by a deed dated the 22d day of September, 1897, and recorded in the said county clerk's office in Deed Book 83, page 513, and thereupon, as the corporation authorities had done before, the corporation proceeded to construct a wall, grade and improve it by putting stone upon said strip of land, and otherwise working and keeping it in order as part of said street, thereby accepting the said strip of land as dedicated to the town as a part of said Church street. The said McGraws made said dedication so complete partially because they were members of the Catholic Church, whereof the Right Reverend A. Van de Vyver was the bishop, and said McGraws knew that their Catholic Church, which was situated in Harper's Ferry, on Church street, at the point where said strip of land abuts on said street, would be greatly improved by said street being widened at that place, and without said street being made the wider to the extent of said strip of land that the approach to said church would have been greatly disfigured. J. C. and Katie A. McGraw, as had their father before them, had contributed heavily to the building of said church and to its improvement after it was built. Moreover, said lot 48 when so owned by Jas. McGraw, and when owned by J. C. McGraw and Katie A. McGraw, was a vacant lot, and owing to its configuration was enhanced in value by reason of the said Church street being made the wider; the said irregular strip (so dedicated) being totally useless as a part of said lot. Said lot fronts on Shenandoah street and runs back to Church street, and its frontage on Church street is 50 feet higher than its Shenandoah street frontage. J. C. and Katie A. McGraw, 12 days after they had executed said deed of dedication, made an assignment for the benefit of the creditors, and conveyed their title to lot 48, and in due course said lot 48 was sold under proceedings of the court, and V. Kaplon

and Abraham Kaplon, partners as aforesaid, bought said lot in 1898, and a year or two later built a large building on said lot, after having blasted—dug out—said lot back to the southern edge of said strip."

To constitute a dedication of land by the owner to public use, his acts and declarations must be deliberate, unequivocal, and decided, manifesting a positive and unmistakable intention to abandon his property to the specific public use claimed. *Pierpoint v. Harrisville*, 9 W. Va. 215; *Boughner v. Clarksburg*, 15 W. Va. 394; *Miller v. Aracoma*, 30 W. Va. 606, 5 S. E. 148; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155. Plaintiff alleges an express and positive dedication of the strip of land in controversy for the purpose of a public street by deed of record from J. C. and Katie A. McGraw to the Right Reverend A. Van de Vyver, dated the 22d day of September, 1897. This deed was made to an individual, and the appellant is not a party to it by name. It is contended that this deed is not a sufficient dedication to the public. A dedication of land by the owner to the public, for the purpose of a public street, may be established by evidence contained in a deed made by such owner to a private person, in which the rights of the public are recognized. *Riddle v. Town of Charlestown*, 43 W. Va. 796, 28 S. E. 831; 9 Am. & Eng. Encyc. Law, 33 & 37; 13 Cyc. 463. *Elliott on Roads & Streets*, § 123, says: "The authorities show that dedications have been established in every conceivable way by which the intention of the party could be manifested. If the donor's acts are such as indicate an intention to appropriate the land to public use, then upon acceptance by the public the dedication becomes complete." See, also, *Id.* §§ 124, 163. This seems to us to be a complete answer to the contention that this is not a dedication to the public. We think the bill sufficiently alleges an express and positive dedication, on the part of the owners, of the strip of land in controversy, to the public for the purpose of a public street. There are some allegations relating to an implied dedication, but it is not necessary to pass upon their sufficiency, holding, as we do, that an express dedication is alleged.

As to the acceptance by the appellant of such dedication, the bill says: "And thereupon, as the corporation authorities had done before, the corporation proceeded to construct a wall, grade and improve it by putting stone upon said strip of land, and otherwise working and keeping it in order as part of said street, thereby accepting the said strip of land as dedicated to the town as a part of said Church street." No question of the right to charge the town with the duty of keeping the street in repair, or of making it liable for injuries occasioned thereon, is involved. As between the owner dedicating the strip, or his alienees, and the

public authority claiming the dedication, the acceptance thereof may be implied from the actual appropriation and use of the land by such public authority for the purpose of the dedication. *Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. 130; *Sturmer v. County Court*, 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300; *Riddle v. Town of Charlestown*, supra; *Yates v. West Grafton*, supra; *Jarvis v. Town of Grafton*, 44 W. Va. 453, 30 S. E. 178; *Hast v. Railroad Co.*, supra; *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275.

It is contended that the assignment and conveyance by J. O. and Katie A. McGraw for the benefit of creditors was recorded before the deed to Van de Vyver; but this, if true, does not appear upon demurrer. The bill alleges that 12 days after the McGraws had executed the deed of dedication they made an assignment and conveyance for the benefit of creditors; but it does not allege that such assignment or conveyance was ever recorded. No paper or exhibit is made a part of the bill which shows whether or not this assignment and conveyance was recorded, or, if recorded, when it was recorded. We do not now decide whether or not the date of the recordation of this assignment and conveyance, if recorded, is material in the final determination of the case, but only that it does not appear upon demurrer.

The bill is also objected to because it does not specifically allege that the plaintiff is a municipal corporation. The courts will take judicial notice of that fact. *Beasley v. Town of Beckley*, 28 W. Va. 81. The corporate name of the plaintiff is set forth in full, and that is sufficient. *Snyder v. Phila. Co.*, 54 W. Va. 149, 46 S. E. 366, 63 L. R. A. 896, 102 Am. St. Rep. 941. The matter complained of by the bill, viz., the threatened construction of a building by a private person upon a public street, is a proper matter for relief by injunction. *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834; *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275. It appears to us that the bill is sufficient in law, and that the demurrer should have been overruled.

The decree complained of is reversed, the demurrer to the bill is overruled, and the motion to dissolve the temporary injunction is overruled, and the injunction continued until the further hearing thereof in the circuit court; and this cause is remanded, to be further proceeded with in accordance with the principles herein announced and the rules governing courts of equity.

(53 W. Va. 559)

OLD NAT. BANK OF MARTINSBURG et al.
v. BERKELEY COUNTY COURT et al.
(Supreme Court of Appeals of West Virginia.
Dec. 15, 1905.)

TAXATION—EXEMPTIONS—BONDS OF UNITED STATES—NATIONAL BANKS.

Bonds of the United States held by a national bank as part of its capital cannot be

taxed by the state or under its authority. Stocks in such bank may be taxed to its owner (Syllabus by the Court.)

Error to Circuit Court, Berkeley County.

Action by the Old National Bank of Martinsburg and others against the county court of Berkeley county and others. Judgments for plaintiffs, and certain defendants bring error. Affirmed.

C. W. Dillon and C. W. May, Atty. Gen., for plaintiffs in error. Faulkner, Walker & Woods, for defendants in error.

BRANNON, P. The Old National Bank or Martinsburg and the Citizens' National Bank of Martinsburg rendered to an assessor of Berkeley county for taxation in 1903, separate statements of the value of all their personal property, including money, credits and investments, in pursuance of the tax assessment law of West Virginia, showing the total of their property, but deducting therefrom the bonds of the United States held by them as securities in which their capital stock had been invested. The assessor denied their right to deduct such bonds, and assessed them with their entire personal property including such bonds. The said banks filed before the county court their joint petition asking that they be relieved from such assessment of United States bonds and their assessments diminished by the amount of such bonds, and the county court having refused them relief, they carried the case by writ of certiorari to the circuit court, and that court reversed the action of the county court, and exonerated the banks from such assessment to the extent of said national bonds, and the state and county have brought the case to this court by writ of error.

In the year 1819, that great decision was pronounced by the Supreme Court of the United States, through Chief Justice Marshall, which has ever since exerted so much influence upon the powers of the federal government. I refer to the historical case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. It holds that "the state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers. The states have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." This doctrine has been ever since maintained, and has been frequently said to be axiomatic. *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850. Under this principle falls a national bank, since it has been held frequently to be an agency or instrumentality created for public national purpose, and as such, necessarily subject to the paramount authority of the nation, and beyond the power or control or regulation of any state, save only so far as Congress may

confer upon the state that power. *Davis v. Elmira Savings Bank*, 161 U. S. 283, 16 Sup. Ct. 502, 40 L. Ed. 700. Therefore, as held in *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850: "A state is wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets and franchises, except when permitted so to do by the legislation of Congress." The opinion says (page 668 of 173 U. S., page 538 of 19 Sup. Ct. [43 L. Ed. 850]): "It follows then necessarily from these conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of Congress."

Seeing that the state cannot tax a national bank, either as a corporation, or by its property of any sort, except as Congress has allowed it, we must look at the federal statute. The national banking act provided that "nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the Legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value as other real property is taxed." Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502]. On this section the Supreme Court in said case held: "Section 5219 of the Revised Statutes is the measure of the power of the states to tax national banks, their property, or their franchises, that power being confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank."

We find in that section no power given a state to tax the bank as a corporation, its franchise, its property or investments—any personal property—owned by it. It does empower a state, county, or municipality to tax a bank's real property, but not any other property owned by the bank itself. Thus not only are national bonds held by the bank exempt by force of this section, but also all other personalty is exempt, and this by force of that section, without looking at other law, for the simple reason that it is a national bank, and no power to tax such personalty is conceded by national law. The section

quoted above expressly concedes to a state power to tax shares of stock owned by individual stockholders. Under that section the state, to repeat, can tax stockholders in their own names, with their shares of stock in a national bank, but cannot tax the bank, as such, with any of its personal property. *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850. In *Louisville v. Third Nat. Bank*, 174 U. S. 435, 19 Sup. Ct. 874, 43 L. Ed. 1037, it was held that taxes were illegal because levied upon the property and franchise of a national bank, and not upon the shares of stock in the names of the stockholders. Section 5219, Rev. St. U. S., alone rendered void the taxes in this case levied on the bank's capital for the reason alone above stated that the state cannot tax property of any kind, personal property of a national bank. But it is argued that, as the act of Congress allows taxation against stockholders on their shares, the taxation of the bonds to the banks is equivalent to taxation of the shares of the stockholders themselves. In the first place, the letter of section 5219 does not justify us in sustaining such equivalency. It says the stock shall be charged to its holder. And in the second place, we say that this particular point has been several times made before the Supreme Court of the United States, and it has uniformly been held that no such equivalency exists, and that the charge of the capital of a national bank to the bank is not the equivalent of a charge of the stock to its owners, and that a charge to the bank of its capital is void, and not justified on the theory that it amounts to the same as would a charge of the stock to its holders. That court has several times held that the bank in its corporate capacity or personality is one thing, and the shares in its stock another and different thing. *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229; *Bradley v. People*, 4 Wall. 459, 18 L. Ed. 433; *Bank v. Commonwealth*, 9 Wall. 358, 19 L. Ed. 701; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850; *Third Nat. Bank of Louisville v. Stone*, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035. I have said that section 5219 alone forbids, or rather does not grant, the states the right to tax personality of a national bank, including therein national bonds. The very failure of that section to concede that right denies it. That consideration invalidates the tax imposed in this case. But I add that section 3701, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2480], says: "All stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority." Why should national bonds be taxable simply because held by a national bank? They would not be taxable to an individual. Would not that section also forbid it, there being no grant by Congress to the states

of power to tax such bonds? The claim of the state that circulating notes of the bank based on national bonds can be taxed is not sound. They are debts against the bank. The promissory notes given by borrowers for those notes are property of the bank not taxable. There must be national law to tax bank capital, bonds, or notes. Where is the national law to tax bonds or notes?

Such is the federal law, and be the state law what it may, if inconsistent with the federal law, the state law must yield. The federal law is supreme in some cases; the state law is supreme in some cases. In this case, we must follow the decisions of the Supreme Court of the United States, even if we have to disregard state law. But I do not think that our state statutes are repugnant to federal law. Consistently with the rule which requires a court to so construe a statute, if possible, as to make it harmonize with the Constitution, so we ought to construe the statute law of the state so as to harmonize with national statutes and decisions in matters where the national authority is supreme. The state Code of 1899 (chapter 29, § 41) requires that "every person of full age and sound mind shall list for taxation the property belonging to him, including the shares held by him in any national or other bank in this or any other state, except where the same is listed under the provisions of section 64 of this chapter." Section 64, c. 29, provides, as to incorporated companies, that the assessor "shall ascertain from the proper officers or agents of all incorporated companies . . . the actual value of the capital employed or invested by them in their trade or business [exclusive of real estate and property exempt by law from taxation]." Now, observe that section 41 does in terms require a taxpayer to list his shares in a national bank. This is consistent with the federal law. Section 43 declares that there shall be exempt from listing by the taxpayer property "belonging to the United States, or which, by the laws of the United States, is exempt from taxation by or under state authority." By this provision bonds of the United States are taken out of the taxation imposed by section 41, because by federal law such bonds are exempt. The law of this state is composed of both federal and state law, and property exempt from state taxation by federal law is to be regarded as exempt from taxation under the state assessment law. When section 64 says that exempt property shall not be reported, property exempt by federal law is meant, as well as that exempt by state law. Thus sections 41 and 43 harmonize with federal law, taken together. Section 41 requires persons to list property, including shares in national or other banks, except where the same is listed under the provisions of section 64. And section 64 requires incorporated companies to return for taxation the value of the capital employed or invested

by them. This provision means that shares of stock may be charged either to the holder or to the banks; but reading it with section 41 and the provision of section 64 requiring them to report "the actual value of the capital employed or invested by them in their trade or business [exclusive of real estate and property exempt by law from taxation]," we say that the provision giving power to tax bank stock either to the individual or to the bank can apply only to shares in state banks, because the federal statute requires the shares in national banks to be taxed to the holders, and not to the banks, and the state law in section 64 releases the banks from reporting any property or investment of a bank that is exempt by law. In other words, the said provisions of the Code exempting a corporation from reporting property exempt by law operates to release them from reporting for taxation in their name shares of stock or investments, exempt by state or national law. We do not think that the state law, properly construed, justifies the assessment in the name of the banks of any personal property, and does not justify the assessment to a national bank of its investments in United States bonds. Section 51 saying that when stock is charged to a company, its owner need not report it, and section 47 making the word "investments" include securities of the United States, taken alone, would argue against this construction; but we must read all sections coming into the question together. Section 51 cannot apply when federal law forbids an assessment of a national bank. Section 47 does not, under "investments," tax those things exempt. It only means to define "investments" by saying what it covers. It does not per se assess taxes. It means that a national bond is an investment, and if law should tax it, it would cover it, as it would cover national bank stock; but it does not itself tax. It does not tax investments exempt by other sections. In other words, national bonds are not taxed by West Virginia statutes, held by individuals or banks, national or state. I will add that under section 69 the stock can be back taxed to its owners. Therefore we affirm the judgment of the circuit court of Berkeley county.

(58 W. Va. 523)

PARR v. CURRENCE et al.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1905.)

WRIT OF ERROR—REVIEW—RECORD—EVIDENCE.

Syllabus in *Dudley v. Barrett*, 52 S. E. 100, 58 W. Va., —, and points 1, 2, and 3. *Syl., Tracy's Adm'r v. Coal Co. (W. Va.)* 50 S. E. 825, and point 1, *Syl., McKendree v. Shelton*, 41 S. E. 909, 51 W. Va. 516, approved. (Syllabus by the Court.)

Error to Circuit Court, Randolph County.
Action by Genevive B. Parr against Jona-

than Currence and William Currence. Judgment for defendants, and plaintiff brings error. Affirmed.

W. B. Maxwell, C. H. Scott, and Harding & Harding, for plaintiff in error. J. F. Strader and C. W. Dalley, for defendants in error.

McWHORTER, J. Genevive B. Parr brought her action of ejectment in the circuit court of Randolph county against Jonathan Currence and William Currence for a tract of 790 acres of land. The case was tried and the verdict of the jury and judgment were in favor of the defendants. Plaintiff brought it here upon writ of error, and the judgment was reversed and a new trial awarded. The case is reported in 53 W. Va. 524, 44 S. E. 184. A jury was impaneled for another trial on the 18th day of May, 1904, and returned a verdict in favor of the plaintiff for an undivided five-sixths interest in fee simple to the land in controversy. The defendants moved to set aside the verdict of the jury and grant them a new trial, which motion was overruled, and judgment entered upon said verdict.

In the course of the trial the defendants took bills of exceptions numbered 1 to 6, inclusive; the sixth purporting to include a certificate of all the evidence given in the case by both parties. Bills of exceptions Nos. 1, 3, 4, and 5 go to the ruling of the court in refusing to allow certain questions to be answered by witness, Peter Scott, introduced on behalf of the defendants, which it is contended by defendants should have been admitted. Bill of exceptions No. 2 is to the ruling of the court in admitting certain documentary evidence on behalf of the plaintiff over the objections of the defendants, which they insist should not have been admitted in evidence. The original bill of exceptions No. 6, which was brought up on writ of certiorari, together with the certificate of the clerk of the circuit court making return thereof, is as follows:

"Genevive Parr, Plff. Below, Deft. in Error, v. Jonathan and William Currence, Defts. Below, Piffs. in Error. In Ejectment.

"In the Supreme Court of Appeals of West Virginia.

"I, G. Nelson Wilson, clerk of the circuit court of Randolph county, and who made up the record in the above entitled action, do certify that 'defendants' bill of exceptions No. 6,' which begins on page 17 of the second printed record in the case, came to me in skeleton form, exactly as follows:

" 'Defendants' Bill of Exceptions No. 6.

" 'Genevive Parr, Plaintiff, v. Jonathan and William Currence. In Ejectment.

" 'Be it remembered that upon the trial of the above-entitled cause the plaintiff and defendants to maintain the issue involved upon

said trial introduced the following evidence: [Clerk here insert all the evidence introduced by both the plaintiff and the defendants as shown by the certificate thereof made by the official court stenographer.]

" 'And the court certifies under the hand and seal of the judge thereof that the foregoing evidence is all of the evidence that was introduced upon the trial of said action, and this certificate of the evidence, for the purpose of identification, is marked defendants' bill of exceptions No. 6.

" 'Jno. Homer Holt [Seal]

" 'Judge of Third Judicial Circuit.'

"Along with said bill of exceptions there came to me the vacation order in the case, which is found on page II, of the second printed record. When I came to make up the transcript upon the order of the defendants, preparatory to their applying to the Supreme Court of Appeals of West Virginia, for a writ of error, I inserted as part of said bill of exceptions, the statement of evidence found in said second printed record beginning on page 17 and ending with the form of stenographer's certificate on page 48. This statement was contained in a typewritten paper filed in my office on June 10, 1904:

" 'Parr v. Currence. In Ejectment.

" 'Evidence.'

"No name was signed to the form of stenographer's certificate, ending on page 48, and there was no certificate of said paper made by the Judge of said Court, and no mark of identification of any kind made by him.

"Given under my hand this 12th day of September, 1905.

"G. Nelson Wilson,

"Clerk Circuit Court of Randolph County."

There is copied into the record what purports to be the evidence given before the jury in the trial of the case at the end of which is found the following certificate in blank:

"I, Howard H. Holt, the official stenographer of this court, do hereby certify that the foregoing is a true and correct transcript of the shorthand notes taken by me of the testimony in this case.

"_____, Stenographer."

There is nothing to identify this matter inserted as the evidence given in the case as being such evidence. The bill of exceptions No. 6 directs the clerk to "insert all the evidence introduced by both the plaintiff and the defendants as shown by the certificate thereof made by the official court stenographer." It nowhere appears in the record that the court had an official stenographer, or a stenographer appointed to take the evidence in this case. The only reference in the whole record to such official is the direction of the judge to the clerk to insert the evidence in the bill of exceptions, and that contained in the statement at the close of what is inserted in the record as the evidence in the case, but

that statement is signed by no one, and it does not appear from anything in the record that the said paper purporting to be such evidence was before the judge at the time he signed the said bill of exceptions, nor is it in any manner described or identified by mark, letter, number, or any other means of identification, nor was it annexed or attached to said bill of exceptions. It is insisted by counsel for plaintiffs in error that without bill of exceptions No. 6 it is clear from the nature of the questions asked of witness Scott, and the information expected to be elicited from the witness in reply thereto, that the court erred in refusing to permit the questions to be answered. Without the evidence before this court, we are unable to see that the admission of the evidence excluded could have changed the result or produced a different verdict. "In reviewing a judgment in an action at law, upon a writ of error, when the evidence is not made a part of the record, this court will not consider assignments of error involving a consideration of the evidence, but will affirm the judgment." *Dudley v. Barrett* (decided at this term) 52 S. E. 100. In that case there was copied at length into the record what purported to be the testimony of witnesses in the case for the respective parties upon the trial, to which was appended what purported to be the certificate of John T. Harris official stenographer of the court to the effect that he made a report in shorthand writing of the testimony adduced and proceedings had at the trial of the action, and that the transcription thereof was a faithful and true translation of said report, but the record failing to show that Harris was appointed by the court stenographer to report the proceedings had and the testimony given in the case under the statute the paper thus copied into the record had no greater value than a fugitive paper made by any other person which might have been found amongst the papers in the case. In case at bar the paper copied by the clerk as the evidence was not certified by any one. See *Tracy's Adm'x v. Coal Co.* (W. Va.) 50 S. E. 825; *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909; *Williamson v. Hays*, 35 W. Va. 52, 12 S. E. 1092.

For the reasons stated, the judgment of the circuit court of Randolph county is affirmed.

(58 W. Va. 544)

COAL & COKE RY. CO. v. JOYCE et al.
(Supreme Court of Appeals of West Virginia.
Dec. 15, 1905.)

EXCEPTIONS, BILL OF—SUFFICIENCY.

The skeleton bill of exceptions relied on in this case for the purpose of making the evidence a part of it does not do so, and the evidence is not a part of the record, under the authority of the cases of *Parr v. Currence*, 52 S. E. 496, 58 W. Va. —, *Dudley v. Barrett et al.*, 52 S. E. 100, 58 W. Va. —, *Tracy's Adm'x v. Coal Co.* (W. Va.) 50 S. E. 825, and *McKendree v. Shelton*, 41 S. E. 909, 51 W. Va. 516.

(Syllabus by the Court.)

Error to Circuit Court, Randolph County.
Action by the Coal & Coke Railway Company against Thomas W. Joyce and others. Judgment for plaintiff, defendants bring error. Affirmed.

W. B. Maxwell, for plaintiffs in error.
C. W. Dalley and E. D. Talbott, for defendant in error.

COX, J. Thomas W. Joyce, Margaret Caveney, and Ann Joyce complain of an order of the circuit court of Randolph county, made in a proceeding to condemn land for railroad purposes, in which they are defendants, sustaining the motion of the applicant, Coal & Coke Railway Company, to set aside the verdict of the jury therein and granting it a new trial.

The question whether or not there is error in this order involves a consideration of the evidence. This record presents another case of a fatal skeleton bill of exceptions, whereby the evidence is not made a part of it, and therefore not a part of the record. The original bill of exceptions, which is claimed to make the evidence a part of it, was brought here by certiorari. It is a skeleton bill. The parenthetical direction to the clerk therein contained is as follows: "(Here insert the evidence as certified by the official stenographer, which evidence is now here referred to and directed to be here inserted.)" It does not appear that the evidence was annexed to the bill or so marked by letter, number, or other means of identification mentioned in the bill, or so described in the bill as to leave no doubt, when found in the record, that it is the evidence referred to in the bill. The bill of exceptions is therefore insufficient to make the evidence a part of it, or of the record. The statement copied in the record, purporting to be questions and answers of witnesses on the trial, has appended to it the following certificate:

"Grafton, W. Va., Jan. 29, 1904. I, W. H. Pilson, former stenographer of the 3d judicial circuit hereby certify that the foregoing evidence is a true copy of my shorthand notes taken at the trial of the above-styled cause. Given under my hand this the 29th day of January, 1904. W. H. Pilson."

The record discloses no appointment of an official stenographer, and, if it did, we do not think that the statement copied in the record, purporting to be the questions and answers of witnesses on the trial, is sufficiently identified by the bill of exceptions as the evidence directed to be therein inserted. This case is governed by the cases of *Parr v. Currence*, 58 W. Va. —, 52 S. E. 496, *Dudley v. Barrett*, 58 W. Va. —, 52 S. E. 100, *Tracy's Adm'x v. Coal Co.* (W. Va.) 50 S. E. 825, and *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909.

This court can examine no question presented, but must affirm the order complained of, and remand the case.

(58 W. Va. 487)

WHEELING & E. G. R. CO. v. TOWN OF TRIADELPHIA et al.(Supreme Court of Appeals of West Virginia.
Dec. 12, 1905.)**1. STREET RAILROADS—GRANT BY MUNICIPAL AUTHORITIES—EFFECT.**

An ordinance, passed by the council of a town, granting to a street railway company the right to lay its track and operate its railway in the streets of the town, and accepted by the railway company, constitutes a contract between the town and such company, vesting title to such right or easement in it, unless the ordinance contains conditions precedent compliance with which is requisite to the vesting of title.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 64-70.]

2. SAME—FORFEITURE OF RIGHT.

Such right may be forfeited and lost by failure to comply with subsequent conditions, and, if the ordinance expressly provides for forfeiture as the penalty of noncompliance with conditions specified in it, substantial performance of the contract as a whole constitutes no answer to a proceeding to forfeit for failure to comply with such conditions, however slight their relative importance may be. The question of materiality is, in such case, withdrawn from the courts by the stipulations of the contract.

3. SAME—CONDITIONS—NONPERFORMANCE.

A street railway license or privilege in a street may be forfeited for failure to lay planks of prescribed dimensions along the rails of its track in front of improved property, if the ordinance expressly gives the right to forfeit it for such cause.

4. EQUITY—RELIEF AGAINST FORFEITURE.

Equity will relieve from forfeitures for nonperformance of covenants other than those for the payment of money, arising out of accident, mistake, or surprise, and in the absence of willful and deliberate refusal to perform, when no pecuniary injury has resulted to the covenantee and the wrong done is easily remediable; but such power of relief is discretionary, and will not be exercised unless the delinquent covenantor is able and willing to immediately perform the covenant.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 69-71.]

5. SAME—ENFORCEMENT OF FORFEITURE.

Equity will not permit the enforcement of a forfeiture in an inequitable and oppressive manner, nor a perversion thereof to purposes other than those for which the power of forfeiture has been reserved.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 69-75.]

6. SAME—OPPRESSIVE CONDUCT.

In the exercise of such power, under an ordinance of a municipal corporation prescribing notice and specification of cause as a necessary preliminary step, the officers of such corporation must deal fairly, openly, and frankly with the party whose rights they attempt to take away, and abstain from such conduct as will work a surprise upon him. Their conduct is governed by substantially the same rules and principles as apply to proceedings by private persons under similar circumstances. In order to be inequitable and oppressive, their conduct need not be actually fraudulent. If in equity and conscience it is oppressive or lacking in fairness, equity will relieve, however honest and sincere the parties attempting to forfeit may have been.

7. APPEAL—REVIEW—DISCRETION OF COURT.

The discretion of the court in such case is a sound legal discretion, subject to review, and the appellate court will reverse the action of the trial court when, in its opinion, relief has been improperly denied.

8. STREET RAILROADS—USE OF STREETS—FORFEITURE OF RIGHT—RELIEF.

A declaration of forfeiture of a street railway privilege in a street by the council of a town, effected by repeal of the ordinance by which the privilege was granted, pursuant to a reservation of power so to do, for cause and after notice, has not the force and effect of a judicial determination of the existence of cause for forfeiture, and does not preclude a resort to the courts by the railway company for vindication of its rights. After such repeal, pursuant to notice, the railway company may, by injunction, prevent the town authorities from removing or disturbing its track, if no cause of forfeiture existed, or the circumstances shown are such as to call for the exercise of equity jurisdiction to relieve from forfeiture. In so far as the decision in *Town of Davis v. Davis*, 21 S. E. 906, 40 W. Va. 464, imports the contrary of the foregoing proposition, it is re-examined and disapproved.

9. MUNICIPAL CORPORATIONS—PRIVILEGES IN HIGHWAYS—POLICE POWER.

The action of municipal authorities in granting and revoking privileges and licenses in highways is the exercise of delegated police power, and is not judicial in character.

10. CERTIORARI—ACTIONS REVIEWABLE.

Only judicial action is reviewable by the writ of certiorari under sections 2 and 3 of chapter 110 of the Code of 1899. The scope of the writ is not altered by the statute in respect to the nature of the proceedings for the review of which it may be had. In this respect it remains as it was by the common law.

11. STREET RAILROADS—CONSTRUCTION—CONSENT OF MUNICIPAL AUTHORITIES.

Consent of the board of commissioners of Ohio county to the operation of a street railway on and over the Cumberland Road in said county of Ohio does not confer authority upon the railway company holding such permit to construct and operate its railway on and over such portion of said road as lies within the limits of the town of Triadelphia, in said county, without the consent of the authorities of said town.

(Syllabus by the Court.)

Appeal from Circuit Court, Ohio County.

Bill by the Wheeling & Elm Grove Railroad Company against the town of Triadelphia and others. Decree for defendants, and plaintiff appeals. Reversed.

Rehearing denied January 9, 1906.

Henry M. Russell and Howard & Handlan, for appellant. Alfred Caldwell and Nelson C. Hubbard, for appellees.

POFFENBARGER, J. The council of the town of Triadelphia, in Ohio county, having repealed the ordinance under which the Wheeling & Elm Grove Railroad Company had been operating its street railway in said town, and caused a part of its track to be taken up, said railroad company obtained a temporary injunction, inhibiting the town, its officers, and agents from interfering with its road. Thereupon the town answered the bill, alleging forfeiture of the privileges

granted by the ordinance, because of failure and refusal to observe and perform conditions, and praying, by way of affirmative relief, that the railroad company be enjoined and restrained from further operating its road in said town and compelled to remove from the streets thereof its poles, wires, rails, ties, etc., and restore the street and a certain bridge, mentioned in the bill, to the condition in which they were before the construction of the road, unless the consent of the town to the further occupation and use of the street for the purpose aforesaid should be obtained. On the hearing, the injunction was dissolved and the cross-relief asked for by the town granted. From this decree said company has appealed.

The ordinance was passed on the 31st day of March, 1896, granting to the Wheeling Suburban Railway Company, its successors and assigns, the privileges now in question, and that company subsequently assigned the same to said Wheeling & Elm Grove Railway Company. Under it, the road was constructed within the time required. The forfeiture is not for nonuser of the franchise or privilege, but for failure to comply with certain conditions imposed by section 4 of the ordinance in the following clauses thereof: "Said railway company shall so construct its tracks upon the roads or streets hereinbefore mentioned that at any place any of its tracks may cross any road or street within said town, the said railway company shall at every such place lay its track or tracks on a level with the surface or plane of said road or street at the place of such crossing and shall pave with white oak planks not less than two inches thick between all its rails crossing such road or street and shall at all times hereafter keep and maintain the said paving or planking in good order and repair to the satisfaction of the council of said town. Said company shall also lay and maintain a white oak plank two inches thick and eight inches wide on each side of each rail along its track in front of all improved property." To enforce compliance with these conditions and others inserted in the ordinance, section 15 of that instrument provided as follows: "Should the Wheeling Suburban Railway Company fail to fulfill and perform the conditions of this ordinance or comply with the requirements thereof upon them, or do those things they are by this ordinance prohibited from doing, the said town may give said Wheeling Suburban Railway Company notice of its intention to repeal this ordinance and revoke and annul all the rights, powers and privileges by this ordinance given by said town to said Wheeling Suburban Railway Company, and stating in such notice in what respect said Wheeling Suburban Railway Company have failed to fulfill and perform the conditions of this ordinance or to comply with the requirements thereof upon them, or

wherein they have done any of those things they are by this ordinance prohibited from doing. At any time after three months from the service of such notice upon the president or secretary of said Wheeling Suburban Railway Company the council of said town may repeal this ordinance and revoke and annul the rights, powers and privileges by this ordinance given by said town to said Wheeling Suburban Railway Company; provided, however, that if the said Wheeling Suburban Railway Company before such repeal and revocation and annulling shall fulfill and perform the condition or conditions of this ordinance said notice alleges they have failed to fulfill and perform, and shall comply with the requirement or requirements of this ordinance said notice alleges they have failed to comply with, and shall cease at once on receipt of said notice to do any of those things that they are prohibited from doing by this ordinance which said notice states they have been doing, said council shall not have the power to repeal and revoke and annul the rights, powers and privileges thereby given by said town to said Wheeling Suburban Railway Company." Notice dated August 28, 1901, specifying, as breaches of conditions, elevation of the tracks above the level of the streets at the crossings of Monroe street and Clay street, failure in part to pave the crossing at Clay street, and failure to lay planks along the rails in front of lots 24 to 33, inclusive, except a short strip at the corner of lot 30, was served upon the railway company. Just a few days before the expiration of three months from the date of service of said notice, said company caused its track to be lowered at the crossings and some plank to be put down at the places specified in the notice, but the plank pavement at the street crossing did not extend entirely across the street, and the planks laid along the tracks in front of improved property were not of the width required by the ordinance. Many of them were only five inches wide and, in one place, for a distance of about 90 feet none at all was put down, and the crossing at Monroe street was left too high by about five inches. On the 7th day of December, 1901, more than three months after the date of the service of the notice, the council of the town repealed the ordinance, reciting in the repealing ordinance the giving of the notice and noncompliance with its requirements. The failure to comply strictly with the requirements of the ordinance is not denied by the railway company, but it claims to have substantially complied with them, and also that, prior to the repealing of the ordinance, its agents applied to officials of the town to know whether there was any objection to the manner in which the work had been done, and expressed a willingness to remedy any defects in it which might be suggested, and no objection was made. But this seems to have occurred

after the repeal of the ordinance. The railway company's own witness says it was afterward.

In addition to its defense of substantial compliance, the railway company relies upon certain ordinances adopted by the commissioners of Ohio county, granting to it the privilege of operating its railway on and over certain portions of what is known as the Cumberland Road, including that portion thereof which runs through the town of Triadelphia, and on which said railway is located through said town. This road was originally constructed and owned by the government of the United States. In 1835, the government ceded to the several states through which said road was located the care and control of the portions thereof lying respectively within said states, reserving to itself certain rights in them. By this compact it relieved itself of the burden of maintaining said road and cast it upon the states, but it retained the right to use the same free of charge for any governmental purpose. *Searight v. Stokes*, 3 How. 151, 11 L. Ed. 537; *Neil v. Ohio*, 3 How. 720, 11 L. Ed. 800; *Achison v. Huddleson*, 12 How. 293, 13 L. Ed. 993. Upon the formation of the state of West Virginia, that portion of said road lying within this state passed under its control, and, by statute, the management thereof was intrusted to the board of public works of the state. By an act of the Legislature, passed on the 13th day of February, 1890, the care and control of so much of said road as lies within the county of Ohio, together with all the rights, powers, and duties in relation thereto, belonging to the board of public works of this state under existing laws, including power to collect tolls on said road, was committed to the board of commissioners of said county, as soon as said board should pass an ordinance agreeing to accept the trust. Soon afterwards, such ordinance was passed. It is contended now that the town of Triadelphia has no control of that part of said road which lies within its limits, and that the railway company is entitled to the use and occupation thereof, for the purposes of its road, under the ordinances passed by said board of commissioners. On the other hand, it is urged that the act of the Legislature of Virginia, passed on the 4th day of February, 1840, incorporating the town of Triadelphia, lying on both sides of said road, and conferring upon it, among other things, the power "to regulate and graduate the streets and alleys, and to pave the same if deemed necessary," vested in said town all the right and title to, and power over, so much of said road as lies within its territory that the state of Virginia then had. Counsel for the appellees rely also upon section 5 of article 11 of the Constitution of this state, which provides that: "No law shall be passed by the Legislature granting the right to construct and operate a street railroad within any city, town or in-

corporated village, without requiring the consent of the local authorities having the control of the street and highway proposed to be occupied by such street railroad." The status of so much of the national road as lies within the territory of the town of Triadelphia depends upon the statutory provisions. Chapter 56 of the Code, concerning the board of public works and tolls on the Cumberland Road and other turnpikes, provides for the maintenance of said road and turnpikes, by means of the exaction of tolls, and this, as to said Cumberland Road, was done by the board of public works of the state, until its care and control were transferred to Ohio county by the act hereinbefore mentioned. Section 21 of chapter 39 of the Code provides that the interest which belonged to the state on the 1st day of July, 1868, in any road or bridge or public landing lying wholly or in part within the limits of any county is transferred to and shall continue vested in such county, so far as such road, bridge, or public landing is within the said county. But the Cumberland Road is expressly excepted from the operation of said section. Section 31 of chapter 43 of the Code of 1899 says: "The roads, bridges and public landings transferred by the state to the several counties in which they are situated shall hereafter be regarded as county roads, bridges and landings." Section 28 of chapter 47, relating to cities, towns, or villages, says: "The council of such city, town or village shall have power therein to lay off, vacate, close, open, alter, curb, pave and keep in good repair, roads, streets, alleys, sidewalks, crosswalks, drains and gutters, for the use of the public, or any of the citizens thereof, and to improve and light the same, and have them kept free from obstructions on or over them." Section 33 of chapter 43 of the Code of 1899, provides that no road or landing shall be established by the county court of a county upon or through any lot in any incorporated village, town, or city without the consent of the council thereof.

Aside from the question of title to the fee in public roads lying within incorporated cities and towns, courts everywhere incline to the view that such corporations have certain rights and powers respecting such public roads. When there are no express statutory provisions limiting the powers of the county authorities over such portions of the public roads, and the General Statute or the charters of cities and towns confer power to lay out, open, and regulate streets, alleys, and walks, portions of the road lying within the city or town are generally held to be under the control of the authorities thereof so far as to enable them to keep the same free from obstruction and in good condition and order by improving them. *State v. City of New Brunswick*, 30 N. J. Law, 395; *Quinn v. Patterson*, 27 N. J. Law, 35; *State v. Pas-saic Turnpike Co.*, 27 N. J. Law, 217; *State*

v. Jersey City, 26 N. J. Law, 444. These are cases of turnpikes and plank roads owned by private corporations. Dillon on Municipal Corporations (4th Ed.) par. 676, says: "Throughout the United States, township, county, or other local authorities have the general control and supervision over the ordinary public highway, while in incorporated towns and cities this power, as respects streets, is usually conferred upon the corporate authorities. When the jurisdiction and power in the one is excluded by the charters of the others has given rise to nice and difficult questions of construction, depending upon the supposed intention of the Legislature, to be gathered from the whole course of legislation on the subject in the particular state, and with reference to the particular municipality." At section 677 the same work says: "So, by statute in Texas, the counties had a general authority to keep in repair the public highways therein, and an incorporated town, by its charter, had the right to improve its streets and alleys; and the question arose whether the county or town authorities had power to keep in repair streets or highways within the corporate limits of the town. The court, to prevent conflict of jurisdiction, held that the town had exclusive control of the streets and highways therein. So it is held in Indiana, that the General Statutes of the state in relation to 'public highways' do not apply to the streets and alleys of an incorporated town or city." In Norwich v. Story, 25 Conn. 44, such provisions in the charter of a city, read in connection with the general laws conferring powers upon the county authorities, were held to give concurrent jurisdiction over the highway within the city to city and county authorities.

The status of the Cumberland Road seems to be somewhat different from that of the ordinary county road. The Legislature has dealt with it in a manner different from that in which it has dealt with other roads. Whether the law contemplated its maintenance throughout from tolls, until its transfer to the authorities of Ohio county, is not clearly indicated. It would seem, however, that in order to effectuate the purpose of its maintenance, the Legislature must have necessarily retained the power of maintenance through the corporations situated on it. No express authority is conferred upon them to close or alter it, nor is any duty laid upon them to maintain it according to any particular standard. Hence, if the state did not retain the power to keep it up, the portions lying within the town might have become, or might yet become, so dilapidated and out of repair as to render the whole road practically useless. Before the cession of the road to the state, the government expended upon it large amounts of money, and stipulated for the use of the road for governmental purposes, without liability for future expenses or cost of keeping it in repair. By al-

lowing the road or any part of it to fall into decay, the state might become guilty of recreancy to the trust confided in it by the national government. On the other hand, as the towns have the power to make, construct, and keep in repair their roads and streets, it seems reasonable to say they might improve, repair, and maintain such portions of said road as lie within their territories. This is not at all inconsistent with the rights of the state or county. Though not having full and complete control so as to enable them to impair the efficiency of the road as a state road, they might well have the right and power, consistently with the interests of the state, to aid in keeping it in repair and to add to the work done by the state such additional work and expense as their authorities might deem expedient in order to put such portions of it in a higher and better state of repair and condition than other portions thereof. As to additional burdens upon the road, a reasonable view would be that the state, without the consent of the authorities of the town, would have no right or power to place upon that portion of it lying within the town anything in the nature of an obstruction or additional burden. The town, when incorporated, accepted the road as a part of its territory without any such burden, and the Constitution withholds from the Legislature power to grant the right to construct a street railroad within any city or incorporated village, without the consent of its authorities. And the state may have the power to say, on the other hand, that the town shall not impair the efficiency and usefulness of its road by authorizing the construction of a street railway upon it. The statutes and constitutional provisions must be harmonized, if possible, so that all may have effect. By giving this community of interest in so much of the road as lies within the town, repugnancy is avoided, and the rights of both the state and the town protected. Part of the Cumberland Road was taken into the town by express legislative authority. The town accepted it as a part of its territory in its then condition. No change occurred in it prior to the adoption of the present Constitution, and that instrument denies to the Legislature the power to authorize the invasion of any town by a street railroad without its consent. As the Legislature has no power to do this in any case, it could not authorize the board of commissioners of Ohio county to grant such a privilege within the town. In view of this situation, the respective rights of the town, and of the state or Ohio county, the Wheeling Suburban Railway Company took the precaution to obtain grants of privileges in that part of the road lying within the town of Triadelphia from both the board of commissioners and the council of said town. Whether, as to that portion of the road, it was necessary to have authority

from said board of commissioners, it is not necessary to decide, but we are clearly of the opinion that it was necessary to have authority to use it from the council of the town of Triadelphia. The grant from the town of permission to use said Cumberland Road and continuance thereof being conditions precedent to its rights to use it, two questions arise: First. Assuming that there has been no forfeiture of the franchise granted, has the railway company sought the proper remedy for the vindication of its rights? The council of the town, by repealing the ordinance, has declared a forfeiture. What is the effect of that action? What is the character of the function performed in declaring the forfeiture? Is it legislative, executive, or judicial? Second. Does the admitted failure of the railway company to comply with the conditions mentioned operate a forfeiture, independently of the force and effect of the repeal of the ordinance?

No objection to the jurisdiction in equity or the remedy invoked has been raised by counsel. Both sides ask an adjudication upon the merits. But it has been suggested here, in consultation, that the action of the council in repealing the ordinance is judicial and is binding upon the parties until reversed by some appellate procedure, in consequence of which resort cannot be had to a court of equity as to any matter involved in, or governed by, this action of the council. If this be true, the remedy is certiorari, under the statute. Section 2, c. 110, Code 1899. But is it true? This depends upon the nature of the proceeding, as well as the nature and scope of the remedy by certiorari. That writ is an extraordinary common-law remedy, except in so far as it has been altered by statute. Originally, it could be invoked only to review judicial proceedings, and to correct errors of law apparent on admitted and established facts. 4 Enc. Pl. & Pr. 11. "The office of a writ of certiorari is to bring to a superior court for review the record and proceedings of an inferior court, an officer, or a tribunal exercising judicial functions, to the end that the validity of the proceedings may be determined, excesses of jurisdiction restrained, and errors, if any, corrected. It is not essential, however, that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice, but it is sufficient if they are quasi judicial. It is enough if they act judicially in making their decision, whatever may be their public character." 6 Cyc. 750; *Poe v. Machine Works*, 24 W. Va. 517. Our statute (sections 2, 3, c. 110, Code 1899) concerning the remedy by certiorari is broad in its language, and, upon a hasty reading thereof, would seem to import that the writ is applicable to all proceedings before county courts, municipal councils, justices, and other tribunals; but a careful examination of it leads to the conclusion that it does not broaden the scope of

the writ as to the class of cases to which it applies. It says the writ shall lie in every case, matter, or proceeding before a county court, council, a city, town, or village, justice, or other inferior tribunal, in which there has been a judgment or final order, or a judgment or order abridging the freedom of a person. What is the meaning of the words "every case, matter or proceeding"? Are they to be taken literally? Why did the Legislature use these terms? A very good reason is that proceedings reviewable by writ of certiorari are such in their very nature as can be described only by the use of general terms. They are proceedings not according to the course of the common law, but anomalous proceedings, various in number and unusual in kind. Common-law proceedings are embraced under the designations of the forms of action, such as assumpsit, debt, covenant, trespass, trespass on the case, ejectment, and others. For all these, the writ of error is the process for review. In chancery causes the remedy is by appeal. But proceedings which do not fall within these classes of cases are indefinable by nature and must be referred to in general terms. This difficulty was experienced by the Legislature, and the section under consideration bears evidence of it on its face, in the description of the classes of cases to which certiorari was applicable before the passage of that statute. It says: "In every case, matter or proceeding in which certiorari might be issued as the law heretofore has been." Those were cases to which common-law certiorari was applicable, and they are described in the exact language of the new statute. Prior to the passage of chapter 153, pp. 487, 488, §§ 2, 3, Acts 1882, the present statute, we had no similar one on the subject, and the writ had only its common-law force. This statute had other purposes than an increase in the classes to which the writ might apply. Prior to its enactment this mode of review was exercised before final judgment. This, the statute cut off by saying the judgment or order must be final, unless it is one abridging the freedom of a person. It limited the right to review in civil cases before justices to those in which the amount in controversy, exclusive of interest and costs, exceed \$15. Prior to the passage of any statute on the subject, the reviewing court could only consider questions of law, such as want of jurisdiction in the inferior court and deviations from the law in pronouncing judgment upon admitted or established facts disclosed by the record. It would not determine questions of fact nor consider the evidence. This statute provides that, upon the hearing, the circuit court, in addition to determining such questions as might have been determined as the law was before its passage, shall review the judgment, order, or proceeding of the inferior court or tribunal upon the merits, determine all questions arising on the law and evidence,

and render such judgment or make such order upon the whole matter as law and justice may require. No decision of this court has ever construed the statute as giving the right to review by certiorari as to cases, matters, or proceedings nonjudicial in their nature. It goes to a county court in cases of election contests. *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770; *Burke v. Supervisors*, 4 W. Va. 371; *Dryden v. Swinburn*, 15 W. Va. 234; *State ex rel. v. McAllister*, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343. But these are all adversary proceedings involving the exercise of judicial functions. They involve the rights of parties in respect to matters distinct from the exercise of legislative or police power. In *Brazie v. Commissioners*, 25 W. Va. 213, the duties of election canvassing boards are declared to be quasi judicial. Tested by that decision, the use of certiorari to review such proceedings is within the limits of judicial powers. In *Board of Education v. Hopkins*, 19 W. Va. 84, this writ was given to review the action of a county court upon a sheriff's settlement respecting an allowance of commissions to him. It was a matter of controversy between the sheriff and a board of education of the county, and the county court had jurisdiction to the extent of power to adjudge a settlement *prima facie* correct, but not conclusive. This also, as to the sheriff, was a matter of private right, the determination whereof required the exercise of judicial power. The judgment of the county court, for the time being, gave or withheld commissions claimed by him. It also made evidence for or against him, to be used in any other proceeding for the final and ultimate determination of his rights. The line of discrimination between judicial and nonjudicial functions is sometimes difficult to trace; but it is not difficult to see that the matters above mentioned stand upon a very different footing from many others, in which a municipal board or other tribunal, in the exercise of its legislative or police power, deals with the rights of the citizen who has no official connection with that body, such as a claim to office or a right to commissions. There is no suggestion by the court in any of these cases that the action reviewed is not judicial or that the writ lies to review nonjudicial actions. *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906, presents a different and anomalous illustration of the writ, holding it to be appropriate to review the action of a town council in declaring a certain thing a nuisance and abating it as such; but the court was careful there to say the act was judicial. Whether this was a correct determination does not affect the question now under consideration. Consistently with the view here advanced, the court treated the act as a judicial one and proceeded accordingly.

Whether the council of a municipal corporation acts judicially in ascertaining

whether there is cause of forfeiture of a right in a street granted by it to a railway company is a more difficult question. As above stated, the distinction between legislative or ministerial functions and judicial functions is difficult to point out. What is a judicial function does not depend solely upon the mental operation by which it is performed or the importance of the act. In solving this question, due regard must be had to the organic law of the state and the division of powers of government. In the discharge of executive and legislative duties, the exercise of discretion and judgment of the highest order is necessary, and matters of the greatest weight and importance are dealt with. It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment. It must be the exercise of discretion and judgment within that subdivision of the sovereign power which belongs to the judiciary, or, at least, which does not belong to the legislative or executive department. If the matter, in respect to which it is exercised, belongs to either of the two last-named departments of government, it is not judicial. As to what is judicial and what is not seems to be better indicated by the nature of a thing, than its definition. It is necessary to the proper and effective exercise of the police power of a state or community that it be free from restraint by the judiciary. It is at variance with the very nature of such power that the officers and tribunals intrusted with its exercise must stop at every step and take those proceedings which are requisite to the due exercise of judicial power. The health of the people, the good order of the community, and the due exercise of the power demand that the officers and tribunals intrusted with its exercise be free from such restraint. It may remove, destroy, and abate, without waiting for any judicial determination, and leave the party to his right of appeal to the courts, by an action for damages, for a determination of the question as to whether the thing abated was a nuisance, or protected by a contract, unless the abatement will result in irreparable injury and thereby give equity jurisdiction by injunction. In the case of a contested election, or the settlement of the accounts of an officer and allowance of his commission, no such public necessity exists. Pending these controversies, the public service goes on unaffected by them and unimpeded. Not so in the case of obstructions to streets and highways and the existence of offensive, unwholesome, and dangerous things constituting nuisances. The public service cannot wait upon tedious long drawn out judicial investigations.

It would be difficult to enumerate all of the subjects belonging to the police power of a state or municipality, but that it does include the abatement of nuisances, the opening, construction, and repair of roads and

bridges, and the lighting of streets is beyond question. 22 Am. & Eng. Enc. Law, 927, 29, 30. That the establishment, control, and regulation of roads, bridges, and streets belong to the police power of the state is nowhere asserted more emphatically and plainly than by this court. In *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747, it decided that private citizens, having no special property or interest to be affected, could not by certiorari review the trial or action of the county court in proceeding to alter the location of and rebuild a county bridge. Up until that time, these citizens had not made themselves parties to the proceeding. Afterwards, they did attempt to make themselves parties, and to appeal from the action of the county court, and this court prohibited the circuit court from entertaining the appeal by its writ of prohibition, for want of jurisdiction. *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. 488. Judge Brannon, in delivering the opinion, said: "We think it essential to the public interests, as involved in the execution by county courts of the important functions assigned them by law touching roads and bridges, that we should decide, as we now do, that citizens and taxpayers, merely because they are such, who have no special property or interests affected thereby, cannot become parties to proceedings by county courts for the establishment, location, or alteration or construction of county roads and bridges, and cannot appeal from the action of the county court therein. Under any other rule, it would be impossible to say when litigation would occur, when it would end, what would be the public cost, or what would be the delay and obstruction in these matters so essential to the public welfare." The Supreme Court of Virginia announced the same doctrine in *Supervisors v. Gorrell*, 20 Grat. 484. Of course, the citizen may object to the taking of his property for public uses without compensation, and interfere. But how does he interfere? Not by making himself a party to the unauthorized proceeding. He is not bound to subject himself and his rights to the assumed jurisdiction of a county court or a municipal council and review its action by certiorari in order to obtain relief. He appeals to a judicial tribunal having the power to settle and determine questions affecting his rights. He is entitled to have such important matters determined in the first instance, as well as finally by a court, by a judge or judge and jury, upon regular proceedings, according to the course of the common law, and not in an irregular, haphazard proceeding by mere agents of the state, unlearned in the law, and charged with mere ministerial or legislative powers. Although the citizen may have a special interest in the sense of being damaged by the exercise of the sovereign power to establish roads, if his property is not actually taken, but only injured, he still has no power to interfere, and must resort

to his action at law for damages. *Spencer v. Railroad Co.*, 23 W. Va. 406; *Arbendz v. Railroad*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; *Watson v. Railroad Co.*, 49 W. Va. 528, 39 S. E. 198. A work of internal improvement authorized by law, whether carried on by a private or a municipal corporation, is an exercise of police power delegated by the Legislature, and is not subject to judicial control and is not itself judicial action. Corporations exercising such power are, so long as they confine themselves within the authority conferred, beyond any restraint at the hands of the judiciary. If, in the exercise of such power, they transcend the authority conferred upon them by the Legislature, they are, in some form of action, amenable to the power of the courts, at the instance of any individual injured thereby, and their decision or mere declaration that they have power, when they have not, affords them no protection.

The granting of a license, privilege, or franchise to a street railway in the streets of a city, town, or village is so manifestly an act affecting the street itself, the care and custody of which is, by law, intrusted to the council, by way of exercising part of the police power of the state, as to preclude the idea that such grant can be anything other than an exercise of such power. This is not disputed. Nor can it be denied that the repeal of the ordinance granting such privilege, or a declaration of forfeiture in any other form, is a function of the same kind. But it is suggested that inquiry and determination as to the cause or ground of forfeiture is judicial. If so, it is only incidentally performed in the exercise of police power. It is not the thing done, the function performed, but a mere incident thereof. It is not the whole, including the exercise of police power as one of its parts, but is itself a mere part, governed, overshadowed, controlled, and limited by something larger — a matter or function in government which, for reasons of public policy, is not required to wait on the slow process of judicial determination of private rights which are incidentally and occasionally affected, but not extinguished by it, and, if injured, may be vindicated by proper remedies in the courts, in which the necessary judicial power for that purpose is lodged. It is an inclusive, subsidiary, or incidental power, which in the nature of things can be no broader than the thing to which it is incidental. Like the stream which can rise no higher than its source, or the blood which cannot circulate beyond the body to which it belongs, this function, be it quasi judicial or not, cannot operate or be effective beyond the limits of the act or proceeding in which it is performed. It does not determine the character of the proceeding in which it is performed, or alter or enlarge its nature. That is determined by the division of govern-

mental powers, effected by the organic law of the state. The very nature of the police power and the necessity for its free and prompt exercise forbid any such restriction upon it as judicial supervision and control. To make it effective, those charged with its enforcement must be as free from restraint, as long as they confine themselves within their authority, as individuals are. Must there be citation and hearing before the city authorities may tear down a building as a means of stopping a disastrous conflagration? If a man erect a house or barn in the center of the principal street of a populous city, is he entitled to demand notice and a full judicial hearing before it can be removed? If, instead of so proceeding, the authorities abate it immediately, are they trespassers simply for lack of such judicial proceeding, to be punished with costs and nominal damages in a case in which they have violated no right, and done no wrong, other than that of failing to obtain an adjudication of the right to do what they have done? Are municipal corporations to be mulcted in costs attendant upon judgments for nominal damages for mere technical invasions of the rights of the citizen, as well as delayed in the exercise of the important powers conferred upon them for the promotion of the health and comfort of the people, the maintenance of order, and the prosperity and general welfare of the community? If we say the function is judicial in the full sense of the term, all these questions must be answered affirmatively, and such results attained as would paralyze the police power of the state. It is not a question of due protection of the rights of the citizen. It is not enough to say he may, by his writ of certiorari, accompanied by bond, supersede the action taken against him, pending the determination of the rightfulness of his claim. That covers but one side of the question. What about the public? Is it duly protected and vindicated, or is it hampered, clogged, and paralyzed? If we say the function is judicial, we allow the citizen, in obtaining vindication of his rights, to stop the machinery of government. If we say it is not judicial, he still has his remedy in the courts for any injury done him, as in the case of injury done him by a private individual, and the machinery of government goes on performing its functions, while he prosecutes his rights in the courts. He is no more entitled to stop, impede, or delay the operations of government, except to prevent irreparable injury, than to stop an individual. Are not the interests of the general public as great and as justly entitled to protection and freedom as those of his fellow man? The only exception to this is the case of irreparable injury, which may be prevented by injunction, as in cases of irreparable injury at the hands of individuals. If we say it is not judicial, there is no adjudication

against the citizen. He still has his remedy. There is therefore no want of process. The Legislature of the state, in declaring a forfeiture, performs exactly the same function that the council performed in this case. It necessarily ascertains the existence of cause of forfeiture. An individual, in declaring the forfeiture of a contract right, does the same thing. But no court has ever regarded such declaration in either case as an adjudication. Nor do they so regard such declarations made by municipal councils.

This court, in *Railroad Co. v. Town of Alston*, 54 W. Va. 597, 46 S. E. 612, said: "If the council improperly annulled its orders or ordinances assenting to the plaintiff's occupancy of its streets, the plaintiff could treat such annulment as void, or it could have the same reviewed and reversed by proper judicial method of review." In *Street Railway Co. v. Asheville*, 109 N. C. 688, 14 S. E. 316, the court held as follows: "Where a city, by authority of its charter, granted a street railway company the right to construct a branch road over a certain street, it cannot, by a subsequent ordinance, arbitrarily annul its license; and when, under such latter ordinance, it attempts by force to prevent the completion of the road then in process of construction, injunction will issue restraining the city from such interference." In *Railway Co. v. Easton*, 133 Pa. 505, 19 Atl. 486, 19 Am. St. Rep. 658, this declaration of principles was announced: "A railway track, laid upon a city street in good faith, under a corporate charter granted for the purpose, but not endangering the health or safety of the inhabitants, cannot be classed among the nuisances which the city authorities may abate summarily without resort to the processes of the law, even though, by reason of the manner of its construction, it may obstruct the street to such a degree as to amount to a nuisance. When the authorities of a city have declared such a track to be in violation of a municipal ordinance and a public nuisance, and have summarily undertaken to remove it by force, and the railway company prays for an injunction against such removal, the city not applying, by cross-bill or otherwise, for a legal adjustment of the differences between the company and itself, the injunction will be granted without regard to the merits of the controversy." In *Bond v. Newark*, 19 N. J. Eq. 376, 384, the court said, speaking of municipal corporations: "All legislative acts or exercise of discretionary powers, within their authority, are beyond the control of the courts, however unwise or impolitic, or even when done from corrupt motives, or unworthy purposes. * * * But when the corporations have fulfilled their legislative functions, and have exercised their legislative discretion, and are about to fulfill a contract by paying for its performance with the money of the lot owners, they are not acting in a legislative capacity, but as agents." In *Railroad Co. v.*

Cape May, 35 N. J. Eq. 419, Van Fleet, V. C., after quoting part of the above language, said, when the corporation "are about carrying their legislation into execution, then, if the effect of their act is to violate vested rights or inflict irreparable wrong, the courts may properly intervene." That case decides that injunction does not lie to prevent the repeal of an ordinance, but does lie to prevent the tearing up of a railroad pursuant to such repeal, and thereby, in effect, denies judicial effect to the action of the council. In Railroad Co. v. Paterson, 24 N. J. Eq. 158, 168, the court said: "The ordinance complained of is manifestly intended as a means to an unlawful end, as a basis of operations for removing the track in Colt street. There is no good reason for the course of procedure on which the city have entered in this matter. They cannot be permitted, under such circumstances, to pursue it."

In Sinking Fund Cases, 99 U. S. 700, 25 L. Ed. 496, Chief Justice Waite, in speaking of the reserved power to amend or repeal the charter of the Union Pacific Railroad Company, said: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made." In People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684, Ruger, C. J., said: "It is also to be observed that in none of the provisions for repeal in this state is there anything contained which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the necessary consequences of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irreparable, or to undo what has been lawfully done under power lawfully conferred." The same judge, in speaking of the grant by the city of New York to the Broadway Surface Railway Company of the right to use the streets, said: "Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they are grants in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for the purpose of a street railroad." Both on reason and authority, a charter, lawfully granted and duly accepted and acted upon, has all the elements of a contract and is binding upon all the parties to it, and enforceable, if not always in the same manner yet to the same extent, as an ordinary agreement between natural persons."

Booth on Street Railways, § 8. In Street Railway Co. v. Circuit Judge, 118 Mich. 694, 71 N. W. 1073, the court held it competent for a city council to declare a forfeiture upon a conceded and undisputed breach of a condition. Plainly this means that the forfeiture is effective only in such case, just as such a declaration by an individual is effective when he has the right to make it, and therefore has none of the efficacy of a judicial determination.

The decision of Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906, may seem to be inconsistent with this position, but it does not clearly propound a different doctrine. Whether it was intended there to give to the resolution of a municipal council the dignity and force and effect of a judicial decision, binding upon the citizen and denying to him any remedy except by way of appeal from it, is not at all clear. In the paragraph of the opinion which seems to countenance this view, it is admitted that the proceeding for abatement of a nuisance is an exercise of delegated police power, and no authority is cited for the position that a judicial function is involved. The question of its conclusiveness is propounded and not answered except by the holding that there is a right of review by certiorari, and possibly of action for damages. If, after such abatement, a right of action exists, it is plain there has been no adjudication of the fact of nuisance. There cannot be two adjudications of the same right. One precludes the possibility of another, if pleaded. The trouble with the decision in the Town of Davis v. Davis is its failure to distinguish between the function of abating a nuisance and that of determining what is a nuisance. Abatement is the exercise of police power. That power the Legislature has conferred upon the councils of cities, towns, and villages, but does not confer upon them the general judicial power necessary to determine what is a nuisance. They may determine it in a qualified manner, just as an individual, in the exercise of his common-law right of abatement, may determine for himself what is a nuisance. His determination of that question is binding upon nobody. In like manner, the determination of the same question by a municipal council is a determination for the sole purpose of coming to a decision as to whether it will exercise its power of abatement. After having done that, as in the case of an individual, it acts at its peril. If, assuming that to be a nuisance which is not, it destroys it, the preliminary declaration affords it no protection and is not binding upon the citizen. When a court of competent jurisdiction determines that a thing is a nuisance, its decision, until reversed, is final and conclusive. Whether the thing be in fact a nuisance or not, it becomes in law a nuisance by force of the decision. The courts everywhere say no such power is vested in a municipal corpora

tion or in the Legislature of the state itself.

In *Hutton v. City of Camden*, 39 N. J. Law, 122, 23 Am. Rep. 208, the court said: "The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the hands of the individual, is a common-law right, and is derived in every instance of its exercise, from the same source—that of necessity. It is akin to the right of destroying property for the public safety in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind."

Dillon on Municipal Corporations (4th Ed.) at section 374, says: "This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such." In *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, Mr. Justice Miller said: "But the mere declaration by the city council that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the state within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities."

All this argues lack of judicial power in such tribunals. It is because of want of such power and authority that their resolutions, declarations, or determinations, respecting personal and property rights, are ignored by the courts. Being nonjudicial, the authority must be ministerial, legislative, or executive. It may be that the court, in *Town of Davis v. Davis*, entertained the view that, in the exercise of police power, there is a right of review by certiorari, although the proceeding is not an adjudication, precluding a resort to the courts for damages. Whether, so viewed, the decision is sound, there is no occasion to say; and, but for the close analogy between that case and this, it would be unnecessary to re-ex-

amine it. It is not a case exactly in point, but many of the general principles involved in it are, to say the least, very similar to those governing this case. Being firmly of the opinion that the council of a municipal corporation is not clothed with the requisite judicial power to finally determine questions of property rights, in such cases as this, we cannot recognize it as authority binding upon us in this class of cases, and we leave its exact status and effect in nuisance cases to be determined whenever the necessity therefor shall arise. Nor are we to be understood as saying or intimating that the Legislature cannot confer, or has not conferred, limited judicial power upon municipal corporations for the punishment of offenses and violation of ordinances.

Having reached the conclusion that jurisdiction in equity is not precluded by the action of the council, the next question is whether there has been such nonperformance of covenants as give power to forfeit by proper proceedings. Authorities already cited, to which many more might be added, show that, by acceptance, the ordinance became a contract. Can it have effect otherwise than according to its terms? To say that it can would be to deny to parties the power to determine their respective rights by contract, or, to say, after a contract has been made, its terms may be disregarded. Courts cannot do that, the power to do which is denied to the Legislature by both the state and federal Constitutions, namely, deny, relieve from, or refuse to enforce, the obligations of contracts. Noncompliance with the terms and conditions of the ordinance is frankly admitted, and the prayer for relief stands upon the allegation of substantial compliance. This argument is addressed to the court, concerning, not implied conditions, which the law reads into a contract in order to work out equity and justice between the parties as to matters not provided for by express stipulation, or express conditions, violation of which is not, by express stipulation, made cause of forfeiture, but conditions and covenants plainly written in the contract and the penalty for violation of which is expressly made a cause of forfeiture. Courts of equity have large powers for the vindication of equitable rights, and, under peculiar circumstances, for the amelioration of the rigidity of the law, but they cannot, any more than courts of law, ignore or violate contract rights fairly and properly acquired. There is here no suggestion of fraud or mistake in the procurement of the contract. It was deliberately and fairly entered into. Substantial compliance with the terms of an express contract never excuses the party in fault or supports a prayer for equitable relief against its obligation. The party not in default may hold the other to the performance of so much as he is able to do. He has a right of election to take that,

rescind the contract, or, standing upon it, sue for damages for the breach. But no instance is recalled in which one party to a contract has been permitted to compel the other to accept less than full performance.

The authorities relied upon to sustain the position that substantial compliance with conditions, the violation of which is expressly made ground of forfeiture, do not support that view. They are all cases in which the ordinances did not say failure to comply with certain specific conditions, the conditions there in question, should result in forfeiture of the privilege granted. There was no such stipulation in the act construed by the Court of Appeals of New York in *People v. Broadway, etc., Co.*, 26 N. E. 961. The propositions asserted in *Booth, St. Rys.* § 45, are inapplicable for the same reason. At section 46 of the same work it is said: "But if the statute provides that upon such failure the franchise shall be terminated or shall cease, the default will put an end to the franchise without judicial proceedings, and the Legislature may confer the franchise upon any other company or person." And this is fully sustained by the following decisions cited in support of it. In re *Brooklyn, etc., Ry. Co.*, 72 N. Y. 245; In re *Brooklyn, etc., Ry. Co.*, 75 N. Y. 335; *Brooklyn, etc., Ry. Co. v. City of Brooklyn*, 78 N. Y. 524; *Oakland R. R. Co. v. Oakland, etc., R. R. Co.*, 45 Cal. 365, 13 Am. Rep. 181. Continuing, the author says, in the same section: "The same rule applies to a grant made by ordinance. Accordingly, if the company fails to build within the time fixed by the local authorities, the privilege no longer exists. Such consent is a mere license, and until the grantee avails itself of the privilege, no obligation or relation arises which requires a judicial declaration of forfeiture. After the time expires, a renewal of the privilege is necessary to entitle the company to occupy the streets and build its road." This is sustained by *Ft. Worth Ry. Co. v. Rosedale Ry. Co.*, 68 Tex. 169, 4 S. W. 534, and *Grand Rapids St. Railways*, 48 Mich. 433, 12 N. W. 643. For similar applications of the same principle, see *Ward v. Sea Ins. Co.*, 7 Paige (N. Y.) 294; *Matter of Jackson, etc., Ins. Co.*, 4 Sandf. Ch. 559. "Slight deviations from the provisions of a charter would not necessarily be either an abuse or a misuser of it, and would therefore be no ground for its annulment, although it would be competent for the crown, by apt words, to make the continuance of the charter conditional upon the strict and literal performance of them." *Eastern, etc., Co. v. Regina*, 2 El. & B. 856, 870. As to railway franchises and privileges, see, also, *Railway Co. v. Railway Co.*, 45 Cal. 373, 13 Am. Rep. 181; *Myrick v. Brawley*, 33 Minn. 377, 23 N. W. 549. In the absence of the stipulation for forfeiture as to the conditions not complied with here, it could be held, consistently with all authority,

that there has been a substantial compliance with the contract as a whole, and, therefore, no cause of forfeiture. But it is competent for the parties to make any condition a material and essential part of the contract. As these parties have done so, how can the court deny to one of them the benefit of the contract, or relieve the other from its obligation? A distinction between conditions precedent and conditions subsequent is made by the courts. The condition in this case belongs to the latter class, but the distinction does not seem to relieve the company. In the former class, no declaration or adjudication of forfeiture is necessary, but in the latter it is, since noncompliance may be waived. *Hovelman v. Railroad Co.*, 79 Mo. 682; *Chicago v. Railway Co.*, 105 Ill. 73, 78.

Having thus determined that there was, on the face of the contract, cause for forfeiture, it remains to be determined whether such steps were taken by the council as to work, in law, a forfeiture; and, if so, whether the circumstances under which it has been done, and the conduct of the municipal authorities in accomplishing it, have been such as to call upon a court of equity to ignore it or to relieve against it. In dealing with this situation the court must keep its eye upon both sides of this contract and both parties to it. It is not a one-sided affair. It places duties upon both. Under the strict letter of the contract mere failure to comply with conditions works no forfeiture. However great the cause of forfeiture, it does not occur until it has been legally and properly declared by the corporation. The mode of effecting it is prescribed by the ordinance. It requires three months' notice of intent to declare it, accompanied by specification of the cause. The ordinance was passed in 1896. Within a short time after that, the road was built and was then operated until August, 1901, without any steps having been taken by the town, in the manner prescribed by the ordinance, to require compliance with these conditions. For four or five years the town acquiesced in absolute noncompliance on the part of the railway company. There is no proof or evidence showing that any notice was ever served upon the company specifying these instances of noncompliance. There is some evidence tending to show that officers of the town had been directed to serve notice on the company, and that one member of the council did verbally make a demand upon, or request of, the president; but it does not appear that any such notice as is prescribed by the ordinance was ever given. But if such notice had been given, and not followed by any further action, it would simply tend to prove acquiescence and waiver. In August, 1901, after four or five years of acquiescence, the council took steps to forfeit by service of notice. Then before the expiration of the time allowed there was a partial compliance with the requirements of the notice—a substantial compliance with

its requirements. In view of the long acquiescence of the authorities of the town, the railway company may well have supposed, and no doubt did suppose, that no action to forfeit the franchise would be taken under these circumstances. If the testimony of the manager is entitled to credit, and there seems to be no reason for believing otherwise, the failure to comply fully was due, in part, to disappointment in obtaining the lumber from the place, and within the time, contemplated by the company. He says the order was given to mills in the country, but, as time went on and it did not arrive, they were compelled hastily to obtain it from somebody in the city. They gave the order for first class lumber, and under that order lumber was furnished and put down by the company's employes. It did not prove to be of the requisite dimensions and some portions of it were unsound and it had the appearance of being old, but it had never been used. This repealing ordinance was passed immediately after the timber was put down and possibly before it was all down, and without any intimation of dissatisfaction with the work. Immediately afterwards, the manager of the railway company applied to members of the council for information as to their objection to the work and offered to remedy the defects, but was informed that the ordinance had been repealed and all rights of the company forfeited.

While the town has the right to require full and complete performance of all covenants on the part of the railway company, and is not bound to accept a mere substantial performance, its authorities, in proceeding to take away the rights of the company, pursuant to the terms of the ordinance, must deal frankly and fairly with it. They must act in good faith and not endeavor to pervert this forfeiture clause to a purpose for which it was never intended. Neither party ever supposed it would be used for any purpose except to compel performance of the covenant entered into by the railway company. The public interests required the construction and operation of the railway. That was the inducement or consideration moving the town to the passage of the ordinance. It was also of interest to the public that the streets be kept in good condition. Hence, the provisions in reference to them, and the right of forfeiture to enforce performance thereof. That clause was never inserted for the purpose of ousting the railway company from the occupancy of the streets merely to get rid of it or to compel it to seek a new franchise with conditions more favorable to the town, nor at all, unless it refused to perform its covenants. Nothing in the answer of the defendant suggests a desire to get rid of the railway. On the contrary, it evinces a desire to keep it, but to impose conditions more favorable to the town than those contained in the present ordinance. On the whole, the evidence evinces a purpose,

not merely to enforce compliance with the conditions of the ordinance under which the railway company had been operated, but to force that company to apply for a new franchise with new conditions, a purpose wholly foreign to the forfeiture clause. This motive apparent on the face of the answer and in the evidence, taken in connection with the circumstances and conduct hereinbefore adverted to, tends to prove that the declaration of forfeiture was not made in the utmost good faith, that the failure on the part of the railway company to comply with conditions was not willful, in the sense of obstinacy, but, at the worst, negligent, and that the previous acquiescence and delay on the part of the town, followed by the sudden and speedy repeal of the ordinance operated as a surprise upon it. By this, actual fraud is not imputed to the authorities of the town. Nor is it intended to impute any dishonest motive or purpose to them. It is an error of judgment, a misconception of legal rights and duties, working inequitable results. The answer shows a frank avowal of sincere belief on their part in their right to use this power of forfeiture to coerce a more liberal proposition from the railroad company, and shows an utter lack of appreciation of the force and effect in equity of their long acquiescence in nonperformance and the suddenness of the blow they have attempted to deliver by repealing the ordinance. Not being chancellors, conversant with the principles of equity, they could, as many others have done, easily fall into errors of grave character without being guilty of the least dishonesty or fraud in the ordinary sense of the terms, and it is perfectly apparent that they have done so. Such circumstances warrant intervention by a court of equity to relieve from forfeiture, when no pecuniary or substantial injury has resulted and full performance of the covenant can, and will, be effected. Willingness and desire to comply strictly with all its covenants is plainly expressed by the railway company in its bill, and was verbally communicated to the town authorities immediately after the forfeiture was declared, when the ink on the repealing ordinance was hardly dry. As to the ability of the company to make full compliance, there is no question. Under these circumstances, is it equitable and just to the company, or promotive of the public interests, to destroy this railway? It represents an investment of thousands of dollars and affords means of convenient and rapid travel and transportation for the people of the town and the general public. Why so great a punishment for such slight cause? It is unprecedented so far as the authorities examined disclose. If the injury could not be remedied, or the railway company stood defiant, refusing to perform, the case would wear a different aspect, but it does not. It is willing to perform to the letter—to pay to the last farthing.

In *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151, this court applied the principle of relief against forfeiture, and declared as follows in respect to forfeiture of an oil lease: "In case of such a lease, if the lessor by his conduct clearly indicates that payment will not be demanded when due, and thus lulls the lessee into a feeling of security and throws him off his guard, and because of this he does not make payments when due, the landlord cannot suddenly without demand or notice declare a forfeiture, and there is no forfeiture which equity would recognize, and, if there is in such case technically a forfeiture at law, equity would relieve against it." It may be objected that because the covenant violated here is not a pecuniary one, jurisdiction in equity to relieve it does not exist. It is said that in the English courts equity will only relieve in such cases. But this is not strictly accurate. Where the covenant is pecuniary, and there is default and consequent forfeiture, equity will relieve independently of the circumstances of fraud, accident, mistake, and surprise. But, where fraud, mistake, accident, or surprise enters into the matter, or the forfeiture has resulted from only negligent conduct on the part of the covenantee, equity will interfere, although the covenant be for the performance of some collateral matter and not for the payment of money. Story, Eq. Jur. § 1323. In section 1324 of said work it is said that in America the narrow doctrine of the English courts and the restricted application of jurisdiction to relieve from forfeitures would be received with hesitation, and, substantially, that the jurisdiction is broader in this country. In cases of forfeiture for nonperformance of pecuniary covenants, relief in equity goes as a matter of course, where compensation may be made, but in other cases, unless the delinquency is willful, the court has discretionary power to relieve. "A court of equity has power to relieve a party against forfeiture or penalty incurred by the breach of a condition subsequent, when no willful neglect on his part is shown, upon the principle that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice and oppression." *Noyes v. Anderson*, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657. The forfeiture in this case was for failure to pay an assessment for a sewer. "When a mortgagor, without his fault or neglect, is prevented by accident from paying an installment on the day named in a decree of foreclosure, on a bill brought to redeem, equity will grant relief; and he will be reinstated, but on terms that he satisfy the equitable rights of the other party." *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742. "Equity will relieve against a forfeiture incurred by the breach of a covenant to insure in a lease of real estate, caused by accident or mistake, if no actual damage has been sustained by

the lessor." *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323. "A court of equity may grant relief from the forfeiture of an estate conditioned for the maintenance and support of the grantee, where the forfeiture was accidental and unintentional, and not attended with irreparable injury. But it rests in the sound discretion of the court when relief shall be granted in this class of cases." *Henry v. Tupper*, 29 Vt. 358. This is a leading case, and the opinion was written by Chief Justice Redfield, who, in the course of his opinion, said: "That relief might be granted in equity, even where the condition was for the performance of collateral acts seems to be admitted in most of the cases upon this subject. *Webber v. Smith*, 2 Vernon, 103; *Hack v. Leonard*, 9 Mod. 90; *Cox v. Higford*, 2 Vernon, 664; *Saunders v. Pope*, 12 Vesey, 282. These are cases of nonrepair of premises leased; and the chancellor, Lord Erskine, says in the last case: 'I cannot agree it is necessary the nonperformance of the covenant should have arisen from mere accident or ignorance.' The cases are abundant where relief has been granted against forfeiture of title by nonperformance of other collateral acts, as for not renewing a lease (*Rowstone v. Bentley*, 4 Br. C. C. 415), or for cutting down timber when covenanted against, on pain of forfeiture (*Northcote v. Duke*, Ambler, 511; *Thomas v. Porter*, 1 Oh. Cas. 95). But it has been held relief will not be granted where the forfeiture arises from an act incapable of compensation, although of no essential damage to the other party, as the breach of a condition not to assign. *Wafes v. Mocato*, 9 Mod. 112. The same rule obtains where the forfeiture arises from an omission to insure. *Rolfe v. Harris*, 2 Price, 206. * * * It seems, however, to be pretty well established in England that relief for nonrepair of premises will not be granted as matter of course, and especially when there was a willful default (*Bracebridge v. Buckley*, 2 Price, 200; *Hill v. Barclay*, 16 Vesey, 403 and 18 Vesey, 56); but where the failure is from 'accident, fraud, surprise, or ignorance not willful,' relief will be granted (2 Lead. O. in Equity, 464, 465; *Baton v. Lyon*, 3 Vesey, 698)—the result of all which seems to be that there is no well-settled rule upon the subject, or none which is not liable to considerable variation, and to be affected by the circumstances of the particular case. * * * But we must all feel that cases of the character before the court should be received with something more of distrust, and relief afforded with more reserve and circumspection, than in ordinary cases of collateral duties. And although we are not prepared to say that it must appear that, in all cases, the failure arises from surprise, accident, or mistake, we certainly should not grant relief when the omission was willful and wanton, or attended with suffering or serious inconvenience to the

grantee, or there was any good ground to apprehend a recurrence of the failure to perform, as was held in *Dunklee v. Adams*, 20 Vt. 421, 50 Am. Dec. 44."

It may be objected here that this position is in violation of the rule that equity will not relieve against a statutory forfeiture. *Pom. Eq. Jur.* 458; *Railway Co. v. Fitler*, 60 Pa. 124, 100 Am. Dec. 546. But this ordinance partakes of the nature of a contract. It is generally held, in such cases, that the relation of the parties is contractual. The power of municipal corporations to contract cannot be denied. This ordinance is not a statute. By its very terms it establishes a relation of contract. It does not provide for forfeiture without action on the part of the council. Unlike a statute granting a privilege or franchise and declaring forfeiture as the penalty of noncompliance with conditions, it provides for notice and active steps on the part of the council to bring about forfeiture. It was agreed that, in order to effect a forfeiture, the town authorities should adopt just such methods as one individual resorts to, to bring about the forfeiture of the rights of another individual under a contract existing between them. Municipal authorities are agents as well as legislators, and are, in great measure, subject to the legal principles governing transactions between private persons. Many cases hold that municipal corporations are precluded by their conduct from enforcing forfeitures. "A court of equity will not enforce a forfeiture of the rights and privileges of the grantees in a contract for their failure to complete their performance of it in time, where the party seeking the forfeiture was guilty of the first breach of the agreement." *Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333. In that case, the party seeking forfeiture was a municipal corporation. "Where a street railway company has expended large sums of money and exercised due diligence in building and operating its road, so as to comply with an ordinance of permission, but unforeseen circumstances have caused a delay, which has occasioned no pecuniary injury to the township or its inhabitants, equity will interfere to restrain the adoption of an ordinance by the township declaring a forfeiture of the franchise of the corporation because it did not comply with the statute of permission, which provided that cars should be running at a certain headway, on a continuous line of double track, within a specified time." *Railway Co. v. South Orange*, 58 N. J. Eq. 83, 43 Atl. 53. In *Chicago v. Railroad Co.*, 105 Ill. 73, the court enjoined the city from interfering with the laying of the track of a railway company after the expiration of the time limited by the ordinance, because the company had been prevented by injunctions, and by the police officers of the city, acting under the direction of the mayor,

from prosecuting its work, in consequence of which the limit expired before it was completed. In this respect municipal corporations seem to stand upon the same footing as individuals. They are subject to the law of estoppel by acts in pais. "But of late years, much more than formerly, the doctrine of estoppel, most wholesome and just in its operation when properly applied, has been extended to these municipal corporations, so as to bind and conclude them by their own acts and acquiescence, and the acts and acquiescence of their officers, whenever an estoppel would exist in the case of natural persons." *Kneeland v. Gilman*, 24 Wis. 39. See, also, *Martel v. East St. Louis*, 94 Ill. 67; *Railroad Co. v. Joliet*, 79 Ill. 25; *Wilson v. Wheeling*, 19 W. Va. 323, Syl. point 12, 42 Am. Rep. 780. This is subject to the limitation that the subject-matter must not be ultra vires—must be within their authority. Here the town had undoubted right and power to waive nonperformance of covenants, or extend time.

As above indicated, however, there must be full performance of the covenant as a condition of relief. The relief is against the forfeiture, on the ground of inequitable conduct, working surprise, not against the contract or from its obligation. We do not take away either the right to have the delinquency made good or the power to forfeit for future delinquencies. The covenants for the non-performance of which forfeiture has been declared must be performed, and that fully and promptly. In the event of refusal to perform, another question would arise, namely, whether the bill should be dismissed or retained and affirmative relief granted the defendant by way of enforcement of the forfeiture. As we cannot say such contingency will not arise, though there is hardly any probability of it, we must now give direction as to the course to be pursued in that event, else the principles of the cause will not be fully settled, and another appeal might result, involving a question already presented on this appeal. Cross-relief has been given by the decree. Never to declare or enforce a forfeiture, or divest an estate or title for violation of a condition subsequent, is an invariable rule of equity, if there is a legal remedy. Under such circumstances, a court of equity utterly declines to touch the case and leaves the party to his legal remedies. In the language of a former able judge of this court, now deceased, equity abhors a forfeiture. Our leading case on the subject is *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363. See, also, *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 415, 8 Am. Dec. 598; *Horsberg v. Baker*, 1 Pet. (U. S.) 232, 7 L. Ed. 125; *Marshall v. Vicksburg*, 15 Wall. 146, 21 L. Ed. 121. This is different from an appeal to equity for aid in the abatement of a nuisance. In such case there is no forfeiture, and no vested

title or right as against the public. The thing proceeded against is wrongful. Here, a title vested by contract, and the effort is to take it away by forfeiture. To do this the town must resort to its legal remedies, if any are available. Besides the right of abatement without judicial proceedings, if it can be done peaceably, there are remedies in the law courts. There is much authority for the position that a municipal corporation has its possessory action for a street against a railway having no right to occupy it. *Dillon, Munic. Cor.* §§ 662, 723. What others it may have it is unnecessary to inquire. To prevent equity jurisdiction for this purpose, it suffices that there is one.

Agreeably to the principles and conclusions above stated, the decree appealed from will be wholly reversed, with costs, and the cause remanded to the circuit court of Ohio county, with directions to perpetuate the injunction, if the covenants in question shall be fully and properly performed by the appellant within a reasonable time to be allowed for the purpose, if they have not already been so performed, but without prejudice to the right and power of the town of Triadelphia to forfeit the privileges of the appellant under the said ordinance for any future failures to comply with the conditions thereof, and to dismiss the bill if the appellant shall refuse to perform said covenants within the time to be allowed therefor, as aforesaid.

BRANNON, P. If equity has jurisdiction, I find no fault with the actual decision of this case. If the decision of the town council is a nullity, injunction lies; but, if it has a legal force, I am not clear that injunction lies. The grant of the franchise vested the council with jurisdiction or power to examine the facts and determine whether the town ordinance had been complied with, or whether the franchise had been forfeited. Is not the repeal, declaring forfeiture, a judicial act? The council was a public body exercising legal function in this matter, and it has been difficult for me to see that its judgment repealing the charter is mere wind, without legal force. If erroneous on the facts, still it has force until reversed. To reverse the writ of certiorari is the process, not injunction, because certiorari is, and injunction is not, a process to correct error. By the Code of 1899, c. 110, § 2, certiorari applies not only as it was by common law, but it is enlarged so as to apply to "every case, matter or proceeding before a county court, council of a city, town or village, justice or other inferior tribunal." I do not therefore consent to the overruling of the case of *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906, Syl., point 7. The common-law principles stated in *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770, and *Poe v. Machine Works*, 24 W. Va. 517, would likely justify certiorari in this case, but if not, that statute would seem to do so. In this

case there was a notice that the ordinance had not been complied with by the company, warning it that, if it did not comply within a given time, its franchise would be repealed; but there was no notice giving time and place of the hearing of the question whether such warning had been heeded and the conditions of the grant complied with. Now, it may be that, as the repeal was ex parte, without hearing the company, the order of repeal is not one between parties, and that for that reason an injunction lies, as the injury is irreparable. If the company had been summoned, or had been heard, I think certiorari, not injunction, would lie. I think that the statute enlarges the scope of the writ, since that is imported by its words, and this court has several times so looked at the statute. *Fouse v. Vandervort*, 30 W. Va. 330, 4 S. E. 298; *Chenoweth v. Commissioners*, 26 W. Va. 233; *Morgan v. Railroad*, 39 W. Va. 17, 19 S. E. 588. In the *Chenoweth Case* Judge Snyder said that the statute gives review by certiorari, "and makes no exception as to whether the matters to be reviewed are judicial or merely ministerial." Judge Dent has said as to this statute: "The Legislature has seen fit to recognize town councils as inferior judicial tribunals in the determination of questions involving the rights of individuals and property, and has made their decision subject to review by the higher judicial tribunals of the state. It has thereby rendered unnecessary the appeal to equity in such cases, unless irreparable injury is threatened, or it is necessary to preserve the property in statu quo until the right thereto can be properly determined." *Clifton v. Town of Weston*, 54 W. Va. 255, 46 S. E. 360. If a town council's order is good in any case until reversed, I do not see how injunction lies. In this case right to property of great value was involved, making the case one adversary in character. My idea is that the statute aimed to give certiorari in every case where rights of parties are involved, in the instances indicated by the statute, where no appeal or writ of error lies to the proceedings before the tribunals referred to in the statute. In cases where writ of error or appeal lies, they are the remedies. The Legislature knew that in cases before inferior tribunals rights of property of great importance are sometimes involved, and I think it designed to make certiorari, in such cases, commensurate for relief with appeal and writ of error.

(38 W. Va. 159)

HEFNER et al. v. FIDLER.

(Supreme Court of Appeals of West Virginia.
Oct. 31, 1905.)

1. DETINUE—WHEN LIES.

The action of detinue will lie to recover a promissory note.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Detinue, § 1.]

2. SAME—ELEMENTS.

In order to ground the action of detinue, these points are necessary: (1) The plaintiff must have property in the thing sought to be recovered; (2) he must have the right to its immediate possession; (3) it must be capable of identification; (4) it is essential that the property be of some value; and (5) the defendant must have had possession at some time prior to the institution of the action.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Detinue, §§ 1-11.]

3. SAME—FRAUD.

One who purchases property, and gives his notes for the purchase price thereof, cannot maintain detinue to recover such notes, upon the discovery of such fraud as would entitle him to a rescission of the contract.

(Syllabus by the Court.)

Error to Circuit Court, Gilmer County.

Action by G. W. Hefner and others against Emmett Fidler. Judgment for plaintiffs, and defendant brings error. Reversed.

Rehearing denied January 9, 1906.

R. F. Kidd and A. L. Holt, for plaintiff in error. R. G. Linn and L. H. Barnett, for defendants in error.

SANDERS, J. This is an action of detinue, instituted before a justice of the peace of Gilmer county, for the recovery of the possession of two certain promissory notes of \$62.50 each. Upon the trial of the case, both before the justice and upon appeal to the circuit court, judgment was rendered in favor of the plaintiffs, and to this judgment a writ of error and supersedeas has been allowed. The defendants sold to the plaintiffs one four-horse power engine and boiler, for the sum of \$125, to be paid in two equal payments of \$62.50 each, for which they executed the said two notes. The plaintiffs claim that shortly after the consummation of the trade, by the execution of the notes and delivery of the engine and boiler, they discovered that the defendant had knowingly made false and fraudulent representations to them in regard to said engine and boiler, for the purpose of misleading and deceiving them, and which did mislead and deceive them, to their prejudice, and for which they claim they are entitled to rescind the contract, and to this end they offered to return the engine and boiler to defendant, and demanded possession of the notes, and defendant claimed that he had assigned the notes away, and could not comply with their offer.

The first question that confronts us is, does the action of detinue lie? In order to ground the action, these points are necessary: (1) The plaintiff must have property in the thing sought to be recovered; (2) he must have the right to its immediate possession; (3) it must be capable of identification; (4) it is essential that the property be of some value; and (5) the defendant

must have had possession at some time before the institution of the action. The authorities universally hold that the action of detinue will lie to recover the possession of a promissory note. Some of these are 1 Barton's Law Pr. 214; 1 Chitty, Pl. (11th Ed.) 121; Cooper v. Watson, 73 Ala. 252; Robb v. Cherry, 98 Tenn. 72, 38 S. W. 412; Lewis v. Hoover, 24 Ky. 500, 19 Am. Dec. 120; Robinson v. Peterson, 40 Ill. App. 132; Carter v. Turner, 37 Tenn. 178. But while this action will lie to recover the possession of a promissory note, yet one, to maintain it, must bring himself within the rule herein stated. As we have seen, the plaintiff must have property in the thing sought to be recovered, and it must be of some value. Then, the pertinent inquiry is, what property have the plaintiffs in the notes sought to be recovered, and what is their value? When recovered by the plaintiffs, they are of no value to them. It could only be the possession by them of evidence of outstanding indebtedness. If the theory of the plaintiffs is correct, that they have the right to rescind, and have rescinded, the contract, the notes are also of no value to the defendant; he having lost the right to recover on them. If, however, he has not lost the right to recover, he would be in the lawful possession of them, and the plaintiffs' action could not, for that reason, be maintained.

The plaintiffs are deprived of nothing of value to them by reason of the detention of the notes. It may be claimed that the defendant may sue upon them. If so, the plaintiffs can make any defense which they may have. If they have the right to rescind the contract, they can set this up as a defense. Then, again, the notes should have an alternative value. A judgment in detinue should be for the specific property of a specified value, so that, if the property cannot be had, its value may be recovered. Certainly a judgment could not be given for the plaintiffs for the face value of these notes, for they have no such value in them. Would they be of that value to the plaintiffs, if recovered? This question must be answered in the negative. Then, if not, how could they have a judgment for the value of a thing which is valueless? In the case of Todd v. Crookshanks, 3 Johns. (N. Y.) 432, the plaintiff brought an action to recover the possession of a note which he had paid, and had taken a receipt showing payment in full, and the court, speaking in this case, says: "There was no foundation for the action below. After the note was paid, a receipt in full given by one of the payees, it was completely discharged, so as to be of no value."

For these reasons, the judgment of the circuit court is reversed, the verdict of the jury set aside, and the action dismissed.

(58 W. Va. 189)

PHILIP CAREY MFG. CO. v. WATSON.(Supreme Court of Appeals of West Virginia.
Oct. 31, 1905.)**1. JUDGMENT—INQUIRY OF DAMAGES—RIGHT TO PLEAD.**

In an action of assumpsit, where an order for inquiry of damages is required, the office judgment entered at rules does not become final on the last day of the next succeeding term of court, not having been previously set aside, so as to bar a defense thereafter; but the defendant may plead to issue at any time before the order for inquiry of damages is executed.

2. ALTERATION OF INSTRUMENTS—EFFECT.

If a written agreement, not under seal, be altered by the party claiming under it in a material part, *heid*, he can never recover upon the agreement so altered, nor can he avail himself of the contract in its original and true form. *Newell v. Mayberry*, 8 Leigh, 250, 23 Am. Dec. 261.

3. SAME—MATERIALITY OF ALTERATION.

The materiality of the alteration is a question of law for the court upon the admissibility of the altered agreement in evidence.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Alteration of Instruments, § 266.]

4. SAME—BURDEN OF PROOF.

Where a material alteration is shown to have been made after the execution of the agreement, the burden is on the party producing and relying upon the agreement to explain the alteration by showing that it was made under circumstances rendering it lawful.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Alteration of Instruments, §§ 242, 245.]

5. SAME—PRESUMPTIONS.

In the absence of such explanation, the alteration will be presumed to have been made by the party producing the agreement, or with his privity, and fraudulently, so far as legal fraud attaches to a willful change of an agreement by a party thereto.

6. SAME—FRAUD.

If such material alteration appears to have been made fraudulently by the party producing and relying on the agreement, or with his privity, such party cannot recover on the original consideration or demand.

(Syllabus by the Court.)

Error to Circuit Court, Harrison County.

Action by the Philip Carey Manufacturing Company against Andrew J. Watson. Judgment for defendant, and plaintiff brings error. Affirmed.

Rehearing denied January 9, 1906.

E. G. Smith, for plaintiff in error. Davis & Davis and E. Bryan Templeman, for defendant in error.

COX, J. In an action of assumpsit by the Philip Carey Manufacturing Company against Andrew J. Watson in the circuit court of Harrison county, there was a trial by jury, and motion by defendant to exclude plaintiff's evidence and to direct a verdict for defendant, which was sustained, and a verdict accordingly and judgment of dismissal thereon; and plaintiff brings error.

The first question raised is: Did the office judgment in this action become final on the last day of the next term of court after it was entered at rules, it not being previously

set aside, and there being no plea to issue at that term? This question involves the consideration of parts of sections 44, 45, 46, and 47 of chapter 125 of the Code of 1899. The declaration is in the usual form, and contains only the common counts. The plaintiff's bill of particulars, accompanied by affidavit, charging the defendant with a balance of \$640.75 on an open account, after allowing certain credits, was filed in court at the next term after office judgment. The action was brought on the 26th day of July to August rules, following. At August rules the clerk made an entry of summons executed, declaration filed, and conditional judgment. At September rules, the clerk made an entry of conditional judgment confirmed and order for inquiry of damages. The September term of court, 1902, followed. The action was twice continued by consent of both parties, once at that term, and once at the January term, following. On February 5, 1903, in term, the defendant tendered his plea of the general issue, accompanied by affidavit, to which plea plaintiff objected as coming too late, but the objection was overruled and the plea filed. In this action the order for inquiry of damages was proper, under sections 44 and 45. This was not an action for debt on bond or other writing for the payment of money, or against the drawer or indorser of a bill of exchange or negotiable note. Nor was it an action of debt or *scire facias* upon judgment or recognizance, but an action on an open account, and was not exempted, by the provisions of section 45, from the necessity of an order for inquiry of damages. As to the finality of office judgment at the next term, this action does not fall under the provisions of section 46, because its provisions apply to cases wherein there is no order for inquiry of damages. We are, then, left to the provisions of section 47 to give finality to this office judgment on the last day of the next term of court, if it is to have such finality. We confess that the language of section 47 appears to be somewhat doubtful, but in construing it we must consider all the provisions of the statute relating to the same subject-matter, in order that we may determine the scope and intent of this section. Does this section, standing alone, provide for the finality of office judgment in any case on the last day of the next term of court? It does not seem to do so. We read it in vain for any positive declaration that an office judgment shall become final in any action at any term of court. The general object of this section seems to be to provide a way of setting aside an office judgment, which otherwise would become final under some other provision of law. If this be true, we look for that other provision, and find it in section 46, which provides for finality in a case where there is no order for an inquiry of damages. The element of doubt as to this

construction is the clause therein, "whether an order for an inquiry of damages has been made therein or not"; but this clause does not purport to make finality. It is found in the provision made to enable the defendant to prevent finality. We think it an unwarranted inference to say that this clause, or any language in section 47, gives finality to an office judgment, if not previously set aside, on the last day of the next term in any action where an order of inquiry of damages is required. The common-law right to plead should not be taken away by such an inference, nor by mere construction. The construction we now give section 47 is the same given to it by this court in the case of *Marstiller v. Ward*, 52 W. Va. 74, 48 S. E. 178, in which Judge Brannon, delivering the opinion of the court, said: "In any action for (not of) debt on any of the writings specified in section 45, and in an action of debt on a judgment, or scire facias on a judgment, there must be an issuable plea at the first term after office judgment. In all other actions, on contract or for tort, the plea may come later. I would say that in an action on a bond with collateral condition there could be a plea at any time before trial, as it would require an inquiry of damages; otherwise in an action on a single bill for money." Under this construction the admission of defendant's plea was not error.

The next question raised by the record is: Did the circuit court err in sustaining the defendant's motion to exclude plaintiff's evidence and direct a verdict for defendant? The consideration of this question makes necessary a further statement of the facts appearing in the record. The balance claimed by plaintiff in its bill of particulars was for a car load of cement roofing, which it claimed to have sold and delivered to defendant. To sustain its case it offered only one witness, its agent who made the contract with defendant upon which it relies. During the direct examination of this witness a paper, purporting to be the written order or contract between the parties for the sale and delivery of the car load of roofing, was produced, and the witness testified to the genuineness of the signatures of the parties thereto, and the paper was admitted in evidence. The essential part of this paper is as follows:

"Aug. 6, 1901.

"To the Philip Carey Mfg. Co.—Gentlemen: You will please enter our order and ship at once 1 car load cement roofing, and same to be settled for Dec. 28, 1901, to be settled for as sold. * * * 300 squares cement roofing "Standard" complete @ 275 per sq. All prices f. o. b. Salem. Ship to A. J. Watson, City, Salem, County, Harrison, State, W. Va. Via B. & O. R. R.

"Yours respectfully, A. J. Watson.

"Accepted by the Philip Carey Mfg. Co., per H. Clayton."

Near the right-hand margin of this paper there appeared in writing the following: "I agree to help sell this car load," and signed "H. C.," the initials of the name of plaintiff's agent. The witness further testified to the shipment and delivery of the car load of roofing to defendant, accompanied by a bill of sale therefor, and that on December 2, 1901, plaintiff received a payment of \$140.75 from defendant, and on the same date gave a credit for freight of \$43.50, leaving a balance due plaintiff of \$640.75. Witness also produced a letter from defendant bearing date December 17, 1901, which was read to the jury, the contents of which is as follows: "Your letter received this morning, and will say in reply that my store and all my stock was burned, including roofing. 56 houses were burned, and most all business houses. I want you to come as soon as possible. I am yours respt., A. J. Watson." On cross-examination of this witness it appeared that the original contract or order for the car load of roofing was executed in duplicate; that the duplicates were prepared by the witness, plaintiff's agent, by placing a carbon paper between a white and a yellow sheet of paper, so that, when the contract or order was written on the white sheet, an exact copy was produced on the yellow sheet, and, owing to the character of the paper used, a copy, or rather a reversed copy, at least in part, also appeared on the reverse side of the white sheet. The white sheet was the one retained and offered in evidence by plaintiff, and the yellow sheet was kept by defendant. Two alterations appeared in the one offered by plaintiff, when compared with the one kept by defendant. The one kept by defendant was produced and offered in evidence on the cross-examination of this witness. On redirect examination of this witness by plaintiff's attorney, the question, "Have you any explanation to offer as to the discrepancy between these two papers?" was asked, to which witness replied, "Nothing at all. As I stated before, I went back afterwards and went over the matter. I don't deny that that is a copy of the original order." And when asked, "Then you are willing to accept as the true order the one for which Mr. Watson contends, are you?" he replied, "Yes, sir." The two alterations in the duplicate offered by plaintiff were as follows: First, the change of the words, "I agree to sell this car load," so as to read, "I agree to help sell this car load"; and, second, the change of the words, "to be settled for Dec. 28, 1901, of what sold," so as to read, "to be settled for Dec. 28, 1901, as sold."

It is not necessary for us to trace the doctrine relating to the alteration of written agreements, in England and in this country, from its origin in *Pigot's Case*, 11 Coke, 27, to the present time. This is ably and exhaustively done by Judge Dillon in 2 Cyc. 137, and by Mr. Freeman and his associates in a note to the case of *Burgess v. Blake*, 86 Am. St. Rep. 80, to which note we shall

hereafter refer in this opinion as Freeman's note. We shall content ourselves with a brief statement of the principles deducible from the authorities, which we deem applicable to this case. Freeman's note says the general rule is that "any change in a material part of a written instrument, after such instrument has been fully executed, by a party to such instrument or one claiming under him, and without the consent of the party sought to be charged, renders such instrument void." The authority is universal in this country, except in the states of Missouri and New Jersey, that no alteration vitiates an instrument unless it is material. 2 Cyc. 190; Freeman's note, 84, 85; Yeager v. Musgrave, 28 W. Va. 90. We must therefore see if the alterations here shown were material. Plaintiff contended that it was entitled to recover the price of the goods sold and delivered under the contract. The defendant contended that the goods were merely consigned, and not sold, to him by plaintiff. Upon this question the alterations were material. The mere statement of the changes made seems to be a sufficient answer as to their materiality. There is a material difference, in legal effect, between agreeing to sell a car load of roofing and in agreeing to help sell it; and there is a material difference in the legal effect of an agreement for settlement as to a car load of roofing on a certain date, for that part which had been sold and an agreement for settlement as sold, especially upon the question as to whether or not the car load was actually sold or only consigned. The expression "as sold" may imply that the whole car load was to be settled for ultimately, while the expression "of what sold" may imply that defendant would not at any time be compelled to settle for more than the part which had been sold. The alterations were material.

It is contended that the question of whether or not they were material alterations should have been left to the jury. We think not. The question of the materiality of the alterations is a question of law for the court upon the admissibility of the altered agreement in evidence. *Newell v. Mayberry*, 3 Leigh, 250, 23 Am. Dec. 281; 2 Cyc. 258; and Freeman's note, 84. There was no denial that the alterations had been made. There was nothing for the jury to pass on as to that question. The fact of alteration was plainly shown by plaintiff's evidence. In this respect this case differs from the case of *Conner v. Fleshman*, 4 W. Va. 693, where it was said that under the circumstances of that case the question whether the instrument had been mutilated was for the jury. We are relieved of the necessity of examining the many conflicting rules and authorities as to the presumption or want of presumption as to the time when the alterations were made—that is, whether they were made before, at the time of, or after the execution of the agreement—because it clearly appears

by the plaintiff's evidence that they were made after the execution of the contract. This witness said in effect that the duplicate produced by defendant, which was without alterations, was a true copy of the original contract. If this is correct, there was no time other than after the execution of the contract when the alterations could have been made. When a material alteration, made after the execution of an agreement, is made to appear, the party producing the agreement has the burden of explaining the alteration. He must show that the change was made under circumstances rendering it lawful, and, unless he does so, it will be presumed to have been made by the party producing it, or with his privity, and fraudulently, in so far as legal fraud attaches to a willful change of an agreement by one of the parties thereto. *Piercy v. Piercy*, 5 W. Va. 199; 2 Cyc. 234, 235.

It is further contended that, notwithstanding that the contract was destroyed as evidence by the alterations, the plaintiff was entitled to recover upon the case made by it. The goods were shown to have been delivered to the defendant, and the defendant's duplicate of the contract, in an unaltered condition, was before the jury. Must plaintiff, simply because the duplicate produced by it was destroyed by fraudulent alterations, lose the benefit which the law would give to it upon the facts, if there had been no fraudulent alteration? In other words, does the fraudulent alteration prevent recovery on the original consideration? It is said, in 2 Cyc. 183, that "it has been considered in some cases that where a party, by his own act, alters an instrument so that it cannot be the foundation of any legal remedy, he will not be permitted to prove the promise contained in it by any other evidence, and this principle prevents a resort to the common counts or a recovery on the original consideration." Among the cases cited to sustain this view is the case of *Newell v. Mayberry*, supra, and that case is binding authority on this court. Judge Tucker, delivering the opinion in that case, said: "The materiality of the alteration is, I take it, matter for the decision of the court; and, moreover, if it had appeared that the alteration was made by Mayberry, or any other by his procurement, then he could never recover upon this contract, nor could he be permitted to establish it by any other evidence, or even to avail himself of the contract according to its original and true character." See, also, Freeman's note, 119, 122. There seems to be no authority allowing recovery on the original consideration, where there has been a material and fraudulent alteration by the plaintiff or with his privity. 2 Cyc. 183-185; Freeman's note, 122, 123. Nor is the plaintiff permitted to establish the contract by any other evidence, such as the duplicate retained by defendant. *Newell v. Mayberry*, supra; Freeman's note, 118. This rule may seem harsh, but the rea-

sons for it are said to be that a written agreement in the hands of an adverse party is easily susceptible of alteration, to the injury of the party charged thereby. Many written contracts are negotiable, and perform important functions in commercial transactions. It is of the highest importance to the commercial world that they be preserved in their original state or condition. Public policy demands this for the prevention of frauds upon innocent persons. The most effective means of preserving the integrity of such agreements is the rule that a material alteration destroys the agreement, so that no recovery can be had upon it, either in its original or its altered condition. The object of the rule is to enjoin the highest care upon the holder of the agreement, and to punish him with loss for his negligent and fraudulent conduct.

Applying this rule to this case, the plaintiff was not entitled to recover, either upon proof of the true original contract, or to recover upon the original consideration. Therefore there is no error in the action of the court sustaining the motion to exclude the evidence and to direct a verdict for defendant, nor in the action of the court in refusing to set aside the verdict and in entering the judgment of dismissal.

The judgment of the circuit court is affirmed.

(58 W. Va. 477)

FEDERATION WINDOW GLASS CO. v. CAMERON GLASS CO. et al.

(Supreme Court of Appeals of West Virginia. Dec. 12, 1905.)

1. DAMAGES—DEFAULT JUDGMENT—WRIT OF INQUIRY.

Where the declaration, in an action of assumpsit, contains the common counts, and one or more special counts upon promissory notes in writing for the payment of money, and office judgment by default is entered at rules, the necessity of an order for inquiry of damages in the action is not avoided by section 45, c. 125, Code 1899.

2. JUDGMENT—OFFICE DEFAULT—FINALITY.

Such office judgment does not become final on the last day of the next succeeding term of court, not having been previously set aside, so as to bar a defense thereafter; but the defendants may plead to issue at any time before the order for inquiry of damages is executed.

3. ASSUMPSIT—ACCOUNT OF ITEMS—FILING.

The plaintiff, in an action of assumpsit, does not waive the common counts of his declaration by failing to file the account required by section 11, c. 125, Code 1899, at the time the declaration is filed. He may file the account afterwards, and rely upon the common counts.

(Syllabus by the Court.)

Appeal from Circuit Court, Marshall County.

Action by the Federation Window Glass Company against the Cameron Glass Company and others. Judgment for plaintiff, and defendant M. L. Benedum appeals. Reversed.

Riley & Ritz, for appellant. J. C. Simpson, for appellee.

COX, J. This action of assumpsit for \$15,000 damages was commenced in the circuit court of Marshall county on the 17th day of October, 1903, by the Federation Window Glass Company, a corporation, against the Cameron Glass Company, a corporation, M. L. Benedum, A. E. Fox, and D. C. Harkins. Process was served on the defendants on the 27th day of October, 1903. The plaintiff filed an original and two amended declarations. The original was filed at November rules, 1903. The first amended declaration was filed in open court on the 26th of January, 1904, and was remanded to rules for proceedings thereon; the defendants not having appeared. The second amended declaration was filed at May rules, 1904. Each of these declarations contained the common counts in assumpsit, and one or more special counts upon two promissory notes in writing for the payment of money, alleged to have been made by the Cameron Glass Company on the 21st of July, 1903, payable to its order 60 days after date, each calling for \$6,000, and indorsed by said corporation, M. L. Benedum, A. E. Fox, and D. C. Harkins. No bill of particulars was filed with either of the declarations. The record discloses no appearance by defendants at May rules, 1904, when the second amended declaration was filed, but the clerk entered a rule to plead against them. At June rules, 1904, the clerk made the following entry: "Affidavit filed by plaintiff, and, defendant failing to plead to declaration, judgment entered for plaintiff against defendant for damages mentioned in declaration, as shown by affidavit." At the June term of court, 1904, following, nothing was done in the case. By an order entered in term on December 2, 1904, it appears, in substance, as follows: Defendant Benedum moved for a nunc pro tunc order showing a demurrer to the first amended declaration and joinder therein by plaintiff, and moved to quash the plaintiff's affidavit filed, and to set aside the office judgment entered at June rules, 1904, and asked leave to demur and file his plea of non assumpsit to the second amended declaration. The court refused the nunc pro tunc order, refused to permit Benedum to demur and to file the plea of non assumpsit to the second amended declaration, quashed plaintiff's affidavit filed at June rules, 1904, permitted plaintiff to file another affidavit, under section 46, c. 125, Code 1899, refused to give Benedum time to file a counter affidavit, and proceeded to treat the office judgment as final, and to ascertain plaintiff's damages in accordance with the last affidavit, and entered judgment in favor of plaintiff against defendants for the sum of \$10,037.45 and costs. Benedum excepted to the several rulings of the court against him, and afterwards obtained from a judge of this court a writ of error to, and supersedeas from, the judgment.

The vital question in this case is: Did the office judgment entered at June rules 1904, become final on the last day of the June

term, 1904, of the circuit court of Marshall county, it not having been previously set aside, so as to bar a defense thereafter? The second amended declaration, upon which this office judgment was entered, contained the common counts, and a special count upon the two promissory notes mentioned. Plaintiff claims that this office judgment became final on the last day of the June term, 1904, so as to bar a defense thereafter, and relies upon the cases of *Hutton v. Holt*, 52 W. Va. 672, 44 S. E. 164, *Marstiller v. Ward*, 52 W. Va. 74, 43 S. E. 178, and *Bradley v. Long* (W. Va.) 50 S. E. 746. Those cases involved the finality of office judgment in actions where no order for inquiry of damages was proper or necessary. The authority of those cases does not apply to actions in which such order is necessary. The recent case of *Phillip Carey Mfg. Co. v. Watson* (decided by this court at this term) 52 S. E. 515, involved the question of the finality of office judgment in an action of assumpsit, where the declaration contained only the common counts. In that case it was held: "In an action of assumpsit, where an order for inquiry of damages is required, the office judgment entered at rules does not become final on the last day of the next succeeding term of court, if not previously set aside, so as to bar a defense thereafter; but the defendant may plead to issue at any time before the order for inquiry of damages is executed." The only material difference between that case and the case here presented is that the declaration here contained, in addition to the common counts, the special count upon the two promissory notes; but this fact did not take the common counts out of the declaration. We do not deem it necessary to repeat what we have said in the case last mentioned. Section 45, c. 125, Code 1899, only makes an order for inquiry of damages unnecessary in an action for debt upon any bond or other writing for the payment of money, or against the drawer or indorser of a bill of exchange or negotiable note, or in an action of debt or scire facias upon a judgment or recognition. It may be argued that this action, while not an action of debt, is an action for debt on writings for the payment of money, and therefore exempted by said section from the necessity of an order for inquiry of damages. This argument might come with much force, if it were not for the common counts. The common counts were as much a part of the declaration as the special count. The common counts stood as parts of the plaintiff's demand against the defendants at the time this office judgment was entered at rules.

The plaintiff insists that the common counts must be deemed to have been waived, because no bill of particulars was filed under them, and that the office judgment, therefore, could only have been upon the special count. The statute (section 11, c. 125, Code 1899) provides that in every action of assumpsit the plaintiff shall file with his dec-

laration an account distinctly stating the several items of his claim, unless it be plainly described in the declaration, and, if he fail to do so, he shall not be permitted to prove any item not stated in such account on the trial of the case. The object of a bill of particulars is to specify the claim and prevent surprise on the trial. 3 Encyc. Pl. & Prac. 519. The bill of particulars under the statute is no part of the declaration. *Riley v. Jarvis*, 43 W. Va. 43, 28 S. E. 366. The failure to file a bill of particulars in an action of assumpsit is not ground for demurrer (*Sheppard v. Peabody*, 21 W. Va. 368); nor is the fact that the bill is too vague (*Abell v. Penn. Ins. Co.*, 18 W. Va. 412). Where the bill is too vague, advantage may be taken of the defect by excluding the plaintiff's evidence. The bill of particulars not being a part of the declaration, no rules could have been taken upon it if it had been filed. We do not think, under our decisions and practice, that the plaintiff waived the common counts by not filing the bill of particulars at the time the declaration was filed. Plaintiff might file the bill later, and rely upon the common counts. We do not understand that it is absolutely necessary that the plaintiff file the bill at the time the declaration is filed. The statute does not say so. It seems to us that the statute means that he shall file the bill in support of, and to amplify and supplement, his declaration, but not necessarily at the same time the declaration is filed. If the plaintiff fails to file the bill, the penalty is the exclusion of his evidence as to any item not plainly described in the declaration. The defendant, before trial, may demand such bill. *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895.

In this case the plaintiff has chosen to bring an action of assumpsit sounding in damages, combining the common counts, which require an order for inquiry of damages, with a special count on promissory notes. It is said, in 6 Encyc. Pl. & Prac. 132, that, where the damages are unliquidated, a judgment by default can never be rendered without reference to a jury, unless by express provision of the statute. See, also, *James River, etc., Co. v. Lee*, 16 Grat. 422; *Smithson v. Briggs*, 33 Grat. 180. The common counts are not relieved from the necessity of an order for inquiry of damages by section 45, c. 125, Code 1899. That being true, the action is not relieved from such order, although the declaration contains the special count in addition to the common counts. If such order is necessary, then the office judgment entered at June rules, 1904, did not become final, either under section 46 or section 47, c. 125, Code 1899, on the last day of the next succeeding term of court; it not having been previously set aside, so as to bar a defense thereafter. We so held in the case of *Phillip Carey Mfg. Co. v. Watson*, supra. Therefore we now hold that where

a declaration in an action of assumpsit contains the common counts, and one or more special counts upon promissory notes in writing for the payment of money, and office judgment by default is entered at rules, the necessity of an order for inquiry of damages is not avoided by section 45, c. 125, Code 1899, and that such judgment does not become final, so as to bar a defense on the last day of the next succeeding term of court, not having been previously set aside, so as to bar a defense thereafter; but the defendants may plead to issue at any time before the order for inquiry of damages is executed.

It is unnecessary for us to say whether or not the judgment in this case is erroneous because the office judgment was entered after a rule to plead, when there had been no appearance by defendants. We do not desire to be understood by this decision as holding that an order for inquiry of damages would be necessary in an action of assumpsit, where the declaration contained only counts upon a writing or writings for the payment of money, or that in such case an office judgment by default would not become final on the last day of the next succeeding term of court. That case is not before us, and we decide nothing in relation to it. It follows from what we have said that the lower court erred in refusing to permit the defendant Benedum to demur and plead on the 2d day of December, 1904.

For this error, the judgment must be reversed as to all of the defendants. State ex rel. Klok Bros. v. Corvin, 51 W. Va. 19, 41 S. E. 211. This action is remanded, with directions to admit, under the rules of law, any proper defense which the defendants, or either of them, shall offer before an order for inquiry of damages is executed, and to be further proceeded with according to law.

(58 W. Va. 216)

KELLEY v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia, Oct. 31, 1905. On Rehearing, Jan. 9, 1906.)

1. TRIAL—DEMURRER TO EVIDENCE.

Upon demurrer to evidence by defendant, if the plaintiff's evidence is sufficient to sustain his case, oral evidence of the demurrant conflicting with that of the demurree is ignored, and the demurrer overruled, unless the oral evidence of the demurrant be so clearly preponderant over that of the demurree that a verdict for the demurree would be set aside.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 354-356.]

2. DEATH—WRONGFUL ACT—DAMAGES.

In an action in behalf of a father for killing his son by wrongful act or negligence, the jury is not confined to compensative damages for mere pecuniary injury, but may consider the sorrow, the mental distress, and bereavement of the father.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 118.]

3. RAILROADS—INJURY TO PERSON ON TRACK—SIGNALS.

When the trainmen see a person walking on a railroad track, they must give him an

alarm signal at such distance before reaching him as will enable him to hear it and get off the track. Until such alarm is given, they cannot act on the assumption that he will get off the track.

(Syllabus by the Court.)

Error to Circuit Court, Wayne County.

Action by John Kelley against the Ohio River Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Vinson & Thompson, for plaintiff in error. Marcum, Marcum & Shepherd and W. W. Marcum, for defendant in error.

BRANNON, P. This is an action by John Kelley, as administrator of James Kelley, against the Ohio River Railroad Company to recover damages for killing James Kelley by running a passenger train against him. The defendant entered a demurrer to the evidence, and upon it the court rendered judgment against the defendant for \$5,000, the damages assessed by a jury. James Kelley and one O'Conner were walking along the railroad track, using it for a footway, and were struck by a passenger train running at the speed of 35 or 40 miles an hour, and both were killed. The case does not involve the question of the liability of a railroad company for failure to keep a lookout for persons on its tracks; for it is without question that the trainmen could see Kelley and O'Conner on the July day on a straight track for more than half a mile, and did see them for a long distance before they were struck. The single question is a question of fact; that is, whether the trainmen, after discovering Kelley and O'Conner on the track, were guilty of negligence in failing to sound an alarm at the proper distance before striking them.

It is undeniable law that one walking upon a railroad track, using it as a footway, is a trespasser, and in that very act is guilty of great negligence. Spicer v. Railroad Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385. But whilst such is the law, it is also settled law that after the trainmen have discovered one so walking upon the track they owe to him a duty under the law. They cannot injure him by willful or gross or wanton negligence. Spicer v. Railroad Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385. Whatever be the duty of a railroad company's agent to keep a lookout to discover persons on the track, certain it is that when the trainmen have discovered a human being on the track, and in danger, they must give him warning of the train's approach, such a warning, by whistle or bell, at such a distance, before reaching the trespasser, that he will be able to hear, take a thought for his safety, and get off the track. Common humanity demands this. True he is a trespasser and in the wrong; but, though every man who uses the railroad track as a footway is committing a trespass has placed himself within the precinct of danger where he has no right to

be, and is guilty of gross negligence, yet people do walk upon railroad tracks, and the law, from sheer necessity, has established the rule, applicable not only to railroads, but generally applicable, that it is the duty of one from whom the injury comes that he shall, when he sees a man in danger, use reasonable care, take reasonable steps, reasonable under the circumstances of the particular case, to save the man in danger. He cannot punish the trespasser for his wrong. It is a condition, not a theory. He cannot thus himself be guilty of a great wrong. He must help his perishing brother by doing what he reasonably can to warn and save him. These men were absent-minded in conversation. Some become listless and abstracted in mind. They are entitled to warning. At any rate, so the law is. Under this principle it is the duty of a railroad company, it was the duty of the defendant in this case, to blow an alarm with its locomotive at a point far enough from Kelley to reach his ears, allowing him to realize his danger, and take steps to save himself from the rushing deadly locomotive. *Raines v. Railroad*, 39 W. Va. 50, 19 S. E. 585, 24 L. R. A. 226; *Teel v. Railroad*, 49 W. Va. 85, 38 S. E. 518; *Ray v. C. & O. Ry. Co.*, 57 W. Va. —, 50 S. E. 413; 3 *Elliot on Railroad*, §§ 1253-1257. In that late great work, *Thompson's Commentaries on Negligence* (volume 1, § 238), we find this: "The courts are almost universally agreed that, notwithstanding the fact that the plaintiff or the person injured has been guilty of some negligence in exposing his person or property to an injury at the hands of the defendant, yet, if the defendant discovered the exposed situation of the person or the property in time, by the exercise of ordinary or reasonable care after so discovering it, to have avoided injuring it, and nevertheless failed to do so, the contributory negligence of the plaintiff or of the person injured does not bar a recovery of damages from the defendant. The rule is aptly illustrated by taking the case where a person negligently walks upon a railroad track, and fails to keep out of the way of a passing train. If the engineer, after noticing his exposed situation, fails to stop his engine, or give the proper signals, or otherwise act willfully and recklessly, in consequence of which the person is killed or injured, the company shall be liable to pay damages."

These unfortunate men were on the railroad track, seen by the engineer and fireman, as they themselves say, for a very considerable distance before they were struck, in open daylight. They say that, when the train struck the straight track, they saw the men. They saw them before blowing a crossing signal, at least 1,000 feet before the men were struck. Furthermore, the engineer swore that, after blowing the whistle, he saw that the men were making no effort to get off the track. The facts fully establish

beyond dispute that the trainmen saw these men, and saw, and had occasion to realize, plain reason to realize, that they were in imminent danger, and did realize it. Everybody must know that an engineer who sees two men walking in front of his engine, flying at the rate of 40 miles an hour, only a few feet away, sees that they are in imminent danger. True the engineer may assume that the trespasser will get off the track; but, when he sees for several hundred feet that he makes no effort to get off the track, it must inevitably arouse a reasonable apprehension that the man does not realize his danger, and that the case calls for prompt alarm signals. If it be true, as the engineer says, that he blew a crossing signal 1,000 feet away from the men, the very fact and the fact that the men still kept walking the track were enough to tell the engineer that the men were listless, and to watch them closely, and to alarm them at the proper point. But the engineer and fireman let these men walk on, according to the plaintiff's evidence, without any sound of alarm until the moment before the engine struck them and hurled them into eternity. Three witnesses swear pointedly that they heard no whistle at the crossing even. Three witnesses swear that the locomotive gave two toots for alarm, but did not do so until just as the engine struck the men. One of the witnesses says it struck them just as the second toot was sounded. If this be so, if this is a fact, then the liability of the company is infallibly fixed under the law of the land, and really here the case ends. Remember that we are upon a demurrer to the evidence, and under principles applicable to a demurrer to the evidence we cannot get away from accepting as a fact that no kind of alarm signal was given until just as the locomotive struck Kelley and O'Conner. There is conflicting evidence, or conflicting in tendency and effect, disputing the theory that no alarm was given until just as the engine struck the men. Two witnesses say that the train was nearly opposite the residence of Bowe, that the engine had passed the house, but that some of its cars were opposite it, when the alarm was sounded, and Bowe measured from the point where the train was when it gave the alarm to the point where it struck Kelley and O'Conner, and found it to be 345 feet. Now, can Bowe be certain as to the point at which the train was? The train was flying. Is this evidence as certain as that of the three men who saw the men struck and heard the whistle at the same time? One of these three witnesses, when cross-examined, was asked if he had an idea how far the engine was from the man when it blew the first whistle, and answered that he did not know. When asked if it was as much as 100 yards, he said he did not know. This somewhat weakens his evidence; but the fact remains that he said: "She whistled twice about the time she hit them." Besides, two other

men swear the same thing. He was a boy 13 years of age, and we all know that under cross-examination children are not always consistent in all their statements. It is said that Bowe's measurement of the distance was with a tape line, whereas the three witnesses who said that the whistles were just as the men were struck merely guessed distance with the eye. There was no distance for them to measure, because they say pointedly that the train struck the men just as it whistled two short toots, one after another. The engineer and fireman say that they discovered that the men were making no effort to get off the track about the train's length before the men were struck, and that the alarms were given that distance before the men were struck; that is, 320 feet. Now, these versions conflict upon a most material controlling point; that is, as to where the train was, with reference to Kelley and O'Conner, when the alarm was blown? What must the court do under a demurrer to evidence? Can it reject as mistaken or untrue the definite statements of three witnesses that no alarm was given until just as the men were struck, and accept as correct and true the adverse evidence? That adverse evidence may be the truth. It may be that injustice is done in this case.

After patient examination by the court of this case, we feel some reluctance in rendering the judgment which we render. It may do injustice, but we feel that we cannot, under principles governing demurrers to evidence, throw away the case plainly made by the plaintiff's evidence, and take that made by the defendant's. The law forbids this. We cannot say that there is a decided, plain preponderance of evidence in behalf of the defendant. Neither in number nor weight is there preponderance for the defendant. Two witnesses swear that the train was 320 feet from the men when the whistle was blown. Three witnesses flatly deny this. We have no reason to say that those three are false. The evidence of the two witnesses who say that the engine had just passed Bowe's house has not that degree of certainty as to just where it was to enable us to say that it was distant from Kelley and O'Conner. They might be mistaken as to the exact place of the engine. Our cases relative to the treatment of demurrers to evidence say that when the evidence of the two sides directly or in effect conflicts the oral evidence of the demurrant conflicting with that of the demurree is disregarded, and the evidence of the demurree is held to prove all that it can be fairly be regarded as proving, and the demurrer is decided against the demurrant, unless the evidence of the demurrant clearly and decidedly preponderates against the demurree's case, or his case is without sufficient evidence to sustain it. Still, if the preponderance in favor of the demurrant is so clear and decided that the court ought to set aside a

verdict against him, his demurrer ought to be sustained. But the demurrant by his demurrer takes the case from the jury, and, if the evidence is such that a verdict for the demurree would stand, the demurrer to the evidence must be overruled. To sustain the demurrer the evidence must plainly preponderate, decidedly preponderate, not be merely doubtful, so that different persons might come to different conclusions. *Barrett v. Coal Co.*, 55 W. Va. 395, 47 S. E. 154; *Mannon v. Railroad*, 56 W. Va. 554, 49 S. E. 450; *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664; *Gunn v. Railroad*, 42 W. Va. 681, 26 S. E. 546, 36 L. R. A. 575. Now, suppose there had been no demurrer to evidence, and the jury had found for the plaintiff: could we set it aside, if we followed old and well-settled principles governing motions for new trial under conflicting evidence? We could not do so. That is the test. As the party takes from his adversary the right to lay his evidence before a jury, should his adversary not have right to have it weighed as it would be after verdict? We are bound to sustain the circuit court in its judgment on demurrer to evidence. We cannot escape from it. The engineer and fireman say that crossing signals were blown for a road 1,000 feet away. This is claimed to be a compliance with all the duty of the defendant. There are several answers why it was not. It was not that short, sharp distress whistle for alarm. Again, after that whistle, the engineer says he noticed that the men were not going to get off the track. This called for an alarm whistle. Anyhow, the fact that the men still kept on the track called for the alarm whistle.

The defendant complains of the refusal of instructions. One was that if the plaintiff failed to show that he had suffered any pecuniary or actual loss by the death of his son, and that he received nothing for his labor, and was not dependent upon him, only nominal damages should be found. Code 1899, c. 103, §§ 5, 6, gives an action for death in case of wrong to the administrator of the decedent for the benefit of his kin, wherever he would himself be entitled to recover damages, if death had not ensued. Can it be thought that the statute contemplates only one cent damages? The deceased was 37 years of age, in good health, unmarried. His father, his sole distributee, to whom the damages go under the statute, was 75 years of age, and might the next week after his son's death be stricken with infirmity and disability to labor. Also, he was bereaved of his son, and cast into sorrow, gloom, and disconsolation of soul. Can it be supposed for a moment that, although the old father was still able to labor for self-support, he would continue so, and that the Legislature intended to give him only one cent damages? We cannot realize that the statute designed only nominal damages in such a case. Moreover, the statute

expressly says that "in every such action the jury may give such damages as they shall deem fair and just, not exceeding \$10,000, and the amount so recovered shall not be subject to any debts or liabilities of the deceased." This does not make the recovery dependent on the fact that the person should be dependent on the deceased. No such exception is incorporated in the statute, and the very fact that the recovery is not liable to the debts of the dead man shows that it was designed for the comfort and support of the next of kin, not merely in his condition to-day, but for his future need. *Searle v. Railway*, 32 W. Va. 370, 9 S. E. 248; 8 Am. & Eng. Ency. L. (2d Ed.) 923.

Another instruction refused told the jury that they could not consider sorrow, grief, and sentimental feelings that the father may have felt, occasioned by the death of his son, unaccompanied by any pecuniary loss, actual or prospective. The statute makes no such limitation. We think the jury had the right to consider these matters, because they enter into the loss, and because the statute gives unlimited discretion as to the amount of the damages to the jury within the limit of \$10,000. The statute gives to those closely related to the person killed by tort a recovery, and we do not see why the jury may not consider the father's grief, bereavement, and anguish of soul under the loss of his son in his old age. Much law will be found in the books saying that the jury cannot consider mental suffering and sorrow in fixing damages; but the most of the decisions propounding this doctrine are based on statutes which limit the damages with reference to "pecuniary injury." The Virginia statute does not contain those words, but says that "the jury may award such damages as to it may seem fair and just." Three times has the Supreme Court of Virginia decided that the recovery is not limited to pecuniary or merely compensatory damages, but that they may be punitive or exemplary, expressly holding that mental anguish and sorrow of the bereaved father may be taken into consideration by the jury in fixing the amount of their verdict, and the damages may be given for solatium, solace, consolation. *Matthews v. Warner's Adm'r*, 29 Grat. 570, 28 Am. Rep. 396; *B. & O. Railroad Co. v. Noell's Adm'r*, 32 Grat. 394; *Anderson v. Hygeia Hotel*, 92 Va. 692, 24 S. E. 269. This court has explicitly approved the construction of that act as given by the Virginia court holding that the damages are not limited to pecuniary or compensative damages, but may be punitive or exemplary. *Turner v. Railroad*, 40 W. Va. 676, 22 S. E. 83; *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217. Now, if damages may be exemplary under these decisions, why cannot the mental distress of the bereaved father be considered? It enters into punitive damages. The Virginia court departs from many other decisions in other states because

their statutes, either expressly or by construction, were limited to "pecuniary injury," whereas the Virginia statute was not. But this is not all. The case is clearer in West Virginia still. And why? Because our first act giving action for death caused by wrongful act expressly limited the jury to damages "with reference to the pecuniary injury resulting from such death." So it reads in Acts 1863, p. 113, c. 98. But when the Legislature made Code 1863, c. 103, § 6, it left out those words and broadly declared that "in every such action the jury shall give such damages as they shall deem fair and just, not exceeding five thousand dollars," and in re-enacting section 6, by chapter 105, p. 309, Acts 1882, it reads, "In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars," still leaving out the provision that the damages should be limited to "pecuniary injury." Now, this change from the acts of 1863, in this material feature, clearly means something. We are bound to take the act as it reads. We are bound to strike out the words "with reference to the pecuniary injury," because the Legislature has twice approved the change from the act of 1863 by leaving those words out. This ought to be the construction of the act, or else the willful murderer will pay only uncertain compensatory damages, which will not atone for the grief and anguish of the bereaved mother and father. His money ought to pay for their consolation, as far as money can give consolation. Why shall he not do so when he has brought the gray hairs of a father or mother in sorrow to the grave? He has caused the grievous loss from which heart or soul suffers more than from pecuniary loss.

A third instruction was refused. It says that in fixing damages the jury should not fix punitive or exemplary damages, but must be limited to such as would compensate the father for actual loss sustained by reason of the death of his son. We think this instruction was properly rejected under principles stated in *Turner v. Railroad*, 40 W. Va. 675, 22 S. E. 83, and *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217. It is useless to re-discuss the subject of the discretion of the jury under said act.

For these reasons, we affirm the judgment.

On Rehearing.

BRANNON, J. A petition for rehearing asserts that in the decision announced in the above opinion we have run counter to the cases of *Raines v. Railroad*, 39 W. Va. 50, 19 S. E. 565, 24 L. R. A. 226, and *Teel v. Railroad*, 49 W. Va. 85, 38 S. E. 518. We do not so see it. Plainly the *Raines* Case says that, "if those running a train discover a trespasser in immediate danger, they must use all reasonable exertions to avoid inflicting injury; otherwise, the company will be liable." The argument for the company in this case

is that the engineer had the right to assume that the trespasser would get off the track. So he may, so far as not to require him, after alarm signal, to stop the train or lessen speed; but he cannot so assume as to dispense with such warning. After discovery he must give the track walker the benefit or chance of a warning. The Raines Case says that the trainmen, "having given such signals as are required, have a right to act on the presumption that such person will step aside in time to remove himself from danger." This pointedly demands the signal before the right to act on that presumption begins. The law cited in the two opinions in the Raines Case shows this. Thompson, Com. on Negligence, vol. 2, § 1736, says that "after having given sufficient warning by whistle or bell he [the engineer] has a right to act on the assumption that the trespasser will quit the track." Who can dispute that the decisions demand that warning after discovery? The very fact that the law demands such warning denies that it can be dispensed with on the theory that the engineer may assume that the track walker will get off the track. Why call for warning, if this is not so? The Teel Case supports our decision. It says that the engineer who discovers a person on the track is not bound to stop the train, unless he sees that the person is helpless; "but the engineer's only duty toward such obstructor is to give the alarm signals necessary to warn a person of sound mind and good hearing in time to allow such person to vacate the right of way." Now, what do we say in the above opinion contrary to these cases?

Complaint is made against the above opinion that it calls for a warning "at such a distance before reaching the trespasser that he will be able to hear, take a thought for his safety, and get off the track." Of what use would the warning be unless it gives time to "take a thought" for safety? It must be in time to reach the mind. "If the engineer sees the trespasser and waits until the warning by whistle will do no good, when by whistling sooner he could have enabled him to escape, the company is liable." *Lake Shore v. Bodemer* (Ill.) 29 N. E. 692, 32 Am. St. Rep. 218. It is said that the Raines Case accepted station and crossing signals 500 feet away from the person as a sufficient signal. The fact was only mentioned. There were alarm whistles. Even if we say that the station whistle was held enough, it does not follow that a whistle 1,000 feet away would be the same as one 500 feet away. It is said that the Raines Case held an alarm 20 feet off sufficient. It must be admitted that was close; but the court said it was 20 to 30 feet. In that case the train was going 15 miles an hour; in this 40 miles. That would call for a distance of 50 feet in this case. But why so measure, when three witnesses say that there was no alarm until just as the engine struck Kelley?

(53 W. Va. 267)

UNITED STATES OIL & GAS WELL SUPPLY CO. v. GARTLAN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 7, 1906.)

1. ACTION—COMMENCEMENT.

It is well settled in this state that the date of the original summons is the date of the commencement of a suit or action.

[Ed. Note.—For cases in point, see vol. 1, Cent Dig. Action, §§ 725-734.]

2. PROCESS—ALIAS SUMMONS.

In case a summons is returned not executed, an alias writ may issue; and if that be similarly returned it may be followed by further writs until service is made upon the defendant.

3. SAME—ISSUE OF ALIAS SUMMONS—EFFECT.

An alias or pluries writ or summons, regularly issued, is the continuation of an original valid process, and not the inception of a new suit or action.

4. ABATEMENT—NONRESIDENT DEFENDANT.

In order that a suit or action may abate under the provisions of section 8, c. 125, Code 1899, the return on the writ must show that the defendant is a nonresident. The fact alone, that he is "Not found" is not sufficient to abate the suit or action.

5. DISMISSAL—FAILURE TO FILE DECLARATION.

A suit or action may not be dismissed at rules in the office by the clerk for want of declaration, where the process has not been executed, unless defendant appears and enters a rule for bill or declaration.

6. SAME.

Where the original summons has been regularly returned by the sheriff "Not found," and alias writs have thereafter issued and been likewise returned, and continuances have been entered at rules by the clerk regularly each month until the declaration is filed, the suit or action does not abate.

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by the United States Oil & Gas Well Supply Company against J. A. Gartlan and others. Judgment for defendants, plaintiff brings error. Reversed.

Rehearing denied January 9, 1906.

E. McSweeney, Chas. A. Smith, and Dave D. Johnson, for plaintiff in error. Van Winkle & Ambler and A. G. Patton, for defendants in error.

McWHORTER, J. On December 31, 1903, United States Oil & Gas Well Supply Company sued out of the circuit clerk's office of Wood county its summons against J. A. Gartlan and W. H. Ahner returnable to January rules, 1904, to answer plaintiff of a plea of trespass on the case in assumpsit damages \$10,000, which writ was returned by the sheriff of Wood county, "Not found." On the 9th day of January, an alias summons was issued returnable to February rules, which was returned by said sheriff, "Not found in my bailiwick." On the 23d day of February, 1904, still another summons was issued returnable to April rules and likewise returned, "Not found in my bailiwick." On the 25th day of February the plaintiff filed in the said clerk's office an affidavit of Henry

M. Miller, secretary of the plaintiff company, for an attachment against the said defendants and on the 27th day of February the clerk of said court issued an order of attachment against said defendants, which order was sent to the sheriffs of Wood, Marion, and Wetzel counties, respectively, to be served on South Penn Oil Company and Thomas Gartlan who had been designated by the plaintiff as being indebted to or having in their possession the effects of the defendants requiring them to answer said garnishment in the circuit court of Wood county, and on the 29th of March, 1904, the plaintiff gave bond in the penalty of \$15,000 when the sheriff of Wetzel county was directed to take possession of the personal property which had been by him levied upon in his county, which he did. And at the March term, 1904, of the circuit court of Wood county the attachments were docketed on motion of plaintiff. On the 22d of March, the South Penn Oil Company tendered and filed its answer as garnishee. On the 26th day of March, 1904, A. G. Patton appeared for defendants solely for that purpose, and moved the court to quash plaintiff's affidavit for attachment, of which the court took time to consider and on the 13th of April, the court overruled the motion to quash, to which ruling of the court defendants excepted.

At the May rules, 1904, plaintiff filed an affidavit for an order of publication under the provisions of section 8, c. 124, Code 1899, in case of process having been twice returned, not found against the defendant in the county in which he resides, which order of publication was duly published and posted; the clerk of the court at each of the subsequent rules entered an order continuing for declaration until the November rules, 1904, when the declaration was filed. On the 21st of November, 1904, the defendant W. H. Ahner by his attorney appeared "for the following purpose only, and not otherwise, and moved the court to dismiss the attachment docketed in this cause at a former term, on the ground that the same was not issued in a pending suit, and there is no suit now pending to support such attachment at this time. And the questions arising upon such motion are set down for argument." Which motion was afterwards on the 27th day of December, 1904, sustained, and the attachment theretofore issued and levied in the action was quashed, released, and discharged, and judgment for costs rendered against the plaintiff. To the opinion of the court in sustaining said motion and dismissing said attachment, releasing the property levied on and discharging the garnishee, the plaintiff by its counsel excepted. The plaintiff obtained from this court a writ of error and supersedeas and says, that the circuit court erred in sustaining the motion to dismiss the attachment, and in dismissing and quashing the same, and in releasing and discharging the levy made under said attachment, and rendering judgment

for costs against plaintiff in favor of defendant Ahner. The defendants, by counsel, assign as cross-error, that the court erred in overruling defendants' first motion, made April 13, 1904, to quash the attachment.

It is contended by defendants' counsel that the statement in the affidavit for attachment giving the nature of plaintiff's claim is not sufficient. The statement shows that the first item was a note of \$2,000 made by the defendants to the plaintiff, that the note was not paid when it became due and payable by the said defendants, and that the same was protested for nonpayment, giving the amount of the protest fees, and that by reason thereof the plaintiff had suffered the loss of said debt and interest, and was obliged to pay said protest fees, and that there was due and payable to plaintiff from said defendants the full amount of said note \$2,000 with interest from the 2d day of September, 1903, and the protest fees; and stating further that the said defendants were indebted to plaintiff for goods, wares, and merchandise, sold and delivered by plaintiff to the defendants, at their request, in the sum of \$5,080.77, with interest on said last-named sum from May 1, 1903, and, "that the amount at the least, which the affiant believes the said plaintiff is justly entitled to recover in the above-entitled action at law instituted by the said United States Oil & Gas Well Supply Company against the said J. A. Gartlan and W. H. Ahner, is the sum of seven thousand and eighty-two dollars and fifteen cents (\$7,082.15), together with the interest on two thousand and one dollars and thirty-eight cents (\$2,001.88) thereof from September 2d, 1903, and interest on five thousand and eighty dollars and seventy-seven cents (\$5,080.77) thereof from May 1, 1903." It is objected that the affidavit states "that an itemized account of plaintiff's claim both for the amount due upon said promissory note and said merchandise account will be filed in the above-styled action, the same being designated as "Exhibit A," with plaintiff's declaration, which this affiant prays may be considered and treated as an exhibit accompanying this affidavit," is a concession that the affidavit is incomplete and insufficient without said exhibit, and the same not being filed therewith, the affidavit must fail. The affidavit without the exhibit sets out sufficiently the nature of plaintiff's claim to give notice to the defendants thereof, and this reference to the exhibit may be treated as surplusage. The affidavit sets out two grounds as existing for the attachment. The first is that the defendants Gartlan and Ahner had concealed themselves so that a summons could not be served upon them, and had avoided the service of process upon them in said action after they had learned by report, publication, and news items published in the newspapers of the city of Parkersburg of the pendency of said action at law, that in consequence of their avoiding service of process in said ac-

tion plaintiff had been unable to obtain service of the summons upon the defendants in said Wood county, that the defendants had purposely kept away from said Wood county, and out of the reach and sight of the sheriff thereof in order to avoid the service of summons upon them by the sheriff and by reason of said defendants avoiding service, absenting themselves from said county, and keeping out of reach and sight, and away from the sheriff, while in said county, had avoided the service of summons upon them by the sheriff of said Wood county. It is not stated in this ground for attachment that said defendants were residents of Wood county, and no reason is given in the affidavit, what obligation they or either of them were under to be in Wood county or why they should at any time be found therein, nor is it shown with sufficient particularity what they did to prevent service of process upon them in said action. It does not even allege that the sheriff made any effort to find them, that he went to the place or places where they were in the habit of staying and failed to find them there, or that he sought to find them at all. From all that appears in the affidavit the sheriff, on receiving the process, from his seat in his office may have returned the process "Not found." Even if residents, the defendants may have been absent from the county on legitimate business. No act is shown at intentional concealment or effort to dodge the officer to prevent service. *Sandheger v. Hosey*, 26 W. Va. 221-224; *Delaplaine v. Armstrong*, 21 W. Va. 211, Syl., point 2.

The second ground stated is that the defendants had assigned or disposed of all their property with intent to defraud their creditors, and especially the plaintiff, that the defendants were insolvent and since the institution of said action at law and on or about the ——— day of January, 1904, made a pretended assignment, disposition, or sale of all their drilling tools and also their contracts with the South Penn Oil Company, for drilling oil wells in West Virginia to one Thomas Gartlan; that the said pretended sale, disposition, and assignment, was false and fictitious, without any intention on defendants' part to sell such property to said Thomas Gartlan, but for the purpose of placing the same beyond the reach of the creditors of defendants and especially the plaintiff, that they had not delivered possession to said Thomas Gartlan of the said property, and that since the said pretended sale and assignment defendants had been and still were in possession of, using, and controlling said property, and averred that the said defendants since their pretended assignment had made repeated statements to their creditors that they intended to use, possess, and occupy their said property for the drilling of oil wells for the South Penn Oil Company and others, and especially to complete their contracts for the drilling of oil wells

for the said South Penn Oil Company, which contracts the defendants had made a pretended disposition of to Thomas Gartlan, and further stated that Thomas Gartlan would settle the indebtedness of defendants; that Thomas Gartlan was a brother of the said J. A. Gartlan, the defendant, and was also a stockholder in and a director of the said plaintiff company, and at the time of said pretended assignment and disposition of said property, had knowledge of defendants' insolvency, defendants' indebtedness to said company, and the pendency of said action at law. This distinctly alleges a false and fraudulent sale by the defendants of all of their property to the brother of one of the defendants for the purpose of placing their property beyond the reach of their creditors; that they retained possession of the property using and controlling the same as their own, the pretended purchaser having knowledge of the insolvency of the defendants, of their indebtedness to plaintiff and of the pendency of this action. The material facts under the second ground for attachment are sufficiently set out in the affidavit.

Was there a suit pending at the time the judgment was rendered quashing and dismissing the attachment by the court in November, 1904? "The process to commence a suit, shall be a writ commanding the officer to whom it is directed, to summons the defendant to answer the bill or action." Section 5, c. 124, Code 1899. "It is a general rule, except where it has been otherwise provided by statute, that an action is deemed commenced, so far as the parties to it are concerned, from the time that the writ or summons is sued out." 1 Cyc. 747. It is well settled in this state that the date of the original summons fixes the date of the commencement of the suit or action. *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187; *Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342; *Lambert v. Ensign*, 42 W. Va. 813, 26 S. E. 431; *Abney v. Ohio Lumber Co.*, 45 W. Va. 448, 32 S. E. 256. See, also, *Justis' Annotations* to Code, 756. And section 3, c. 124, Code 1899, provides for alias and other proper processes when the original summons has been returned not executed. And in 20 Enc. Pl. & Pr. 1178, it is said: "When a summons is returned not executed, the plaintiff may have an alias summons issued, and upon failure to obtain service of the latter, pluries writs may issue successively until the defendant is served." And 24 Am. & Eng. Enc. of Law (1st Ed.) 524: "In case a summons is returned not executed, an alias writ may issue; and if that be similarly returned, it may be followed by pluries writs until service is made upon defendant." *Railroad Co. v. Brown*, 90 Va. 340, 18 S. E. 276: "Where previous writs of summons have failed for ineffectual service or other irregularities, plaintiff is entitled to an alias writ." 1 Bar. Chan. Pr. pp. 251, 252. "Ad

alias writ or summons regularly issued is the continuation of an original valid process, and not the inception of a new suit." 1 Cyc. 748, citing *Insurance Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754, and many other authorities. Defendant in error contends that upon the return of the first summons "Not found" the action abated under section 8, c. 125, Code 1899. This could not have been the result because the officer receiving the process not knowing the defendants resided out of his county nor that they resided out of the state, could not and did not return them "Nonresidents," and such return was necessary to effect an abatement of the action under said section.

It is contended there was no suit pending because no declaration was filed within three months from the issuing of the writ. Section 6, c. 125, Code 1899, provides that the defendant may appear at the rule day at which the summons is returnable, and enter a rule for declaration, in case the same is not filed, and if plaintiff fail to file his declaration at the succeeding rule day, or shall at any time after the defendant's appearance fail to prosecute his suit he should be nonsuited, etc. Section 7 provides that "if three months elapse after the process is returned executed as to any one or more of the defendants, without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants may have appeared." There is no provision in the statute for the dismissal of a case for want of declaration where the process has not been executed. The clerk in the case at bar entered his continuances at rules for declaration, from January rules, 1904, for every month to November rules, when the declaration was filed. In some states it is held that an alias should be tested at the time of the return of the former summons, and the same to be continued from term to term until service is secured. It is so held in Tennessee; also in Kentucky. In *Slatton v. Jonson*, 4 Hayw. 197, it is held that "when process has been commenced, it must be pursued without any chasm, and every subsequent process must be dated on the day of the preceding process." So in *Dougherty v. Shown*, 1 Helsk. 302. In *Parker v. Grayson*, 1 Nott & McC. 171, it is held that "an alias ought to be tested at the return of the original capias and made returnable to the next ensuing term. A case is out of court when the proceedings have been suspended more than a year"—clearly implying that there might be a suspension of less time than a year. In *McClurg v. Fryer* 15 Pa. 293, it is held: "A summons in a case on a guaranty in writing, issued above four years after the right of action on the guaranty arose, was returned nihil, and an alias summons issued above five years from the issuing of the first. Held, that the original and alias were so connected as to prevent

the running of the statute of limitations from the time of the issuing of the original summons." In that case, at page 295, it is said in the opinion: "The alias suit was instituted within six years of the first, that is to say, about five years after the first summons. The first summons was not served; the second was. The second suit was for the same cause, was entitled an alias, and so marked on the record; and this, as it has been held, is so connected and linked with the first as to be a continuation or reiteration of the original, and so indissolubly connected as to be one, and that, so far as the statute is concerned, it stops running from the institution of the first process." *Lynn v. McMillen* 8 Pen. & W. (Pa.) 170; *Schlosser v. Leshner*, 1 Dall. 411, 1 L. Ed. 200. In *Magaw v. Clark*, 6 Watts (Pa.) 529, it is said: "To save the bar of the statute of limitations, the plaintiff may reply a writ issued within six years, but he must show that it has been continued down to the time of declaring. These continuances are mere matters of form, and may be entered at any time, *Schlosser v. Leshner*, 1 Dall. 411, 1 L. Ed. 200; *United States v. Parker*, 2 Dall. 378, Fed. Cas. No. 15,992, 1 L. Ed. 421; *Pennock v. Hart*, 8 Serg. & R. 380; *Jones v. Orum*, 5 Rawle, 254; 2 Salk. 240, provided there be a ground laid for entering them by having a return of the first writ."

Counsel for defendants in error cite *Simmons v. Simmons* (W. Va.) 48 S. E. 833, where it is said: "Summons commencing the action must be followed by the filing of a declaration within a specified time, else the entire proceeding fails. The attachment is process out of the main suit, and depends upon the main action. It must stand upon it, and as a declaration brings into the record the true nature of the plaintiff's claim, the defect in the proceeding which quashes the attachment appears in an instrument that is vital to the existence of that writ." The specified time within which the summons commencing a suit must be followed by the filing of a declaration, only applies when the summons has been executed or when there is an appearance by the defendant, and a rule given the plaintiff to file his declaration. In the case at bar there is no variance between the affidavit for the attachment and the declaration when it was filed; and, as the defendants had neither been served with process nor had appeared in the action, the same had not abated or been dismissed. Objection is made to the affidavit for and the order of publication, but as the circuit court took no action as to that, it cannot arise here.

For the reasons herein stated the judgment of the circuit court in quashing the attachment and releasing the same, and dismissing the action, is reversed and the case remanded to the circuit court of Wood county for further proceedings to be had therein.

(58 W. Va. 424)

RAINEY v. FREEPORT SMOKELESS COAL & COKING CO. et al.*

(Supreme Court of Appeals of West Virginia. Dec. 5, 1905.)

1. CORPORATIONS—DISSOLUTION—PROCEDURE.

In a proceeding brought under section 57, c. 53, Code 1899, for the purpose of dissolving and winding up the affairs of a corporation, it is a condition precedent to the maintenance of the suit that it be alleged and proved that the persons seeking such dissolution comprise not less than one-third in interest of the stockholders of the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2439.]

2. SAME—JURISDICTION.

Equity has jurisdiction, at the suit of not less than one-third in interest of the stockholders of a corporation, to dissolve and wind up the affairs of the corporation upon a bill filed for that purpose, setting forth such facts as show good cause why it should be done. But, where the proof fails to sustain the material allegations of the bill, it will be dismissed.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2439, 2440.]

3. SAME—RECEIVERS—APPOINTMENT.

A stockholder, or creditor, under section 58, c. 53, Code 1899, may file a bill in equity asking for the appointment of a receiver to take charge of and administer the assets of a corporation, and upon sufficient cause being shown therefor, a court should appoint such receiver; but, when so appointed, he should be discharged and the bill dismissed, unless the allegations of the bill are supported by the evidence.

4. RECEIVERS—JURISDICTION—SPECIAL RECEIVER.

In order to give a court of equity jurisdiction for the appointment of a special receiver under section 23, c. 133, Code 1899, there must be a suit pending in such court involving the property of a corporation, firm, or person, and it must be made to appear in the case that there is danger of the loss or misappropriation of the property, or a material part thereof. Such suit cannot be maintained where the basis of equity jurisdiction alone is the appointment of such receiver, but there must be equity jurisdiction, independent of the application therefor.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by W. W. Rainey against the Freeport Smokeless Coal & Coking Company and others. Decree for defendants, and plaintiff appeals. Affirmed.

J. Hop Woods, for appellant. Ice & Ice and Fred O. Blue, for appellees.

SANDERS, J. In a bill filed on the 21st day of June, 1902, in vacation, before the judge of the circuit court of Barbour county, the plaintiff, W. W. Rainey, claimed that the defendant, Freeport Smokeless Coal & Coking Company, was organized on the 21st day of June, 1900, with a capital stock of \$25,000, divided into 250 shares of the par value of \$100 each, of which stock Frank H. Sloan had 61 shares, George B. Wade 60 shares, George B. Clifton 5 shares, plaintiff 42 shares, and David H. Poling and Columbus Kelley, each, 41 shares. All of these

parties, together with Alman Poling, W. T. Ice, Jr., John Murdock, and Anthony Marteney, were made defendants to the bill. It was further alleged that prior to the organization of the company, the plaintiff was the equitable owner of certain tracts of land and coal in Barbour county; that, being such owner, he was solicited by the defendants Frank H. Sloan and George B. Wade, to join with them and the defendants J. P. Wade and George B. Clifton, and incorporate themselves into a coal and mine operating company. That, in pursuance to said solicitation, the defendant company was organized, the plaintiff transferring to it his interest in the land and coal before mentioned; that the Wades and Sloan were to advance \$2,500, necessary to consummate the purchase of the property, and that the plaintiff was to receive for his interest therein, \$2,500, which was to be represented by 124 shares of stock in the company, which stock was to be full paid and nonassessable. That of this stock there was issued, at plaintiff's instance, 41 shares to Poling and a like number of shares to Kelley, of which plaintiff had since become the owner, making him the owner of 124 shares. It was further alleged that the plaintiff had been, since the organization of the company, its general manager and superintendent, and that it was indebted to him in a large sum on account of his services. The bill charged that the company's affairs were being mismanaged and its property wasted, and prayed that a receiver might be appointed to take charge of its affairs, that an injunction might be awarded restraining the persons in possession from disposing of the property, that the affairs of the company might be wound up, its debts paid, and the residue of the property, if any, divided among the stockholders. The court awarded the injunction, as prayed, and appointed the plaintiff receiver. The defendant company filed its answer, in which it denied that the stock of the plaintiff, Poling and Kelley, was to be full paid and nonassessable; denied that the plaintiff was the owner of 124 shares of stock, or that he was the owner of any stock, but claimed that his stock had been forfeited for the nonpayment of assessments; and denied that it owed the defendant anything on account of his services as manager, but said that he had been paid all that such services were reasonably worth. In reference to the allegation in the bill that the affairs of the company were being mismanaged, and its property wasted, it was stated in the answer that not only was such a state of affairs nonexistent, but that, on the contrary, after the plaintiff ceased to work for the company, its property was properly and carefully taken care of and used for its sole benefit; that the plant was in a better condition for mining purposes than ever before; that the same was not in a ruined or damaged condition, but was in an improved con-

*Rehearing denied January 9, 1906.

dition, and more valuable than it had ever been. On the 24th day of June, 1902, notice having theretofore been given, the court dissolved the injunction, and removed Rainey as receiver. On the 11th day of November, 1903, a decree was entered, dismissing the plaintiff's bill, and from this decree he has appealed.

The plaintiff's suit is brought under section 57 of chapter 53 of the Code of 1899, which gives to stockholders of a corporation not less than one-third in interest, the right to wind up its affairs, for cause shown. His suit being predicated upon the ownership of not less than one-third of the stock, if he has failed to establish the fact that he owns such interest, his right to maintain his suit fails, unless it can be maintained upon some other ground, which he now claims can be done. The plaintiff claims that he is the owner of 124 shares of stock in the defendant company. In order to own this number of shares, he must establish the fact that he is the owner of the 82 shares owned by David H. Poling and Columbus Kelley. The evidence shows that these shares were issued to Poling and Kelley at Rainey's instance, and he says the consideration therefor was that they had rendered him some assistance in getting up the options on the property which he transferred to the company. On September 18, 1900, Poling and Kelley made written assignments of their stock to Frank H. Sloan, one of the defendants. Rainey claims that these assignments, while made to Sloan, were for his benefit; that Sloan was to hold the stock in trust for him, and that the payment therefor was to be taken out of his salary as general manager. The transfer was made through William A. Wade. Is Rainey's contention supported by the evidence? The burden is upon him to establish this fact. The assignments speak strongly against him, and require clear evidence to overthrow them. It is true that Poling says that Rainey negotiated the trade with him, and that he would not have assigned his stock had he known it was to be used against Rainey, and that Kelley says he does not think, after acquiring the stock in the way in which he did, that he could have sold it to any one who would have used it against Rainey, yet the assignments are plain and unambiguous, the plaintiff is nowhere mentioned or referred to in them, and both Wade and Sloan deny that there was any agreement or understanding by which the stock was to be held for Rainey. It is not claimed by Rainey that he ever paid one cent on the stock, and what the consideration for it was, and why it was to be assigned for his benefit, does not appear. There is copied into the record a letter written by Rainey to Wm. A. Wade, in which he says: "I have finally got Poling and Kelley to agree to accept your offer of \$150 each for their stock and interest in the F.

S. O. & C. Co." This letter, if it shows anything, certainly does not tend to bear out the plaintiff's contention that the stock was being acquired for his benefit, but it goes strongly to show that the stock was not purchased for plaintiff, nor by him. We think it clearly appears that the plaintiff has not shown himself to be the owner of the Poling and Kelley stock.

It is claimed on behalf of the company that the stock of the appellant has been, by a by-law adopted by the stockholders, and resolutions passed by the board of directors in pursuance thereto, forfeited for nonpayment of assessments due thereon, while the appellant claims that from the inception of the company it was agreed and understood, by all the parties in interest, that his stock, and that of Poling and Kelley, was to be full paid and nonassessable. This contention is not borne out by the evidence. At the first meeting of the stockholders, held in Philippi, a resolution was passed, authorizing the board of directors to make an assessment on the stock. Rainey was not present at this meeting, but his proxy was held by Wm. A. Wade, who voted Rainey's stock in favor of this resolution. Besides, in the assignments made by Poling and Kelley to Sloan, it is provided that the "shares of stock are sold, transferred, and assigned absolutely, and the said Frank H. Sloan, or his assigns, is to pay any and all of the installments, or assessments, that may now be due or may hereafter be assessed on the said 41 shares of stock by the board of directors of the said Freeport Smokeless Coal & Coking Company." If the stock was full paid and nonassessable, why provide, in making assignments of it, that the assignee should pay installments and assessments? Kelley and Poling were present at the first meeting of the stockholders, at which the resolution providing for assessments was passed, but they do not claim that they made any objection to its passage. Again, the plaintiff, in his testimony, claims that there was a written agreement to the effect that the stock of himself, Poling and Kelley, was to be nonassessable, and that such agreement was left with the attorney for the company. He states, in his examination in chief, that the parties to the agreement were himself, Poling, Kelley, Wm. A. Wade, and possibly, Sloan. On cross-examination, he states that the parties to the agreement were Wm. A. Wade, Frank H. Sloan, and himself. Wm. A. Wade and Frank H. Sloan, in their testimony, deny positively that any such agreement was ever made and signed, and these witnesses, and George B. Wade and George B. Clifton, state that there was no agreement, either before the organization of the company, or afterwards, that the stock was to be nonassessable. The allegation as to the nonassessability of this stock being denied by the answer, the burden was upon the plaintiff to establish it, and not only has he

failed to do so, but the preponderance of the testimony, on this point, is clearly against him. As to whether or not the provisions of sections 31-33, c. 52, of the Code, providing for the forfeiture of stock for the nonpayment of assessments thereon, have been, in this instance, complied with, it is not necessary to determine, inasmuch as we hold that Rainey is not the owner of one-third of the stock, and therefore not entitled to maintain his suit under the theory first advanced and relied upon, unless we should hold that, under another section, he is entitled to relief.

It is insisted on behalf of the appellant that even if it should be held that he is not entitled, under section 57 of chapter 53 of the Code, to maintain his suit, that he is entitled under section 28 of chapter 133, as a stockholder, owning 42 shares, to an accounting, under the allegations of his bill to the effect that the corporation is being mismanaged, and that its property is being purloined, wasted, lost, and mislaid by the negligence and passive permission of the company. It is true that the bill alleges these facts, and the further fact that the plaintiff had made application, through the officers of the company, to institute, if necessary, such legal proceedings as were proper for the payment of its debts, winding up its affairs, dissolving its corporate existence, and dividing its surplus, if any, after the payment of its debts, among its stockholders, but that the company and its officers had refused to do so. Section 28 of chapter 133 provides that a court of equity may, in any proper case pending therein, in which the property of a corporation is involved, and there is danger of the loss or misappropriation of the same, or a material part thereof, appoint a special receiver of such property, or of the rents, issues and profits, or both. This section is designed to give to a court of equity power to appoint a receiver in any case pending in such court, in order to preserve the subject-matter of the litigation until the suit is determined. In order to have the appointment of a receiver under its provisions, there must be a separate and distinct ground of equity jurisdiction—a pending suit. *Grantham v. Lucas, Trustee*, et al., 15 W. Va. 425; *Beard v. Arbuckle*, 19 W. Va. 145; *McCandless v. Warner*, 28 W. Va. 754. In this case, the plaintiff is not entitled to the appointment of a receiver, on the ground that he is a creditor of the corporation, because he has an adequate remedy at law for the collection of his debt. A receiver should never be appointed until the legal remedy is exhausted. "Having already shown that the aid of a receiver is extended only in behalf of creditors who have fully exhausted their remedy at law, it follows, necessarily, that the jurisdiction will not be exercised in favor of mere general creditors whose rights rest only in contract, and are not yet reduced to judgment, and

who have acquired no lien upon the property of the debtor." *High on Receivers*, § 406.

In this case the appointment of a receiver is not sought as an incident to the main object of the litigation, for the purpose of protecting the property of the corporation, but is sought for the purpose of winding up its affairs, and is the basis for equity jurisdiction. If, under the allegations of his bill, the plaintiff sets forth such good cause required by statute as to entitle him to relief, his case would come within the provisions of section 58 of chapter 53 of the Code: "When a corporation expires or is dissolved or before its expiration or dissolution, upon sufficient cause being shown therefor, such court as is mentioned in the preceding section, may on application of a creditor or stockholder, appoint one or more persons to be receivers to take charge of and administer its assets," etc. *Swing v. Bentley & Gerwig Furniture Co.*, 45 W. Va. 283, 31 S. E. 925; *Rathbone v. Gas Co.*, 31 W. Va. 798, 8 S. E. 570; *Crumlish v. Railroad Co.*, 28 W. Va. 624. But even if the allegations of the bill show such good cause as is contemplated by the provisions of this section, still, in order to entitle the plaintiff to relief, the allegations must be proved. These allegations are denied by the answer, and the proof taken wholly fails to substantiate them. On the contrary, it is shown, by a clear preponderance of the testimony, that the affairs of the company, since the appellant ceased to work for it, have been managed in a successful, businesslike manner; that the output of the plant has been increased, and that it is now a solvent and going concern. Inasmuch as we hold that the plaintiff is not entitled to relief under the provisions of section 58 of chapter 53, we deem it unnecessary to decide, whether or not the 42 shares of stock, claimed to be owned by him, have been legally declared forfeited by the corporation.

The appellant excepted to that part of the depositions taken on behalf of the appellee company which purports to state what the proceedings of the stockholders and directors meetings of the defendant company were, for the reason that the official record, properly certified, is the only proper evidence thereof, and the contents thereof cannot be testified to by witnesses, and cites the case of *Roe v. Town of Philippi*, 45 W. Va. 785, 32 S. E. 224, in support of his exception. That case has reference to the manner of proving the records of a municipal, and not of a private, corporation, and is not applicable here. In this case, the records of the defendant company were introduced by the secretary of the defendant, who had charge of them, and who wrote the minutes of the meetings. The secretary does not attempt to state what the proceedings of the meetings were, but he identifies and examines the resolutions introduced as being the ones which appear upon the records of the defendant

company, kept by him. This was entirely proper. In the case of C. & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.) 50 S. E. 890, it is said. "When the controversy is between stockholders, concerning their interests in the corporation, and involves the consideration of the acts of the corporation, as affecting directly its status, and indirectly their interests, the records and books are admissible, if authenticated by showing that they are the records and books of the corporation and have been regularly kept as such. This is done by calling as a witness the secretary or other recording officer, if he can be had."

For the foregoing reasons, we see no error in the decree of the circuit court, and the same is affirmed.

(58 W. Va. 473)

DUERR et al. v. SNODGRASS.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1905.)

1. TAXATION—ASSESSMENT—TOWN LOTS—IRREGULARITIES.

Under section 36, c. 29, Code 1899, town lots should be assessed separately. But, when this is not done, and several lots lying contiguous are assessed as a whole, this is such an irregularity as is cured, after deed, by section 25, c. 31, Code 1899.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 574.]

2. SAME—TAX DEED—DESCRIPTION—SUFFICIENCY.

It is not necessary to a valid tax deed that the same description of the land used in the delinquent list should be used in the return of sales. All that is required in either is such description as is sufficient to identify the land and give notice to the owner of the assessment or sale.

3. SAME—RETURN OF SALES.

The word "Do." is used as an abbreviation for "ditto," and means the same as that which appears immediately above, and, when it is used in a return of sales of land sold for taxes to designate the purchaser, it will serve to do so if the name of the purchaser appears in the same column and immediately above such word.

4. SAME—SALE.

A sheriff, selling lands for taxes, is required to sell only so much thereof as will be sufficient to satisfy the whole of the taxes, interest, and commissions; but he is not required to certify in the return of sales that it was necessary to sell the whole, or that he offered for sale a quantity less than the whole. And, when the whole tract or lot has been sold, it will be presumed that a sale of it was necessary.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County.

Bill by A. C. Duerr and others against R. E. L. Snodgrass. Decree for defendant, and plaintiffs appeal. Affirmed.

Rehearing denied January 9, 1906.

Thos. P. Jacobs, for appellants. W. G. Snodgrass, for appellee.

SANDERS, J. Complaint is made that the circuit court of Wetzel county erred in dismissing the plaintiffs' bill, which was brought for the purpose of setting aside and declaring

void a tax deed made by the clerk of the county court of said county to the defendant, R. E. L. Snodgrass. On the 20th day of March, 1903, Fannie M. Rogers and her husband conveyed to the plaintiffs two lots, designated as lying on the east side of Maple avenue, in McEldowney addition, in the town of New Martinsville, W. Va., and known on the recorded plat of said addition as lots "CB" and "H"; the plat being of record in the clerk's office of the county court of said county. The taxes on these lots for the year of 1901, and while owned by Fannie M. Rogers, were not paid, and they were returned delinquent for the nonpayment thereof, and on the 4th day of December, 1903, sold by the sheriff, and the defendant became the purchaser.

One of the reasons advanced for avoiding the tax deed is that the lots were improperly assessed as one parcel; it being contended that they should have been entered and assessed separately. This is not an open question in this state. In the cases of Boggess v. Scott, 48 W. Va. 316, 37 S. E. 661, and Winning v. Eakin, 44 W. Va. 19, 28 S. E. 757, it has been decided against the contention of the plaintiffs. Section 25, c. 31, of the Code of 1899, by providing that "if more than one tract of land be charged as one * * * all such right, title, interest and estate therein, as is hereinbefore mentioned, shall nevertheless pass to and be vested in the grantee in such deed," passes good title to the purchaser, notwithstanding such irregularity. If section 36, c. 29, Code 1899, requires that the lots should have been assessed and valued separately, the deed could not be avoided, although this was not done because of this provision in section 25, c. 31, Code 1899. This statute should not be evaded, but should be met squarely, and given the force which it was intended it should have, and when this is done, the sale must be upheld.

And, secondly, it is assigned as error that the delinquent list described the lots as in "McEldowney Add."; while the return of sales described them as being in "Mc. Add., N. M." The delinquent list shows that these lots are situated in Magnolia district, in the county of Wetzel, and were returned in the name of Fannie M. Rogers for the year of 1901, and designated as "New Martinsville town lots CB and H, McEldowney Add." And they are described in the return of sales in exactly the same manner, except that under the heading "Local Description," instead of saying "McEldowney Add., New Martinsville," these words are abbreviated, by using for McEldowney "Mc.," and for New Martinsville "N. M." Surely no one could be misled by this variance between the delinquent list and the return of sales. The lots were returned and sold in the name of Fannie M. Rogers for the year of 1901, and described as "lots CB and H," in Magnolia district, Wetzel county. These facts appear from both the delinquent list and

return of sales, and in the delinquent list they are further described as being in the "McEldowney Add.," in the town of New Martinsville, and while the return of sales does not literally follow the delinquent list in the manner of description, as above stated, yet certainly no one could be mistaken that the lots referred to in the list of sales, and sold, were the same which were returned delinquent in the name of Fannie M. Rogers for the taxes of 1901. It is not necessary to a valid tax deed that the same description of the lots used in the delinquent list should be used in the return of sales. All that is required in either is such description as is sufficient to identify the lots and give notice to the owner of the assessment or sale. And there is no doubt but what the description in both the delinquent list and notice of sales was clearly sufficient to give to the owner such notice. There is nothing here which would prejudice and mislead the owner of the lots so sold as to what portion of the same was sold, and when and for what year they were sold, or the name of the purchaser thereof. Unless this is so, under said section 25, c. 31, Code 1899, the title passes to and is vested in the grantee in the deed, notwithstanding any irregularity in the proceedings. Then, again, in the same section, it is said that "no irregularity, error or mistake in the delinquent list, or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court, * * * shall, after the deed is made, invalidate or affect the sale or deed." The variance between the delinquent list and the return of sales, if it can be denominated a variance, is, at most, only an error or irregularity such as is cured by the curative provisions of said section of the statute. This is the plain command of the statute, which should be obeyed. It needs no construction to arrive at this conclusion and to determine the intention of the Legislature, and all the court should do is to apply it as it is found, without trying to avoid its force by strained construction.

And it is said that the deed should be canceled because the return of sales fails to show the name of the purchaser. From an examination of the list of sales, we are forced to conclude that this contention of the plaintiff is not supported. The return of sales shows that the defendant, R. E. L. Snodgrass, was the purchaser of another lot, sold in the name of Samuel Karnes, and under the heading "Name of Purchaser" R. E. L. Snodgrass, by name, is referred to as having purchased the Karnes lot, and immediately following, showing the sale of the lots returned in the name of Fannie M. Rogers, under the same heading, the purchaser is designated by the use of the abbreviation for ditto, "Do." The name of the purchaser appearing immediately above the letters "Do.," it cannot be mistaken as to what was intended by the abbreviation.

In the case of *Hughes v. Powers*, 42 S. W. 1, 99 Tenn. 480, the court held that ditto marks are to be held as repetitions of what appears on the line above, and are as much a part of the English language as are punctuation marks, and they are often given an important, and sometimes a controlling, part in the construction of general writings, and in the interpretation of legal documents and statutes and constitutions, and, being regarded as a part of the language, the courts will, of course, take judicial notice of their meaning. And, also, in the case of *New England Loan & Trust Co. v. Avery* (Tex. Civ. App.) 41 S. W. 673, the court held that ditto marks are generally understood to mean the "same as above," and that a statute requiring the index to a judgment record to contain the names of the plaintiff and defendant is satisfied, where the same party has been defendant in several actions, by the writing of his name once as defendant in the action first indexed, and the use of ditto marks in the place of his name in the title to the other actions. "Ditto marks. Marks which are generally understood to mean, 'the same as above.'" 14 Cyc. 552. See, also, *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Steinmetz v. Turnpike Co.*, 57 Ind. 457. Therefore the letters "Do." being an abbreviation for "ditto," and meaning "the same as above," it is clear that the return of sales shows the name of the purchaser of the lots in question.

It is urged that the sheriff made no effort to sell less than the whole of these lots, and for that reason the deed should be set aside. Section 8, c. 31, Code 1899, provides that the sale shall be of such undivided interest therein as shall be sufficient to satisfy the whole of the taxes and commissions. This is a plain statutory requirement, and should, in all cases, be complied with. The sheriff should make an honest effort to sell as small interest as possible. But did he do so in this case? We cannot presume that he did not. An officer is presumed to do his duty, and in this case the presumption is that the sheriff offered the lots for sale as required by law; and to set aside the tax deed on this ground the plaintiffs must overthrow this presumption. Then the question is, have the plaintiffs done so? It is true that it is shown that a much less quantity than the whole of the lots would sell for a sufficient amount to pay the taxes and charges. It appears that a one-eighth interest would easily sell for sufficient to do so. But taking all this to be true, and if nothing else appeared, the deed could not be overthrown on this ground. If so, it would be an easy matter to set aside most, if not at all, tax deeds. No purchaser at a tax sale could know, nor could he, by any means, ascertain, when he is getting a good title. This showing, however, of the plaintiffs has been rebutted. It abundantly appears from

the evidence that the sheriff did offer less than the whole, but received no bids, and no one says that he did not do so. Therefore, not only is the presumption here in favor of the sheriff doing his duty, but this presumption is supported by the uncontradicted testimony. Our statute does not require the sheriff to certify that it was necessary to sell the whole in order to pay the taxes and charges, or that he offered for sale a less quantity than the whole.

The decree of the circuit court is affirmed.

(58 W. Va. 459)

HERSHMAN et al. v. STAFFORD.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1905.)

1. EASEMENTS — OBSTRUCTION — MANDATORY INJUNCTION.

A mandatory injunction will lie to cause an obstructed or closed private way to be cleared and opened for the use of the owner. *Boyd v. Woolwine*, 21 S. E. 1020, 40 W. Va. 282.

2. ALTERATION OF INSTRUMENTS—EFFECT.

Where an agreement is prepared between adjoining landowners for a private way through their lands, and signed by all but one of the parties, and, in order to obtain his signature, one who had signed the agreement procured the same to be materially changed as to the route of the proposed road through the lands of the party not signing, the agreement is of no effect as to one who had signed it, but did not know of or consent to the change.

3. EASEMENTS—OBSTRUCTION—INJUNCTION—PARTIES.

Where the bill alleges separate and independent obstructions to a private way by the defendant, it is not error to omit to make another party, who also obstructed the way, a party to the suit.

(Syllabus by the Court.)

Appeal from Circuit Court, Preston County.

Bill by James Hershman and others against William H. Stafford. Decree for plaintiffs, and defendant appeals. Reversed.

Rehearing denied January 9, 1906.

Wm. G. Conley and R. W. Monroe, for appellant. P. J. Crogan, for appellees.

SANDERS, J. This is an appeal from and supersedeas to a decree of the circuit court of Preston county, perpetuating an injunction sued out from said court by James Hershman and Rebecca Huffman, inhibiting and restraining the appellant, Stafford, his agents, servants, etc., from interfering with the plaintiffs in the use of a private way or road through Stafford's land. The right to the use of the way is based upon an agreement entered into between the plaintiffs, Stafford, and other landowners. The appellant, Stafford, filed a special plea, and also answered the bill, setting up two defenses—one that the contract filed with the bill is not the contract which he signed, but that, after the same was signed by him and all the parties thereto, except one E. W. Lee, the contract was altered, whereby the route of the proposed road through the lands of

said Lee was materially changed without the knowledge or consent of appellant; the other that, after the road was opened through the land of appellant, Isaiah Bolyard, who owned the adjoining land, placed his line fence in such a way as to include the road, which constitutes the obstruction complained of by the plaintiffs, and that their remedy is against Bolyard, and not against appellant.

The appellant assigns as error the refusal of the court to sustain the demurrer to the bill, and claims that, even though all the allegations of the bill be taken as true, they amount to simply a repetition of trespasses on the part of appellant, and that the plaintiffs have a complete remedy at law. But this theory cannot be sustained. "A mandatory injunction will lie to cause an obstructed or closed private way to be cleared and opened for the use of the owner." *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020. Judge Holt, speaking in this case in regard to the remedy by injunction, after the right to the way has been established, says: "If such is the right of the plaintiffs, no question is made that this is their proper remedy; in fact, their only plain, adequate, and complete remedy, seeing that it is the unobstructed use of the road they are after, and not damages for the obstruction of it."

It is claimed that the court erred in holding that the agreement filed with the bill was of any binding force upon the appellant, or that it conferred any rights upon the appellee to the easement in question. This claim is based upon the fact that the contract was changed after it was signed by the appellant. That there was a change made in the contract is not denied, but the appellee claims that the change was agreed to by all the parties. The road provided for in the written agreement was to pass through the lands of one E. W. Lee. At the time of the preparation of the agreement, Lee was not living upon this land, but in another community, and John W. Davis was engaged by the parties to see him and procure his signature to the agreement. Davis, in his testimony, states that he made two trips to see Lee. When he returned the first time, he reported to all the parties that Lee said he would not sign the agreement unless it was changed so as to provide that, instead of running through his lands, the road should run "along the line" of his lands. After he went to see Lee the second time, he reported to John Hershman, the appellee, and Hershman proposed to make the change providing that the road should run with the line of Lee's land, and Davis, inasmuch as Lee had given him authority to sign his name to the contract if the change was made, changed the contract in accordance with Lee's instructions and signed his name thereto. Davis states that, so far as he knows, no one of the parties, except Hershman, was aware of the change, and that Hershman paid him for his services. The appellee con-

tends that Stafford agreed to the change, and he and his son, in their testimony, state that Stafford said the parties to the agreement "would better have it along the line than not to have it at all." Admitting this to be true, it does not show that Stafford gave his consent that the agreement should be changed, and in his testimony he states that he never knew of any change in it until a year after the contract was put to record, and we think the evidence fails to establish the fact that he did agree. As to whether or not the change was material, Stafford testifies that he would not have signed the contract, had it provided that the road was to run with the line of Lee's land, as that route was rocky and steep, no road existed there, and one could not be made, except at great expense and on an undesirable grade. The testimony of other witnesses as to the character of this route corroborates Stafford, and that it was a material change is borne out by the fact that in the final order entered in the cause, it is recited that the plaintiff Hershman, having become the owner of the Lee land, agreed that the road might run through that land as provided in the original contract.

Having determined that the contract was changed without the knowledge or consent of Stafford, and before it was signed by all the parties, it must be considered as to whether the change constituted the alteration of a completed contract, or whether there ever was, in fact, any contract between the parties. In 2 Cyc. 145, it is said: "But, on the other hand, where one party subscribes a paper which binds him on the one part, the terms of the paper cannot be changed by the other party before signing or accepting it. This, however, seems not within the contemplation of the usual conception of the term 'alteration,' as dealing with the effect of a material change of a completed instrument, or contract, but rather falls within other general rules pertinent to the elements of a binding contract." It is not denied that the instrument was changed before the name of Lee was affixed thereto. This being so, under the authorities there was no consummated contract between the parties. "A concurrence of minds is essential to the creation of a contract, unless in cases of estoppel. Therefore a written instrument signed by one party, with the intention that the other shall later sign it, which is changed in any manner altering its legal effect, and by that other signed in its altered condition, does not become binding on the former, unless he learn of and ratify the change; and this, although the alteration be made by a stranger." *McGavock v. Morton*, 57 Neb. 385, 77 N. W. 785. See, also, *Sherwood v. Merritt*, 83 Wis. 233, 53 N. W. 512; *Pew v. Laughlin* (D. C.) 3 Fed. 39; *The Hero* (D. C.) 6 Fed. 528. Hershman having procured the contract to be changed in order to coincide with the wishes of Lee, after Stafford's signature had been affixed thereto, the contract never

took effect as to Stafford. There was no meeting of minds, no reality of consent—elements essential to a binding contract.

The appellant claims that upon the filing of his answer the court should have made Isalah Bolyard a defendant to the suit; it being alleged that he, and not the defendant, had obstructed the road by building a fence in the private way, of which the plaintiff had full knowledge. The bill, however, alleges that the appellant obstructed the way by building fences across it at his line, so as to prevent the plaintiffs from going over and upon the roadway, through the lands of appellant; that the appellee removed said fences and the appellant replaced them, and finally built them of wire, and that appellant threatened bodily injury to appellee if he removed the fences. The fact that appellant placed these obstructions in the road is testified to by several witnesses, and is not denied by him. Therefore, even though Bolyard had obstructed the road, inasmuch as it is distinctly alleged in the bill that the appellant himself obstructed it, and the prayer of the bill is that he be restrained from further doing so, it was not error in the court to omit to have Bolyard made a party, as the appellee would be entitled to maintain a separate suit against him for any obstruction.

In the final decree it is recited that the appellee Hershman, having become the owner of the land formerly owned by Lee, agreed in open court that the road should run through his land as agreed upon and stipulated in the contract as originally prepared. The contract having never become effective as to appellant by reason of the change made therein, this agreement upon the part of appellee could not operate to make it effective. As to appellant, there not being any agreement, this stipulation could not make valid an invalid instrument.

The decree of the circuit court is reversed, the injunction dissolved, and the bill dismissed.

(124 Ga. 408)

PATTERSON v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. CRIMINAL LAW—ARGUMENTS OF COUNSEL.

The remarks of counsel for the state were not of such a character as to require the granting of a mistrial or a rebuke from the judge.

2. SAME—INSTRUCTIONS.

In the absence of a written request it is not error requiring a reversal for the judge to fail to instruct the jury upon the law of confessions.

3. SAME—INSANITY—INSTRUCTIONS.

When, in a criminal case, there is evidence introduced in behalf of the accused which raises an issue as to the mental capacity of the accused to commit the crime, it is not erroneous for the judge to instruct the jury as to the law applicable to such an issue; and, if the defense apparently set up by the evidence is not relied on, the attention of the judge must be called to this fact.

4. HOMICIDE—EVIDENCE.

The evidence amply warranted the verdict, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Burrell Patterson was convicted of murder, and brings error. Affirmed.

Burrell Patterson was indicted and tried for the crime of murder. The evidence disclosed that on the day of the killing the accused quarreled with Stewart, the deceased, and that subsequently Mac Patterson, father of the accused, gave Burrell Patterson a pistol and directed him to kill Stewart. Immediately afterwards, Burrell Patterson walked across the courthouse yard to within 10 steps of Stewart, first threw a brickbat at him, then shot him, and after Stewart had fallen to the ground shot him again; either of the pistol wounds being such as would have resulted in death. The defense introduced by the accused was that he acted under duress, that he stood in fear of his father, that his father had threatened to kill him if he did not kill Stewart, and that he was acting under this fear when he shot Stewart. There was testimony of several witnesses who heard Mac Patterson instruct the accused to kill Stewart, but there was no evidence that these instructions were accompanied by threats against the accused. There was evidence to the effect that the accused was subject to epileptic fits, but there was no evidence to show that he had suffered from this complaint within a period of some years from the date of the killing, and there was much evidence from acquaintances that the accused had never betrayed any symptoms of mental weakness. The jury found a verdict of guilty, without a recommendation to life imprisonment. A motion for a new trial was overruled, and to this judgment the accused excepted.

S. Holderness, D. B. Whitaker, and M. N. Moity, for plaintiff in error. J. R. Terrell, Sol. Gen., and Jno. Q. Hart, Atty. Gen., for the State.

COBB, P. J. Error was assigned upon the failure of the court to declare a mistrial because the solicitor general in his argument used the following language: "The blood of this dead man calls upon you to punish this man and protect his family and relatives, and, unless you have the manhood to write it in your verdict, you should be exiled from the good county of Heard." We do not think this language called for a mistrial, or a rebuke from the judge. It introduced no fact, but was merely a forcible, and possibly an extravagant, method adopted by counsel of impressing upon the jury the enormity of the offense, and the solemnity of their duty in relation thereto. In the case of *Taylor v. State*, 121 Ga. 354, 49 S. E. 806, Mr. Justice

Evans said: "It is quite natural, and by no means unusual, for an advocate, in discussing the facts of a case before a jury, to indulge to some extent in imagery and illustration. Sometimes a simile may be inapt, or the metaphor mixed, or the expression may be hyperbolic. What the law forbids is the introduction into a case, by way of argument, of facts not in the record and calculated to prejudice the accused. The language of the solicitor was somewhat extravagant; but figurative speech has always been regarded as a legitimate weapon in forensic warfare, if there be evidence before the jury on which it may be founded." We desire to emphasize what is said in the foregoing quotation. Flight of oratory and false logic do not call for mistrials or rebuke. It is the introduction of facts not in evidence that require the application of such remedies.

2. Complaint is made of the failure of the court to charge upon the law governing confessions; the state having brought out on cross-examination evidence from one Loftin that the accused had told him that he had killed Stewart because the latter owed him \$4. There was no request to the court to charge the law relating to confessions; and in the absence of such a request the failure to so charge is not error. *Walker v. State*, 118 Ga. 34, 44 S. E. 850; *Malone v. State*, 77 Ga. 768 (5); *Sellers v. State*, 99 Ga. 212, 25 S. E. 178.

3. Complaint is made that the court charged the jury on the law of insanity as a defense, when it is alleged such was not the defense relied on by the accused, but duress, and a charge on insanity tended to confuse the minds of the jury and becloud the real issue they were called upon to determine. The testimony of the mother of the accused tended to establish the mental imbecility of her son. The court properly looked to the evidence to determine what subjects of law should be given in charge to the jury, and the evidence justified the charge upon the law of insanity. It is now claimed that the defense of insanity was not relied on, but the judge in a note to the motion for a new trial states that, if this defense was not relied on, his attention was not called to that fact.

4. The accused sought to introduce the testimony of Mrs. Patterson to the effect that on the night of the killing Mac Patterson told her that Burrell Patterson had killed Stewart at his (Mac Patterson's) direction, and that he (Mac Patterson) had forced Burrell to commit the murder by threatening his life. This evidence was offered to support the accused's statement that he acted under duress. It would have tended to prove the fact that Mac Patterson had threatened Burrell Patterson's life if he would not kill Stewart. But it was only hearsay, and was properly excluded as evidence to establish the fact stated; and, as Mac Patterson was the witness for the accused, it was not ad-

missible for the purpose of impeachment. Complaint is made that the court failed to charge fully the law of duress, and did not set out the accused's theory of defense to the jury. The court charged the jury on the law of duress, and this charge correctly sets forth the law upon that subject. It is not obligatory upon the court to give in detail the theory of the defense relied on by accused, in the absence of an appropriate and timely written request. The exceptions to the charge on duress were without merit. The verdict is amply supported by the evidence, and there was no error in refusing a new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 379)

AMERICAN ASSURANCE ASS'N OF ATLANTA v. HARDIMAN.

(Supreme Court of Georgia. Nov. 20, 1905.)

INSURANCE—FORFEITURE—FAILURE TO PAY PREMIUMS—WAIVER.

Where a certificate of life insurance provided that all benefits thereunder should be forfeited upon failure of the insured to pay the premiums as therein stipulated, and that no agent was authorized to alter or discharge contracts, waive forfeitures, or receive premiums in arrears beyond the time provided in the conditions and provisions of the policy, the custom of a mere collecting agent of the insurer with reference to the collection and payment of the premiums, if contrary to the terms of the policy, would not prevent a forfeiture thereof for a failure by the insured to comply with its conditions as to the payment of premiums, where such custom was neither authorized nor ratified by the insurer.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 952.]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Susie Hardiman against the American Assurance Association of Atlanta. Judgment for plaintiff. Defendant brings error. Reversed.

Susie Hardiman sued the American Assurance Association of Atlanta, Ga., in a justice's court of Richmond county, for \$50, on a life insurance certificate issued by the association to C. M. Hardiman, in which she was named as the beneficiary. The case was appealed to a jury in the justice's court, and a verdict was rendered therein for the plaintiff for \$50, which, upon review by the judge of the superior court on certiorari, was sustained, and the association excepted. On the jury trial it was admitted that the insured died on December 31, 1904; and the plaintiff put in evidence the certificate, which bound the association to pay her \$50 upon the death of the insured. The weekly premium on the certificate was 15 cents.

The policy contained the following stipulations: "Premiums must be paid on or before Monday of each week to the associa-

tion at its office during office hours, or to its authorized representative on demand." "When premiums for three weeks are due and unpaid, all benefits under this policy cease; but the policy may be restored by the payment, during the third week, of all arrearages and premiums for the next two following weeks, provided that the insured is at that time in good health and has not suffered disease or injury during the arrearage period." "Nonobservance of any of the written conditions or requirements of this policy, * * * without the written indorsement of approval of the association through its president or secretary, voids and immediately terminates the policy, and all payments thereon become forfeited to the association." "Agents are not allowed to alter or discharge contracts or waive forfeitures or receive premiums in arrearage beyond the time provided in the conditions and provisions above set forth." "Receipt of this policy and payment of the premiums thereon is acceptance in full of the policy terms, conditions, and provisions."

T. J. Tudor testified, in behalf of the defendant, that he was its collecting agent in November and December, 1904; that the last premium paid by the insured was paid November 14, 1904, which was on Monday; that the insured failed to pay the premiums due on Monday, November 21, and on Monday, November 28, 1904; that on December 6, 1904, the witness called on the mother of the insured, the plaintiff in the case, who had been accustomed to pay the premiums, and she refused to pay anything more; that during that week Mr. Franklin, her attorney, came to the witness' office and tendered him \$5, which witness refused to accept, because the insured was in arrears and in bad health. The witness further testified that the insured did not pay his premiums on Monday of each week, but generally paid twice a month, after the city council paid off, and witness received the premiums after they were past due; that the witness on one occasion called after the premiums for two weeks were due, and accepted payment of them. "Witness' custom was to wait on the insured until after council had paid off, and not call for the premiums on Mondays. Insured did not come to witness' office to pay, but witness always called on him, or his mother, at the latter's house, for payment of the premiums."

A physician testified, in behalf of the defendant, that he had professionally attended the insured during November, 1904, and prepared a sick benefit claim (which the evidence shows was presented to the defendant by the insured on the 29th of that month); that the insured was sick in bed on November 28th from tuberculosis, and suffered from that disease until he died.

The error assigned in the petition for certiorari was that the verdict was contrary

to law and the evidence and without evidence to support it.

M. P. Carroll, for plaintiff in error.
Austin Branch and A. L. Franklin, for defendant in error.

FISH, P. J. (after stating the facts). Under the express stipulations of the policy, it was forfeited upon the failure of the insured to pay the three weekly premiums due, respectively, November 21, November 28, and December 5, 1904. The policy could have been restored by the payment, during the third week, of all arrearages and the premiums for the next two following weeks, if the insured had been at that time in good health and had not suffered from disease or injury during the arrearage period. The evidence that the insured was, at the time a tender was made of a sufficient amount to cover the premiums due on November 21st, November 28th, and December 5th, and the premiums for the two next succeeding weeks, in bad health and suffering from the disease from which he subsequently died, was uncontradicted. So by the terms of the policy it was not only forfeited, but the right to restore it by the payment of these five premiums did not exist.

It is contended, however, that the requirement of the policy with reference to the payment of premiums on Monday of each week had been changed or waived by the course of dealing between the local agent of the insurer at Augusta, Ga., and the insured, by which a custom had been established of fortnightly instead of weekly premiums, and that therefore there was an arrearage of only one premium, instead of three, when the tender was made by the attorney of the beneficiary. We do not think there was any merit in this contention. It is, to say the least, very doubtful whether the mere habit of collecting the premiums every two weeks, instead of every week, could have the effect of changing or waiving the conditions of the policy with reference to its forfeiture upon failure to pay three weekly premiums; for, while the policy provided that the premiums should be paid upon Monday of each week, no penalty or forfeiture was incurred by a mere failure to pay one weekly premium, nor for a failure to pay two weekly premiums. So, if the premiums were paid every two weeks, there could be no forfeiture of the policy. But admitting, for the sake of the argument, that an established custom on the part of the association of not insisting upon the payment of each weekly premium as it fell due, but of collecting the premiums at intervals of two weeks, would nullify the provision of the policy providing for its forfeiture whenever premiums for three weeks should be due and unpaid, the evidence fails to show that there was such a custom of the association. The alleged custom, if it existed at all, was between the local collecting agent of the insurer and the insured.

From the evidence it appears that this agent was a special agent, whose authority, so far as the record discloses, was limited to the collection of the premiums upon the certificate of insurance. It does not affirmatively appear that he had even this limited authority, except during the months of November and December, 1904, as the evidence did not disclose that he acted as agent for a longer period. The policy put the insured upon express notice that agents of the insurer had no authority to discharge contracts, waive forfeitures, or receive premiums in arrears beyond the time specified in the policy. It is obvious, therefore, that the insurance association could not be bound by any acts of its agent in contravention of the terms of the policy, unless it subsequently ratified them. It is not contended that it expressly ratified the acts of the agent in reference to the collection of the premiums. Whether, in view of the provision of the contract that "nonobservance of any of the written conditions or requirements of this policy, * * * without the written indorsement of approval by the association through its president or secretary," should render the policy void, the requirements and conditions of the policy in reference to the payments of premiums could be altered or waived by a mere implied ratification by the association of a course of dealing between its local agent and the insured contrary to the terms of the policy, it is not necessary to inquire; for the evidence wholly fails to show such implied ratification.

Before ratification by a principal of unauthorized acts of its agent could be implied, there would have to be knowledge of the principal of such acts, and then conduct on its part in reference thereto inconsistent with its repudiation of them. It is clear, therefore, that there could be no implied ratification by the insurance association of a previously unauthorized custom of its local agent in reference to the payment of premiums upon this policy, until the association had notice of such custom. The record wholly fails to show such notice or facts from which it can be legitimately inferred. The home office of the association was in Atlanta, Fulton county, and the special agent collected the premiums on the policy in Richmond county. It does not appear how often he made returns or remittances to the association of his collections, nor does it even appear when he made any return or remittance to it of a premium or premiums collected on this policy. As we have said, so far as the evidence disclosed, he was acting as the agent of the association only during the months of November and December, 1904. Perhaps it may be inferred from his testimony that he was acting as such agent somewhat longer than that, but, if so, there is nothing to show how long he collected premiums due on this policy.

Granting that the evidence in this case is

sufficient to show a course of dealing between the local and special agent of the insurance association and the insured, with respect to the payment of premiums on the policy, which was not only inconsistent with the terms of the policy, but had existed for a sufficient length of time to establish a custom between them as to the payment of the premiums, still the evidence fails to show that the acts of such agent in this particular were either authorized at the time or subsequently ratified by the association. Under the evidence, the association had the right to treat the policy as forfeited for the non-payment of the premiums due, respectively, November 21, November 28, and December 5, 1904; and, as the insured was in bad health when a tender sufficient to pay these three premiums and premiums for the two following weeks was made, the policy could not be revived without the consent of the insurer. See *Hutson v. Prudential Ins. Co.*, 122 Ga. 847, 50 S. E. 1000. It follows that the judge of the superior court erred in overruling the petition for certiorari.

Judgment reversed. All the Justices concurring.

(124 Ga. 318)

EVANS v. JOSEPHINE MILLS.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS.

The law governing this case having heretofore been settled by this court (46 S. E. 674, 119 Ga. 448), and the facts developed on the last trial affirmatively showing that the defendant was not chargeable with any negligence, it follows that the court below rightly granted a new trial on the ground that the finding in favor of the plaintiff was wholly unwarranted.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 973-976.]

2. EVIDENCE—OPINION EVIDENCE.

On the trial of a suit for damages on account of personal injuries sustained by the plaintiff (a little girl) by reason of having her arm caught in a machine, it was error to allow nonexpert witnesses to testify that the machine "was very dangerous and not at all safe for a child of tender years to be around." The facts should have been stated, and the jury allowed to form their own opinion as to whether the machine was dangerous.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2149, 2150.]

3. TRIAL—INSTRUCTIONS.

It was also error, in such a case, to charge the jury that the only question for them to consider in determining the liability of the defendant was whether the machine by which the plaintiff was injured was running or standing still at the time she touched it, just prior to receiving her injuries. Such a charge was tantamount to instructing the jury that a given state of facts would constitute negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1147.]

(Syllabus by the Court.)

Error from City Court of Polk County;
F. A. Irwin, Judge.

Action by Bettie Evans, by her next friend, against the Josephine Mills. Verdict for plaintiff. From an order granting a new trial, both parties bring error. Judgment on main bill of exceptions affirmed. On cross-bill reversed.

Seaborn & Barry and Wright, Janes & Hunt, for plaintiff in error. Bunn & Trawick, for defendant in error.

FISH, C. J. This was an action for damages on account of personal injuries, brought by Bettie Evans, a minor, by her next friend, against the Josephine Mills. The jury found for the plaintiff for \$5,000, the full amount sued for, and the defendant moved for a new trial on numerous grounds. A new trial was granted on the grounds, as stated in the judge's order, "that it appears from the undisputed evidence that the plaintiff was, at the time of the accident, out of the line of her duty where she was employed to be; and it further failing to appear from any evidence that the co-employé [who set in motion the machine through the operation of which the plaintiff was injured] knew of her presence at the time the machine was started." The remaining grounds of the motion were expressly overruled. The plaintiff excepted to the grant of a new trial, and the defendant filed a cross-bill of exceptions in which it complained, in effect, that the court erred in not sustaining its motion for a new trial in its entirety.

1. A substantial statement of the essential facts of this case will be found in the report preceding the opinion of Mr. Justice Lamar, delivered when the case was here before. *Evans v. Josephine Mills*, 119 Ga. 448, 46 S. E. 674. We have no hesitation in affirming the judgment on the main bill of exceptions; for, viewing the evidence in the light most favorable to the plaintiff, it does not appear that the defendant was chargeable with any act of negligence. The plaintiff and another of the defendant's employés, Minnie Sanders, were children. Neither of them was employed to operate the mangle; the starting of which caused the injury. They went to the mangle without the knowledge of any of the defendant's officers or agents in charge of its mill, and while there the plaintiff put her finger on the rollers for the purpose of ascertaining whether they were hot. According to her testimony, just as she did so Minnie Sanders, who was standing at the other end of the machine, started it in motion and it caught the plaintiff's arm, seriously mashing the same. The plaintiff's testimony does not disclose that Minnie Sanders could have seen her put her fingers on the rollers or had any reason to apprehend that she might do so. In this connection the plaintiff testified that she could see only the head and neck and top of the shoulders of Minnie Sanders, and that she supposed Minnie Sanders could only see her head and shoulders, and not her hands. Under these facts and circumstances, a ver-

dict in favor of the defendant was demanded. When the case was here before, it was ruled (119 Ga. 452, 46 S. E. 676) that the plaintiff could not recover unless the master, or "some one for whose act he was responsible," was negligent. The judgment was reversed, with direction that the case be submitted to the jury on the sole question of whether or not the co-employé who started the machine was negligent; it appearing from the evidence adduced at the trial then under review that this co-employé, Minnie Sanders, was one of the three operatives whose duty it was to run the mangle. On the last trial it affirmatively appeared that Minnie Sanders had nothing to do with the operation of the machine, but, as above stated, that both she and the plaintiff were away from their posts of duty without either the assent or knowledge of any of the officials or supervising agents in charge of the mill. Had the defendant assigned to Minnie Sanders the duty of operating the mangle, it would be no defense that she was a person so young and inexperienced as not to be capable of looking out for the safety of the plaintiff before starting the machine. Relatively to her, the defendant was not only bound to exercise ordinary care in the selection of fellow servants who were capable of properly operating its machinery and taking precautions against injury to her, but was responsible for their conduct while performing the duties assigned to them; since the doctrine that a master is not ordinarily liable for the negligence of a fellow servant does not apply to a case like the present, where the person injured is an infant of tender years. 119 Ga. 448, 449, 46 S. E. 674. Accordingly, it was incumbent on the defendant to place in charge of the mangle an employé not only competent to run the same, but to operate it in such a manner as not to negligently injure other employés of tender years who might come about it and occupy a position which would suggest the probability of their being hurt if the machine were started without warning. This was recognized as true when the case was remanded for another trial on the question whether or not the employé who started the mangle was negligent. The important development on the last hearing, viz., that Minnie Sanders had not been placed in charge of the machine and really had nothing to do with its operation, put an entirely different complexion upon this phase of the case, and cut off all right to a recovery by the plaintiff. The question of the defendant's liability should not therefore have been submitted to the jury, as his honor recognized in his order granting a new trial.

2. A consideration of the points raised by the cross-bill of exceptions discloses additional reasons for setting aside the finding in favor of the plaintiff. Some of the grounds of the motion for a new trial which were overruled by the judge were not urged in the brief of counsel before this court, and therefore will not be considered. Still other

grounds of the motion assign error upon portions of the judge's charge, which, while perhaps not entirely accurate, substantially set forth the law of the case as announced in the decision of this court when it was here before, and which do not show any good reason for reversing the judgment. In the interest of brevity these grounds will not be considered seriatim. It appears, however, that the court allowed a witness to testify that the machine which caused the plaintiff's injuries "was very dangerous, and not at all safe for a child of tender years to be around," and another to testify that she "considered the mangle dangerous with the cover off." This evidence was objected to, on the ground, among others, that the witnesses did not qualify as experts, and consequently their opinions as to the safety or danger of the machine were inadmissible. The admission of this evidence is assigned as error, and we consider the assignment a meritorious one. It was permissible for the nonexpert witnesses to describe the machine and set forth the method of its operation, leaving to the jury to say whether or not it was dangerous. It was not for them to venture an opinion on the subject, and the evidence should have been excluded on the proper objection being made. *Mayor v. Humphries*, 122 Ga. 800, 50 S. E. 986 (2).

3. Error is also assigned upon the following charge of the court: "I charge you, gentlemen, that the only question for you to consider in determining the liability of the defendant in this case is that of whether the press or mangle was running or standing still when [the plaintiff] went to it and put her hand or finger on the machine." We are clear that this charge was error. It was tantamount to a direct instruction that a given state of facts would constitute negligence and render the defendant liable; and, as the state of facts mentioned did not constitute negligence per se, the charge was entirely unauthorized. It is too well settled to need citation of authority that the jury is the sole judge of what constitutes negligence, save only in those cases where the law itself, in express terms or by necessary implication, declares given acts to be negligent. This ground of the motion for a new trial should not have been overruled.

Judgment on main bill of exceptions affirmed; on cross-bill reversed. All the Justices concurring, except BECK, J., not presiding.

(124 Ga. 365)

CITY COUNCIL OF AUGUSTA v. MARKS.
(Supreme Court of Georgia. Nov. 20, 1905.)

1. PLEADING — DECLARATION — ALLEGATIONS OF TIME.

A declaration must aver a time when every material traversable fact alleged in it transpired. If it fail to do so, it is subject to special demurrer on that ground.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 39.]

2. NUISANCE—ACTION FOR DAMAGES—LIMITATIONS.

Although a suit for the creation of a nuisance may be barred by the statute of limitations, yet if the nuisance be of a continuing character, which can and should be abated, suit may be brought for damages arising from its maintenance.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1786; vol. 37, Cent. Dig. Nuisance, §§ 41, 111.]

3. MUNICIPAL CORPORATIONS—SEWERS—ACTION FOR DAMAGES—DECLARATION.

Where a declaration alleged that a municipal corporation built through the lot of the plaintiff a sewer which was constructed to carry off waste water, but which was used also for the carrying of filth, sewage, and fecal matter, and that by reason of the existence of the sewer on his property and the maintenance of a "dumping station" or place for the discharge of such sewage near his residence he has been damaged, on special demurrer he should have been required to allege when the sewer was constructed and for what length of time the nuisance had been maintained during his ownership of the property, causing the damage sued for.

4. SAME—ALLEGATIONS OF DEMAND.

Where an action for damages is brought against a municipal corporation, the declaration must allege a substantial compliance with the act of 1899, which requires persons having claims for money damages against a city to present the same for adjustment before bringing suit; but it is not necessary to annex to the declaration an exact copy of such written demand.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1715, 1797.]

5. SAME—DEMURRER—QUESTIONS RAISED.

The demurrer in this case does not raise the question of the sufficiency of the demand made, but is based upon the ground that a copy of the demand is not annexed to the petition, and the defendant, therefore, cannot state whether the petition and the demand correspond.

6. NUISANCE—ACTION FOR DAMAGES—DECLARATION—VALUE OF PROPERTY BEFORE INJURY.

Where a declaration alleged that the market value of a lot belonging to the plaintiff had been depreciated in the sum of \$3,500 by reason of a nuisance created and maintained by the defendant, such an allegation was subject to special demurrer, on the ground that it did not state what was the value of the lot before the injury.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 407.]

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by D. W. Marks, Jr., against the city council of Augusta. There was judgment for plaintiff, and defendant brings error. Reversed.

David W. Marks, Jr., brought an action for damages against the city council of Augusta. He alleged, that he was the owner of a lot bounded on one side by the Augusta canal, which was owned and operated by the defendant; that the defendant had caused to be built through his lot a large drain sewer, emptying immediately south of his lot and within a few feet of the windows of his

dwelling; that it was constructed for a drain to carry off waste water, but the city used it not only for that purpose, but also to receive fecal matter and filth, which is thus carried through his lot and discharged very near his residence, generating noxious gases, vile stenches, and germs of disease; that this is a continuing nuisance and "by reason of the existence of said sewer on the property of your petitioner, and the maintenance by the city council of Augusta of a dumping station for its contents immediately against the property of your petitioner," the market value of his lot has been depreciated in the sum of \$3,500, and the health of his family has been greatly impaired, and he has been forced repeatedly to close up his home and find another place of residence, to his damage in the sum of \$1,500; that 30 days before filing this suit he petitioned the city council in writing to abate the nuisance, and called to their attention the fact that he had been damaged in the sum of \$5,000, but to this petition they made no response. The defendant demurred to the declaration; the demurrer was overruled, and the defendant excepted.

C. Henry Cohen, for plaintiff in error.
F. W. Capers, Pierce Bros., and Chas. P. Pressley, for defendant in error.

LUMPKIN, J. (after stating the facts). If by reason of a trespass upon realty it has been so injured as to render it permanently useless and valueless to the owner, he should recover the damages thus occasioned in a single action. Thus where a petition alleged that by the erection and maintenance of a dam certain land of the plaintiff and the timber thereon had been rendered worthless and of no value, and a recovery was had, the plaintiff could not maintain against the defendant another action again alleging the same facts as to the injuries sustained and their cause. *Clark v. Lanier*, 104 Ga. 184, 30 S. E. 741; *Allen v. Macon R. Co.*, 107 Ga. 839, 33 S. E. 696. But if the nuisance was of such a character as could be abated and terminate the injury, the plaintiff would not be limited to a single action resulting from its creation, but might sue for injuries resulting from its maintenance. In that event, if he so desired, he might bring successive suits for damages resulting up to the time of bringing each suit, provided they were not covered by a former action, and were within the statute of limitations. *Massengale v. Atlanta*, 113 Ga. 966, 39 S. E. 578; *Southern Ry. Co. v. Cook*, 117 Ga. 286, 43 S. E. 697; *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; *Southern Railway Co. v. Morris*, 119 Ga. 234, 46 S. E. 85. Although the nuisance may have been created more than four years before the action was brought, if it be maintained as a continuing nuisance, this is a renewal of the wrong, and therefore actionable. *Reld v.*

Atlanta, 73 Ga. 523; *Smith v. Atlanta*, 75 Ga. 110. Under the allegations of the declaration in the present case, whether or not the sewer was constructed through the plaintiff's lot more than four years before the action was brought, if the defendant maintained a continuing nuisance by using it for sewage, fecal matter, and filth, instead of merely for waste water, the plaintiff could sue for damages resulting therefrom.

It is contended that an alienee could not sue for damages accruing while the property was owned by the alienor. This is true, but "the alienee of a person owning the property injured may sue for the continuance of the nuisance." Civ. Code, § 3862. It does not appear from the declaration that there has been any alienation since the nuisance began. The defendant, however, is entitled to be put on reasonable notice as to what is claimed by the plaintiff. The declaration alleges that the sewer was built through the lot of the plaintiff, that it had been and is being maintained as a continuing nuisance discharging filth, excrement, and foul matter near his house; that by reason of the "existence of said sewer and said dumping station" the health of his family has been greatly impaired, and he has been forced repeatedly to close up his home and find another place of residence; that the market value of his property has depreciated in the sum of \$3,500, and that his total damages aggregate \$5,000. Certainly the defendant is entitled to know when the sewer was constructed, and for how long a time the plaintiff claims that he has been receiving the continuing injuries alleged by him, affecting the health of his family and damaging the lot as a place of residence. In *Bond v. Central Bank*, 2 Ga. 100, it was said: The writ "must allege all the circumstances necessary for the support of the action, * * * and the time and place, with such precision, certainty, and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal defence." In *Kemp v. Central Ry. Co.*, 122 Ga. 559, 50 S. E. 465, it was said: "The more liberal the law in the allowance of amendments, and the less the necessity for formalities in pleading, the greater the right of the defendant by special demurrer to call for a full statement of the facts out of which the plaintiff's cause of action arises."

The act of 1899 (Acts 1899, p. 74) declares that no person having a claim for money damages against any municipal corporation on account of injuries to person or property shall bring suit at law or in equity against such corporation for the same time without first presenting in writing such claim to the governing authority of said municipality for adjustment, "stating the time, place, and extent of such injury, as nearly as practicable, and the negligence which caused the same; and no suit shall be entertained by

the courts against such municipality until the cause of action therein" has so been presented. Thirty days are allowed the corporation to act upon the claim. A declaration based on such a cause of action must allege a substantial compliance with the act. But it is not necessary to annex a copy of the demand. *Saunders v. Fitzgerald*, 113 Ga. 619, 38 S. E. 978; *City of Columbus v. McDaniel*, 117 Ga. 823, 45 S. E. 59. The ground of demurrer referring to this subject is because "said petition has not annexed to it a copy of the petition filed with the said city council of Augusta, in accordance with the act of December 20, 1899; * * * and that this defendant, not having said petition to said city council of Augusta annexed to this suit, cannot state whether the same grounds alleged in the petition to council appear in this action, nor whether the time, or place, or extent of the injury correspond." This ground does not raise the question as to whether the allegations in regard to the demand are sufficient, but merely whether a copy of the demand should not have been attached to the declaration so that the defendant might compare it with the allegations. It being unnecessary to attach a copy, as stated above, this ground was properly overruled.

An allegation that the market value of plaintiff's property had been depreciated in the sum of \$3,500 was subject to special demurrer. The defendant was entitled to know what was claimed to have been its value before the injury was done, and the ground of the demurrer raising this point should have been sustained. The general demurrer was properly overruled. Some of the grounds of the special demurrer should have been sustained, as indicated in this opinion.

Judgment reversed. All the Justices concurring.

(124 Ga. 371)

STERLING ELECTRIC CO. et al. v. AUGUSTA TELEPHONE & ELECTRIC CO. et al.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. PLEADINGS—AMENDMENT—ADJUSTMENT TO AUDITOR'S REPORT.

Where an issue was made before an auditor, evidence introduced upon it, and the report of the auditor found in regard to it, there was no error in allowing an amendment of the pleadings adjusting the prayer for equitable relief to the finding of the auditor, but not introducing any new or distinct issue.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 603, 605.]

2. CORPORATIONS—ACTION AGAINST STOCKHOLDERS—EVIDENCE.

Under the special facts of the case, this court will not reverse the judgment of the trial court in refusing to decree that there was a liability on the part of the stockholders which was an asset to which the creditors were entitled to look for payment.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1156.]

3. RECEIVERS — ACTIONS BY DISCRETION OF COURT.

A court of equity is not bound, as a matter of course, to direct its receiver to bring suit upon a note or open account appearing upon the books in his hands, but is invested with some discretion in determining whether such a suit would be profitable or likely to result in benefit or loss to the estate. Thus, if the person against whom such claim appears is insolvent, the court is not required to diminish the assets by the incurring of useless costs.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 162, 197.]

4. SAME—DIRECTIONS OF COURT.

Where it appeared that the books in the hands of a receiver indicated an indebtedness by a certain person, and the court directed the receiver to bring suit upon such account or claim, "if upon investigation it appears that there is a reasonable prospect of realizing on any judgment that may be obtained," and where exception was taken to such direction, but it was not shown what evidence was before the court touching the nature of the claim, or the solvency of the alleged debtor, or the probability of realizing on any judgment which might be obtained, this court will not reverse the direction so given.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; Austin Branch, Judge pro hac.

Action by P. H. Langdon, creditor of the Augusta Telephone & Electric Company, and others, against the Sterling Electric Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

P. H. Langdon, as a creditor of the Augusta Telephone & Electric Company, on behalf of himself and all other creditors of the defendant who might become parties, filed an equitable petition against that company, alleging that it had issued two series of bonds secured respectively by a first and second mortgage, plaintiff being the holder of bonds in each series; that it had defaulted, was insolvent, and was threatened with numerous suits, levies, and seizures of parts of its property, which would dismember it and cause loss. He prayed for a foreclosure of the mortgages, that all creditors be enjoined from suing except in this proceeding, and for general relief. Various creditors intervened. The plaintiffs in error were unsecured creditors who became parties plaintiff. Some of the other interveners claimed liens or priorities. The case was referred to an auditor, and among other things he was directed to report the assets and indebtedness of the defendant. Pending the hearing, Weed, an intervener, amended his intervention and alleged that certain stock had been issued as a bonus, without payment therefor, that the unpaid amounts of such stock were subject to a call or assessment, and were assets of the company and should be collected for creditors. He prayed that the receiver be required to institute suit against them, and also to institute suit upon a certain claim alleged to exist against one D. P. Langdon. The auditor in his report included as an asset

the claim against Langdon as appearing prima facie to be due; but, under the evidence, held there was no liability on the part of the holders of the stock, and declined to include such a liability as an asset. Exceptions were filed by Weed on this branch of the case, and by others on other points. The report was filed August 26, 1904. On December 30th, following, the plaintiffs in error filed what they termed an amendment to their interventions, in which they alleged that the stockholders had never paid for stock issued to them, and prayed that the receiver be directed to collect the unpaid subscriptions, and "for such relief and for such further and other directions as may be proper under the circumstances." The original plaintiff filed an amendment to his pleadings, based upon the finding of the auditor, and asking relief in regard to a matter found in the auditor's report. This was demurred to by the plaintiffs in error, but the demurrer was overruled. On January 28th the plaintiffs in error amended their pleadings in reference to declaring a liability on the part of the holders of common stock and in regard to having suit brought on the claim against Langdon. The case coming on for a final decree, the presiding judge entered a decree in which he recites that, "it appearing that all the exceptions to the auditor's report have been withdrawn and dismissed by the parties making them, except the exceptions filed by John W. Weed, and it further appearing that all the parties in interest, as hereinafter set out, are before the court after due notice," he overrules the exceptions of Weed and the prayers of his supplementary petition, except as to the institution of suit against Langdon, "against whom the receiver is ordered to bring suit, if upon investigation it appears that there is a reasonable prospect of realizing on any judgment that may be obtained." The report of the auditor was confirmed, and a decree entered accordingly. Weed did not except, but the plaintiffs in error filed a bill of exceptions alleging three errors: First, because the court overruled their demurrer to the amendment of the original petition; second, because he refused to hold that there was a liability by the stockholders to subsequent creditors, and they contended that this was an asset to which they were entitled to look for payment; third, because, in authorizing suit by the receiver against Langdon, he limited it by the use of the words, "if upon investigation it appears that there is a reasonable prospect of realizing on any judgment that may be obtained."

P. C. O'Gorman, for plaintiffs in error.
Jas. B. & Bryan Cumming and C. Henry Cohen, for defendants in error.

LUMPKIN, J. (after stating the facts).
1. There was no error in overruling the de-

murrer to the amendment of the plaintiff. The matter dealt with in it had been before the auditor, evidence had been introduced on the subject, and he had made a report touching it. The amendment simply adjusted the plaintiff's pleadings and prayer to meet the facts which had thus been considered and passed on. *Cureton v. Cureton*, 120 Ga. 560, 48 S. E. 162 (2).

2. The plaintiffs in error were parties before the auditor. Evidence was introduced on the subject of the liability of the stockholders, and whether it was an asset of the company. No one except Weed seems to have objected to the auditor's making an adjudication on the subject of the liability. His counsel contended that it was not within the province of the auditor to pass on the question of liability, but to report these claims as *prima facie* assets. The auditor construed the order of reference and his duty differently. So far as appears in the record, the plaintiffs in error never filed any exceptions to the auditor's report. In the bill of exceptions it was recited: "That at this time, December 20, 1904, all of the parties who had filed exceptions to the report withdrew the same, except John W. Weed, on which day the [plaintiffs in error] joined in his exceptions by their counsel in open court and were allowed to do so by the court." It is not stated that they filed any exception themselves or took any order on the subject, and we presume that this meant no more than that counsel for these parties assisted in urging the exceptions of Weed. We do not know how they could have become parties to exceptions filed by another person, after the time for excepting had passed. In the absence of anything in the record to show that this was done, we put upon the language the construction referred to above, which represents all that could lawfully have been done by the plaintiffs in error at that time. The presiding judge recited in his final decree that all exceptions were withdrawn or dismissed except those of Weed, which were overruled. Plaintiffs in error appear to have largely rested their proceeding upon that of Weed, and, when he failed to except, they have undertaken to do so. It is true that they filed an amendment somewhat similar to that of Weed, after the auditor had filed his report, alleging that they had never had the opportunity to present this question in a court of law since the facts came to their knowledge. But inasmuch as evidence was introduced before the auditor and he reported on the subject, it is not easy to see how the plaintiffs in error or their counsel could have escaped knowing the facts. If they rested upon the proceeding of Weed to hold the stockholders liable,

the auditor found that he was notified, before he purchased the bonds, that the company would make such a transaction, and that he must be assumed to have assented to it. Generally, where it is desired that a receiver shall bring suits, application is made to the court of his appointment, setting out the grounds for suit, and upon proper showing the court passes an order giving direction to the receiver. It is not altogether usual to have the question whether there is a liability on the part of stockholders, which should be enforced by a suit to be brought by the receiver, finally passed on in limine by an auditor, under an intervention filed with him, before actual suit by the receiver or by the parties, and without prayer for a judgment against any special persons, and to have the court thus decree that a liability exists, as plaintiffs in error seem to desire. Their exception is to a refusal to so hold. Some of the holders of the stock were themselves interveners on other grounds, and were thus before the auditor, while others were not. Neither by invoking an amendment of the order of reference or an order construing it, and giving direction to the auditor, nor by exception to the auditor's report, have these unsecured creditors who brought the case to this court raised the question in the trial court. The parties who filed the bill of exceptions seem to have taken their chances upon this mode of procedure, and we are not prepared to say that as to them the court erred in the ruling which he made. We do not wish to be understood as in any manner modifying or changing the ruling made in *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494. What we hold is that, under the special facts of this case, the plaintiffs in error are not entitled to a reversal.

3. We do not know what evidence was before the presiding judge upon the subject of Langdon, or the nature of the claim against him, or whether he was solvent or insolvent, or as to the probability of realizing on a judgment against him. In regard to directing the receiver to bring suit on promissory notes or open accounts, the judge has some right to look to the interest of the estate. He is not bound to direct the receiver to involve the estate in heavy costs or expenses in suing insolvent or worthless claims. The plaintiffs in error do not appear to have shown whether there was a probability of realizing on the Langdon claim, or whether they were willing to save the estate from costs should the suit be unremunerative. The court gave the receiver some discretion in judging of the matter, and we cannot say that he erred.

Judgment affirmed. All the Justices concurring.

(124 Ga. 518)

LIVELY et al. v. HUNTER.

(Supreme Court of Georgia. Dec. 21, 1905.)

INJUNCTION—MOTION TO DISSOLVE—DECREE.

On the hearing of a motion to dissolve and vacate a temporary injunction, the court is without jurisdiction to enter a final decree disposing of the main case on its merits.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 389, 400.]

(Syllabus by the Court.)

Error from Superior Court, Gwinett County; R. B. Russell, Judge.

Action by F. J. Hunter against C. P. and H. M. Lively. Judgment for plaintiff, and defendants bring error. Reversed.

A petition for injunction was filed by F. J. Hunter, as executor under the will of Mrs. M. V. Medlock, and as next friend of her minor children, to prevent C. P. and H. M. Lively from erecting a warehouse, to be used for the storage of fertilizers, within close proximity to certain dwellings belonging to the estate represented by the plaintiff. A restraining order was granted by the judge of the superior court, and October 15, 1904, was fixed as the date for the interlocutory hearing. On that day an order was passed postponing the hearing, at the request of the parties, till November 2d, that they might be afforded an opportunity to settle the controversy. On October 27th they signed articles wherein they agreed to submit to certain named arbitrators the question whether the "health or property of said plaintiffs" would be injured or damaged by the use of the warehouse contemplated by the defendants; the parties also stipulating that the award of the arbitrators, if favorable to the plaintiff, should be returned to and made the judgment of the superior court. On December 28th the arbitrators, after formal hearing of the matter at issue, found in favor of the plaintiff, and made their return to the superior court, and the judge passed an order directing the submission and award to be entered on the minutes. This order was passed at the March term, 1905, of that court, which was the appearance term of the proceeding for injunction. On March 6th C. P. and H. M. Lively filed a demurrer and an answer to the plaintiff's petition. At that term they also filed exceptions to the award of the arbitrators, to which exceptions the plaintiff interposed a demurrer. The hearing thereon was passed till the next term of the court, owing to the sickness of his counsel. On March 23d the defendants presented to the judge a written motion to dissolve the restraining order previously granted, and asked that he fix a day for a hearing on this motion. On the 27th of that month the judge passed an order, at chambers, calling upon the plaintiff to show cause before him on April 29th why the restraining order should not be vacated and dissolved, upon the motion of the defendants. On April

24th another order was passed, reciting that it was impossible to hear the motion at the time appointed, and directing that the hearing thereon take place on June 8, 1905. The parties appeared on the date last named, and the judge then undertook to deal, not only with the motion to dissolve the restraining order, but also with the issues raised by the demurrer and answer to the plaintiff's petition for injunction, and by the exceptions filed by the defendants to the award of the arbitrators, as well as by the demurrer to these exceptions which had been interposed by the plaintiff. After considering all of the questions thus presented his honor passed an order reciting that the demurrer to the exceptions taken to the award of the arbitrators was sustained, and the exceptions were stricken; that the award of the arbitrators was made the judgment of the court; and that the defendants were "perpetually enjoined from using the house in question for the storage of guano." In a bill of exceptions sued out in behalf of the defendants below, error is assigned upon this judgment.

D. K. Johnston, for plaintiffs in error.
T. M. Peebles, for defendant in error.

EVANS, J. (after stating the facts). The judgment complained of was rendered at the hearing fixed on motion of the defendants to dissolve an interlocutory injunction. The only question before the court on that hearing was the propriety of dissolving or vacating the restraining order in the main case, which was still pending. The main case was not before the court on its merits, and the court was without jurisdiction to enter a final decree disposing of it.

Judgment reversed. All the Justices concurring.

(124 Ga. 518)

SWORDS v. ROBERTSON et al.

(Supreme Court of Georgia. Dec. 21, 1905.)

NEW TRIAL—EVIDENCE—SUFFICIENCY.

The only complaint made is that the verdict was contrary to law and the evidence. There was evidence from which the jury were authorized to find the verdict which was returned, and it was not error to overrule the motion for a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 142-143.]

(Syllabus by the Court.)

Error from Superior Court, Walton County; R. B. Russell, Judge.

Action between Amy Swords and W. F. Robertson and others. From the judgment, Swords brings error. Affirmed.

T. W. Rucker, for plaintiff in error. Napier & Cox and F. C. Foster, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(53 W. Va. 537)

STATE v. WOODROW.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1906.)

1. WITNESSES — COMPETENCY — HUSBAND AND WIFE.

A wife is not a competent witness against her husband in a prosecution for crime.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 133, 139.]

2. SAME.

Quære, is a wife or husband a competent witness now against the other, in a prosecution for crime committed against such witness?

3. SAME—MURDER OF CHILD.

A wife is not a competent witness against her husband in a prosecution against him for the murder of his infant child, of the age of 14 months, though the same pistol ball killed the child and wounded the wife while the child was in her arms.

4. INDICTMENT—MOTION TO QUASH.

An indictment cannot be quashed because it rests in whole or part on incompetent evidence.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 488.]

5. CRIMINAL LAW—INSTRUCTIONS.

Better practice is to require instructions to be in writing; but the mere fact that an instruction is oral will not reverse.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3163.]

6. HOMICIDE—INSTRUCTIONS.

Refusal of an instruction, on a trial for murder, giving the findings in the power of the jury, including one of involuntary manslaughter, is not error, when no evidence in the case tends to show that degree of homicide. Such instruction should not be given.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 655.]

7. SAME—DEMONSTRATIVE EVIDENCE.

Evidence of experiment to test the capacity of a child to fire a pistol is admissible to repel evidence of one accused of murder, going to show that the child fired the pistol, causing the homicide.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 854.]

(Syllabus by the Court.)

Poffenbarger and Sanders, JJ., dissenting.

Error to Circuit Court, Mineral County.

William Woodrow was convicted of murder in the second degree, and brings error. Reversed.

Frank C. Reynolds, for plaintiff in error.
The Attorney General, Frank Lively, and O. A. Hood, for the State.

BRANNON, P. William Woodrow was indicted in Mineral county for the murder of his child, Ruth Elizabeth Woodrow, and was sentenced to the penitentiary for eight years upon a verdict of murder in the second degree. The deceased was a baby 14 months of age, and was in the arms of its mother, at her breast, when a pistol shot killed it, the ball passing through the baby's head and wounding the mother, according to her evidence. The accused offered a plea in abatement to quash the indictment, on the ground that his wife had been examined before the grand jury; but the plea was rejected. On

the trial the wife of the accused gave evidence at the instance of the state against her husband, over his protest. Was the wife a competent witness against him? Elliot on Evidence, vol. 2 § 736, states the law thus: "When the husband or wife was the defendant in a criminal prosecution, the other was, at common law, incompetent either for or against the accused. The marriage relation, however, must be a lawful one, or the rule generally has no application. And, if the offense was committed by husband or wife against the other, the injured party is usually a competent witness, either for or against the accused, both at common law and under the statutes." That late work of great practical value cites many authorities for its text. Bishop's New Crim. Procedure, vol. 1, § 1153, says that, "if personal violence is inflicted on the wife by the husband, she from necessity may, or, if required, must, testify to it in a criminal proceeding against him for the battery; and he may do the like if she beats him." This ancient rule of the common law is stated in all the books. The sole question in this case is: Does this case come within the exception to the rule; that is, was the prisoner's act of shooting the child a crime against the wife? It was not violence to her person. It was not a crime against her person corporeally. Such it has to be under this exception. It is true that there has been considerable difference of opinion as to what instances fall within this exception. Some cases hold that bodily violence to the wife is not the only case under the exception. For instance, cases of bigamy, and other cases, have been held to fall within the exception. The books must be resorted to for full discussion. It will be found that, though cases where no actual violence constituting assault and battery upon the wife have been held to fall within the reason of the exception, yet they are cases which directly affect the legal right of the wife, rights going along with her personality or person, as an individual separated from all other persons. However, I can safely say that the great bulk of American decision is that, to come within the exception, the case must be one of personal violence to the spouse. Bassett v. U. S., 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762; Baxter v. State (Tex. Cr. App.) 31 S. W. 394, 53 Am. St. Rep. 720; Crawford v. State (Wis.) 74 N. W. 537, 67 Am. St. Rep. 829; Commonwealth v. Sapp (Ky.) 14 S. W. 834, 29 Am. St. Rep. 406. And I repeat that those cases, like bigamy and others that do not actually involve violence to the person, which are held within the exception, are cases where the wrong is to the individual particularly and directly injured, by the crime for which the husband is prosecuted. Dill v. People (Colo. Sup.) 36 Pac. 229, 41 Am. St. Rep. 254. But the instances mentioned—I mean the cases—not requiring actual violence to persons are confined to a few states. The weight of authority is otherwise, requiring

personal violence or a restraint of liberty to the wife; restraint of liberty being a wrong to her person. *Bassett v. U. S.*, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762. The act must touch her person, or her personal individual right, as a person distinct and individualized from the balance of the community, to come under the exception spoken of. An enormous wrong this murder was to the mother in a moral point of view, in an emotional point of view, in a sentimental point of view, in a pathetic point of view, under emotions of the heart which move human beings, owing to the relation of mother and child. We are apt to consider this terrible crime as a greater one against the mother than to any other living human being. Still, in a physical point of view, the homicide did not touch the person of the wife, but was only a crime against her as one member of the community—I mean in the eye of the law. Remember that Woodrow was tried for killing the child, not for shooting his wife. On a trial for shooting his wife she could, under the exception stated, give evidence against her husband, and could prove, if material, not only the shooting of herself, but also the shooting of the child, as part of the *res gestæ*; but on his trial for killing the child the fact that the one ball did violence to both mother and child does not alter the case. The homicide of the child is one distinct crime; the shooting of the mother another distinct crime. The close connection of the two in time and circumstances does not blend the results of the ball, and make the killing of the child a personal or corporeal violence to the mother. To come under the exception the crime must be against the mother in a legal point of view. The rule of evidence as to *res gestæ* will not admit the wife as a witness. Under that rule the question is, not the competency of the witness proving the things done or said, but whether the things themselves are proper to go before the jury, even though proven by a competent witness; whereas here it is a question whether the witness is a proper one to prove the things done or said, admitting those things to be proper evidence, if deposed to by a competent witness.

Necessity, the want of another witness, is pleaded for the admission of the wife's evidence in this case. That was the parent of the common-law exception. But that exception may often arise and call as loudly as in this case. Suppose the husband should kill a grown child in the privacy of the home, there being no other witness of the fact but the wife; would this necessity admit her evidence? Suppose he would there kill the wife's grown sister or any one else; would she be competent? I say not. If there were other witnesses present, would she be competent? I suppose not, as the necessity would not then exist. Then, the evidence would be competent or incompetent according as there was, or was not, another witness than the wife. Though we concede that the necessity

meant by law in this instance is not merely necessity for some witness, but the necessity to protect the spouse, still that would not admit the wife's evidence in this case. It is suggested that tender age of the person injured, causing incapacity to give evidence, calls for the wife's evidence. Does it depend on age? If so, the wife's competency or incompetency would rest on the age of the person injured. If the husband should kill a man in the field or highway, none but the wife of the murderer being present, would she be a competent witness against her husband? Surely not. Yet the cry of justice would be as loud in that case as in the present case. The necessity would be just as great. The accidental circumstance that no eye saw the deed but that of wife and husband would, in such case, just as much create a necessity for the wife's evidence as in this case. The ancient rule of the common law, forbidding evidence of one spouse against the other, stands intact to-day. Our Code of 1899, in chapter 152, § 19, reads thus: "In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, at his or her own request, (but not otherwise) be a competent witness on such trial and examination. The wife or husband of the accused shall also, at the request of the accused, but not otherwise, be a competent witness on such trial and examination." The object of this statute, in its latter clause, was to make the wife or husband a competent witness for the other, at his or her request. It is an enabling statute, because before it came neither could use the evidence of the other. It enlarges the right of the accused by giving him or her the right to introduce his or her spouse as a witness, but it does not enlarge the right of the state. Before that statute the state could not introduce the wife against the husband, or the husband against the wife; neither can it do so since that statute. That statute does not touch this case. Whether it has, by the words "but not otherwise," abolished the exception which the common law made to the rule excluding wife and husband—that is, the exception allowing them to give evidence of a crime done by one to the other—we do not say, because it does not arise in this case. If we viewed this instance as within the common-law exception, then we would have to decide whether the statute changed the common-law exception and made the wife incompetent. It may with force be said that the statute is very broad; that it makes one, and only one, exception to the rule of the incompetency of the spouse; that it only allows one to use the other as a witness; that the words "but not otherwise" are an affirmative enactment, since they actually prohibit such evidence, except in one, and only one, case. Reasons which may have operated in the Legislature for branding such evidence as incompetent wholly can be suggested. In many instances the one spouse wants

to get rid of the other, and may give false testimony to accomplish it. Also, it would in some cases breed animosity and marital dissension. The Legislature may have designed to utterly exclude its use in behalf of the state. If such was its design, it could scarcely have used more apt language than those prohibitory words. They are strong prohibitory words. Therefore we conclude that the evidence of Woodrow's wife was improperly used against him.

Next, as to the plea in abatement: The law is thus stated in 17 Am. & Eng. Ency. L. (2d Ed.) 1288: "The court will not look behind the return of the grand jury to set aside an indictment because that body received improper evidence or the testimony of witnesses who were not competent to testify." Many cases there cited support this view. The Texas court said, in a case where a wife had been examined as a witness against her husband by a grand jury: "We cannot look behind the return of the grand jury and set aside an indictment because improper evidence has been received." *Dockery v. State* (Tex. Cr. App.) 84 S. W. 281. Where the accused was examined by the grand jury, it was held not to invalidate the indictment. *Mencheca v. State* (Tex. Cr. App.) 28 S. W. 203. Some of the cases cited by the *Encyclopædia* for its text above quoted are cases where the wife was before the grand jury, giving evidence against her husband. *State v. Tucker*, 20 Iowa, 508; *State v. Boyd* (S. C.) 27 Am. Dec. 376; *Dockery v. State*, just cited. There are authorities to the contrary. In the wilderness of conflicting cases a court in these days can, at best, only select that line seeming to it the better one. Where is the better reason? In the first place, my own experience as a practitioner and judge tells me that it is not usual, under practice in this state, to challenge an indictment on either the ground of want of sufficient evidence to sustain it or even the incompetency of evidence before the grand jury. It would be a practice of great inconvenience. Very plainly a court cannot go into the question of the weight and sufficiency of the evidence to sustain the indictment, and thus review the action of the grand jury. That would be for the court to usurp the office of the grand jury, and also to usurp the office of the petit jury, because the court is not the judge of the weight of the evidence, but the grand jury in the first instance is, and finally the petit jury. When once an indictment is returned a true bill, it has legal force. You cannot go behind the return. It is not void, and it only remains to try its truth. Where there is some legal evidence, though light, before the grand jury, the indictment cannot be quashed. *Wharton, Crim. L. § 508*; *State v. Logan*, 1 Nev. 509; *State v. Morris*, 36 Iowa, 272.

But how is it when the question is not one of sufficiency of evidence, but where incompetent evidence has been heard by the

grand jury? The indictment is not void.

Often incompetent evidence is heard by grand juries, not merely incompetent matter, but incompetent witnesses. It would be an inconvenient and dangerous practice to institute preliminary investigation to ascertain what incompetent evidence was before the grand jury, how much good and how much bad evidence, and what its weight. Where there is any competent evidence before the grand jury, it cannot be quashed, though there may have been some incompetent evidence of witnesses, say the authorities just cited. This proposition would hardly seem to require authority. The court cannot say on what the grand jury found its indictment, or how far the incompetent evidence operated, or on what members it operated. You cannot call each member and ascertain on what evidence he formed judgment. Next, take the case where the indictment rests alone on evidence of an incompetent witness. In such cases some authorities say that the indictment must go, but, even here, why shall we not say that on the trial the state may furnish other evidence ample to sustain its indictment which was not before the grand jury? The indictment is only a charge, to be sustained by competent evidence on the trial. So the court said in *State v. Dayton*, 53 Am. Dec. 270. The accused can have the evidence, if incompetent, excluded on the trial. True, it is hard on him to be put to trial upon an indictment resting alone on incompetent evidence, but grand juries are not good judges of competency, and oftentimes do not consult the court. It would be very bad practice, endless inconvenience, to have a full preliminary trial of competence of evidence before the grand jury in many cases. How far would the practice go? Does the inconvenience to the accused justify the institution of such a practice? Are not his rights fully vindicated by his right to exclude improper evidence on the trial? Therefore we conclude that the plea in abatement was properly rejected.

The prisoner testified that his little boy, less than three years of age, often played with the pistol which killed the baby, and that on that fateful day he was playing with the pistol and discharged it, and thus the baby was killed. The state, to repel this defense, to meet this evidence, gave evidence tending to show that the little boy had not capacity to fire the pistol. This evidence was that, when the hammer of the pistol had been pulled back by a witness, the little boy's finger was placed upon the trigger, and he was asked to pull the trigger and throw the hammer, but was unable to do so. The evidence was also that the little boy was asked to pull back the hammer, and was unable to do so. This evidence was proper to go before the jury to say whether this defense of the prisoner was true or false. It is suggested that the little boy may not have

exerted his full strength to lift the hammer or pull the trigger. This may, or may not, be so. It does not appear that the child refused to try, or did not try, to do so, but the evidence fairly shows that he did make the effort. Whether he used all his strength we cannot—we need not—say, since that is a question of probability or improbability before the jury, not a question of the admissibility of the evidence. In short, its weight was for the jury.

Error is assigned because the court refused to allow a witness to prove that the prisoner told him at a point a quarter of a mile from the place of the homicide, when going for a doctor, just after leaving the spot, how the shooting took place. It does not distinctly appear that the declaration was close enough in time or place to the transaction to be part of the *res gestæ*. Where the declaration is merely a narrative of a past occurrence, though made ever so soon after the occurrence, it ought not to be received in evidence, as it is no part of the *res gestæ*. *Corder v. Talbott*, 14 W. Va. 277; *Hawker v. Railroad*, 15 W. Va. 628, 36 Am. Rep. 825. The proposed evidence was merely the prisoner's story, not on the spot of the transaction, reflecting its truth, but after he had had time to make up the story. Furthermore, it does not appear what the witness would give in evidence as to how the shooting took place. What did Woodrow say to him as to how it took place? It does not appear. This is another reason for holding that the rejection of the evidence constitutes no error. *Sesler v. Coal Co.*, 51 W. Va. 318, 41 S. E. 216; *Greever v. Bank*, 99 Va. 547, 39 S. E. 159; *Kay v. Glade*, 47 W. Va. 468, 35 S. E. 973.

The defendant excepted to the refusal of an instruction saying that the jury could find a verdict of not guilty, or of involuntary manslaughter, or of manslaughter, or of murder in the second degree, or of murder in the first degree, with a recommendation of confinement in the penitentiary, or of murder in the first degree. This instruction commenced with a verdict of not guilty. The usual course is to commence with murder in the first degree. Perhaps the court thought that the object was to give undue prominence to the verdict of not guilty. However, we do not see that this fact would render the written instruction objectionable. But the instruction is bad, because it introduced into the case the degree of involuntary manslaughter, when no evidence whatever tended to show involuntary manslaughter. If the prisoner killed the child, the law would presume that the act was *prima facie* murder in the second degree. Involuntary manslaughter had nothing to do with the case under the evidence. Many cases say that an instruction should not be given when no evidence fits it to the case, for the reason that it introduces before the jury a question not presented by the evidence. It is a wrong to the state, and

often results in a defeat of justice. There is nothing in the evidence of this case to show facts entering into the legal definition of involuntary manslaughter.

Therefore we reverse the judgment, set aside the verdict, and grant a new trial, and remand the case for such new trial.

POFFENBARGER, J. (dissenting). The judgment is reversed because of the admission of the testimony of the wife of the accused on his trial. On the question of its admissibility I am compelled to differ from the majority of the court, though I am in perfect accord with all their rulings as to other phases of the case. Therefore I would affirm the judgment.

By the common law, husband and wife were not competent witnesses either for or against each other. This was the general rule. There was an exception to it, first declared in *Lord Audley's Case*, 3 State Trials, 402; *Rex v. Aryre*, 1 Str. 633; *Lady Lawley's Case*, B. M. P. 287; *Rex v. Mead*, Burr. 542; *Rex v. Bowes*, 1 T. R. 698; *Jagger's Case*, East's P. C. 454; *Rex v. Woodcock*, Leach C. C. L. 463. The existence of this exception to the general rule of the common law is generally admitted by the courts of this country. *People v. Green*, 1 Denio, 614; *State v. Hussey*, 44 N. C. 123; *Whipp v. State*, 34 Ohio St. 87, 32 Am. Rep. 359; *State v. Davis*, 3 Brev. 3, 5 Am. Dec. 529; *Goodwin v. State*, 114 Wis. 318, 90 N. W. 170; *Davis v. Commonwealth*, 99 Va. 838, 38 S. E. 191. In the case last cited the rule is stated as follows: "At common law the wife was a competent witness to testify against her husband in relation to offenses alleged to have been committed by him upon her." *Starkie on Evidence*, vol. 2 (part 1) 554, says: "The wife is a witness ex necessitate on a charge against her husband of violence committed on her person; so the dying declarations of the wife against her husband are admissible in the case of murder." For the state, it is insisted that, under this exception to the common-law rule, the evidence of the wife is admissible under the circumstances of this case.

Before entering upon an inquiry as to this, it is necessary to determine a preliminary question, namely, whether this exception exists in the law of this state. It does, unless taken away by some statutory provision. Section 19 of chapter 152 of the Code of 1899 is the only provision which seems to have any bearing upon the question. It reads as follows: "In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, at his or her own request (but not otherwise) be a competent witness on such trial and examination. The wife or husband of the accused shall also, at the request of the accused, but not otherwise, be a competent witness on such trial and examination. But a failure to make such request shall not create any pre-

sumption against him or her, nor shall any reference be made to nor comment upon such failure by any one during the progress of the trial in the hearing of the jury." The meaning of this statute is plain. It was intended to modify the common law in respect to two rules entirely different from the one now under consideration. By that law the accused person was not permitted to testify at all. No matter what his condition in life, his mouth was closed as regarded testimony. He was only permitted to address to the court a statement, unsworn, and without the aid of counsel. *State v. Taylor* (W. Va.) 50 S. E. 247; *Cooley's Cons. Lim.* 442-449. The primary object of this statute was to enable the witness to testify in his own behalf, but in doing so the Legislature took care not to violate that provision of the Constitution which denies to any court power to compel a person charged with crime to testify against himself. To this end the court is required to allow such testimony only upon the request of the prisoner. To make this emphatic and plain, the Legislature said he should, at his own request, but not otherwise, be admitted as a competent witness. Then the privilege was further extended, so as to permit the wife of the accused, at his request, but not otherwise, to become a witness. This part of the statute relates to the general rule of the common law which prohibited the wife from testifying for or against the husband. It is an enabling statute, passed for the purpose of modifying two common-law rules: First, the one which prevents an accused person from testifying in his own behalf; and, second, the one which forbids the husband or wife of the accused from testifying on his trial. Confessedly its object and purpose is to remove and destroy restrictions upon the competency of witnesses, not to add to them in any respect. This has been the policy and evolutionary tendency of the law of evidence, and of all legislation on the subject. Incompetency by reason of interest has been almost wholly done away with by statute. In most of the states of the Union the accused is now permitted to testify upon his trial, and to have the benefit of the testimony of his spouse. Prior to the enactment of this statute in 1881 the accused was required to remain dumb while the evidence of the state was detailed against him. By the act passed in that year (Acts 1881, p. 277, c. 29) the privilege of testifying was extended to him, if he should request it, and that act contained the cautionary phrase "but not otherwise." Plainly this did not extend beyond the rule which disqualified the accused from testifying. No reference to his testimony on the trial of his wife, or to her testimony on his trial, is found in that act. There is no peg here upon which anybody can hang the contention that the words "but not otherwise" signify legislative intent to prevent the husband and wife from testifying against each other, when, by the common law, they are

entitled to do so; for there is no reference to the husband or wife. It applies to the accused alone, but the double phrase "at his own request, but not otherwise" was used, nevertheless, just as it appears now in section 19 of chapter 152 of the Code of 1899. What possible reason could have existed for adding the words "but not otherwise" in that statute? Plainly nothing more than emphasis. The title of the act, "To make persons charged with crime competent witnesses in their own behalf," shows that it was. By the act of 1882 (Acts 1882, p. 494, c. 151) the substance of the act of 1881 was re-enacted into section 19 of chapter 152 of the Code of 1899 by way of amendment, and an addition was made to it, allowing the wife or husband, at the request of the accused, but not otherwise, to be a competent witness on such trial. As it is perfectly plain that the words "but not otherwise" were used in the act of 1881 merely for emphasis, it is reasonably to be presumed that they have no other signification in the act of 1882. It simply follows the language of the previous act. That phrase received legislative construction before it was inserted in the act of 1882, and therefore, under the rule that all acts in pari materia are to be considered together in ascertaining the legislative intent, it is clear that the purpose was merely to affect the two common-law rules of evidence to which reference has been made. The competency of such witnesses is made to depend upon the request of the accused. This implies intent only to make them competent when their testimony is desired by the accused, but not admissible, and to alter the common-law rules in so far only as they denied to the accused the benefit of such testimony when he might desire it. It cannot be supposed that the Legislature contemplated any such desire when the crime charged has been perpetrated upon the husband or wife of the accused. Cases of this class were governed by a rule different from the two rules which precluded such testimony when desired by the accused. It is termed by the courts and text-writers an exception to the general rule, but in itself it is a rule applicable to a special case, and legislation which is plainly applicable to other rules, and designed to modify them, ought not to be extended to this one by mere inference. Statutes which are in derogation of the common law are to be strictly construed. Moreover, it is well settled that in construing a statute the court must keep in view the evil which the Legislature sought to remedy. What that evil was in this instance is plainly apparent from the language used. By this process of reasoning I reach the conclusion that this statute works no change in the common-law exception which permits the wife and husband to testify against each other on criminal trials for offenses by one against the other.

Whether the exception is broad enough to make the wife a competent witness against

the husband, under the circumstances of this case, involves a consideration of the reason or principle upon which that exception stands. All the authorities say it arises ex necessitate rei. What sort of necessity is its basis? In *Bentley v. Cook*, 3 Doug. 422, Lord Mansfield said "that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury." In *Soule's Case*, 5 Greenl. 407, Mellen, C. J., said: "From the general rule some exceptions have been established, founded on the necessity of the case. For, instance, if a wife could not be admitted to testify against the husband as to threatened or executed violence and abuse upon her person, he could play the tyrant and brute at his pleasure, and with perfect security beat, wound, and torture her at times and in places when and where no witnesses could be present nor assistance be obtained." Wigmore on Evidence, § 2339, says: "That was commonly placed on the ground of necessity; that is, a necessity to avoid that extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule." In *Rex v. Wakefield*, 2 Lew. Cr. C. 1, 20, 279, Hullock, B., said: "A wife is competent against her husband in all cases affecting her liberty and person. * * * It would be unreasonable to exclude the only person capable of giving evidence in certain cases of injury. Our law recognizes witnesses ex necessitate, and it would be strange, indeed, that the husband should be allowed to exercise every atrocity against the wife and her evidence not be admitted."

The nature of the necessity being thus disclosed, is it applicable to the case of a wrong done by either spouse to an infant child? Plainly it appears that this necessity grows out of the privacy and seclusion in which such wrongs may be perpetrated. The husband is master of his home. The law terms it his castle. From it he may exclude all except members of his family. There he has the right to require the presence and continuance of his wife and children. In the secret recesses of his mansion they are bound by duty to stay. Against his will they are not entitled to have others present. He is entitled to the custody and control of his children. He may make them utterly dependent upon him for their support, by denying to strangers the right to give them employment and to receive them within their doors. His right to their custody is admitted to be superior to that of the mother, even when the parents are living separately from each other. Is it possible that the law will not permit the wife to reveal the brutality and inhumanity of the husband to children of such tender years as to make them incompetent as witnesses? If she cannot, what remedy is there in the law for their protec-

tion? If it is not a wrong against her, conceding that it is necessary to bring the act within the definition of a legal wrong against her, then it does not justify her separation from him, and she is compelled either to remain silent and submit to it, or forfeit her right to the support of her husband and to any share in his estate. For a wrong cruelly perpetrated upon her she may, under our law, depart from her lord's castle without forfeiting her right to dower or her distributive share in his estate, but, if she cannot do so for cruelty to her infant child without making such sacrifice, it seems to me that the necessity is even greater than in the case of direct cruelty to herself, as by beating, wounding, and maltreating. If it does justify separation, then it must be, in law, a wrong done to her, and therefore strictly within the exception. To say it is not an injury and a wrong to her is to set at defiance the laws of nature. The lowest orders of the animal kingdom will not only protect their young, but will, as a rule, sacrifice life itself for their safety. Men and women who have the true natural instincts, and in whom the parental affection is normal, undepraved, and unrestrained by viciousness, will make any sacrifice, even that of their personal safety and lives, for the protection of their children. No sacrifice can be greater than that of the child. In subjecting Abraham to the final and highest test of his faith, God required him to offer up his son; and the highest ideal of sacrifice is embodied in the scriptural declaration: "God so loved the world that he gave His only begotten Son," etc.

Any interpretation of the common law which ignores natural rights is not to be entertained, for its object is the vindication of such rights. The general rule to which exception has been made is not predicated upon any natural, inalienable right, but merely upon public policy, and to say that public policy will, in any event, be carried to the extent of destroying a natural right, or falls short of the protection of such rights, is to carry it beyond reason. That the general rule disqualifying the husband and wife from testifying for or against each other does rest upon considerations of public policy is not open to question. All the decisions are to this effect. In *Soule's Case*, cited, Mellen, C. J., said: "Reasons of public policy do not certainly extend so far in such cases as to disqualify her from being a witness against him." Lord Hardwicke said, in *Barker v. Dixie*, temp. Hardw. 264: "The reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families." Lord Kenyon said, in *Davis v. Dinwoody*, 4 T. R. 678: "Their being so nearly connected, they are supposed to have such a bias on their minds that they are not to be permitted to give evidence either for or against each other." Irvin, J., in *Mills v. U. S.*, 1 Pin. 73, 75, said: "But,

suffer or compel him to testify, and indelible disgrace may be fixed upon his family, and he be made the subject of the deepest mortification which a sensitive being can endure. * * * Is a policy so fraught with mischief to those delicate relations of society to be established? Surely not." "The reason for the exclusion of husband and wife when called for or against each other being social policy and not interest, statutes abolishing incompetency resting on interest do not remove the common-law incompetency of husband and wife for or against each other." Whar. Cr. Ev. § 400. If we were to examine all the cases on the subject, nothing better or more forcible than reasons of public policy could be found for the general rule disqualifying husband and wife from testifying. Some judges have said it is due to their unity. Grant it; and yet we have but a fiction rendered necessary for the working out of certain rights artificially created by the law. Are the natural, inalienable rights of life and liberty to be sacrificed or subordinated to mere reasons of public policy? If we say that disqualification goes so far as to prevent the wife from testifying against the husband concerning a wrong done to a helpless child, to whose voice the courts will not, and cannot, listen, we must say that reasons of public policy shall be paramount to natural right.

The rules and principles governing society and the marital relation, as well as the law of nature, demand that parents have the custody of the persons of their children. No law can alter this without subverting the family relation which lies at the basis of all society. No law can clothe a child of extremely tender age with the power to testify, with any degree of certainty, as to the nature and extent of injury inflicted upon it. Hence, if husband and wife are not permitted to testify against each other as to offenses against such children, the law affords no adequate protection to their lives and liberty. If, therefore, it be conceded that an injury to such a child is not a wrong to the person or liberty of the mother or father, the principle of necessity affords independent ground for the admission of the testimony of either husband or wife against the other in respect thereto. The object of the law is to protect life, liberty, and property, and encourage the pursuit of happiness. The family relation, its sanctity and inviolability, are necessary to the existence and perfection of society, and the law will not permit invasions of its sanctity, nor disturbance or breach of its confidential relations, upon considerations of mere convenience, or in respect to light and trivial matters; but human life, liberty, and immunity from great bodily injury are matters of such moment that the remedies afforded by the law must be adequate for the vindication of the right thereto under all circumstances. It must create no places in which wounding

and murder may be perpetrated with impunity, and without fear or possibility of detection and punishment. Husband and wife will not be dragged forth to testify against each other as to offenses against strangers, and divulge matters communicated in confidence, and take action calculated to engender hatred between them and produce discord and dissensions, subversive of the family relation. Their own happiness, and the necessity of maintaining that relation for the benefit of society in general, as well as the protection of the helpless offspring of the union, forbid this, because the public right against the offender may ordinarily be vindicated without it. But when the blood of husband, wife, or helpless child is found on the door of the home, and wounds on the body of such member of the family, the law must invade that home and permit the truth to be disclosed, else the enemy of the home and all society, and violator of all laws, human and divine, must go unwhipped of justice. The law of necessity alters the general rule of competency under such circumstances. This is the force and effect of the common-law decisions which permit the husband and wife to testify against each other on charges affecting their persons and liberty. They declare a principle of the common law, and the reason for the application of that principle here is imperious.

The courts of this country seem to hold that nothing short of personal violence to the husband or wife will make one a competent witness against the other, under the common-law exception. *Brock v. State*, 44 Tex. Cr. R. 335, 71 S. W. 20, 60 L. R. A. 465, 100 Am. St. Rep. 859; *Compton v. State*, 44 Am. Rep. 703; *People v. Schoonmaker*, 117 Mich. 190, 75 N. W. 439, 72 Am. St. Rep. 560; *State v. Frey*, 76 Minn. 526, 79 N. W. 518, 77 Am. St. Rep. 660; *Crawford v. State*, 98 Wis. 623, 74 N. W. 537, 67 Am. St. Rep. 829; *Selden v. State*, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144; *State v. Evans*, 138 Mo. 116, 39 S. W. 462, 60 Am. St. Rep. 549; *People v. Curiale*, 137 Cal. 534, 70 Pac. 468, 59 L. R. A. 588; *Stein v. Bowman*, 13 Pet. (U. S.) 223, 10 L. Ed. 129; *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762. In none of these cases, however, did the necessity of admitting the testimony appear. Some were charges of rape, perpetrated on the wife before marriage and when she was not the wife. Others were charges of bigamy, which the court said were not offenses against the wife, but against the marital relation. One was for incest committed with the daughter of the wife, stepdaughter of the accused. None of these cases, in the facts presented, come up to the exigency of this one. In each of them there was, or ought to have been, some competent witness, without calling the wife, and we need consume no time in testing their soundness. But it may be said, without fear of successful contradiction, that

the courts, in all those cases, made a broader declaration against the scope of the exception than was justified by the facts disclosed and issues made, and in that declaration, disregarded the principle of the exception, and took only the precedents which had arisen under it for their guidance. A case relied upon by the Attorney General to sustain the competency of this evidence is *Clarke v. State*, 117 Ala. 1, 23 South. 671, 67 Am. St. Rep. 157, admitting the wife as a witness against her husband to prove him guilty of having murdered their child by beating her while enceinte, so that the child, though born alive, afterwards died, in consequence of injuries inflicted upon the mother. The exact ground upon which the evidence was admitted is debatable, since the court seems to have based its conclusion both on the ground of necessity, independently of any wrong done to the wife, and personal violence to her. The language is as follows: "Wherever the element of personal violence is a necessary constituent of the offense, every reason exists upon which the exception rested originally, and for the sake of public justice the wife should be admitted as a witness."

Having thus considered the circumstances and the principles of law relating to them, I am firmly convinced (1) that the killing or wounding of a child, too young to protect itself by its testimony, is, in law, a wrong to the parent, affecting the person and liberty, and so making the parent a competent witness against the other spouse on his trial for the crime; and (2) that, independently of any wrong to the parent, he or she is a competent witness against his or her wife or husband, as the case may be, on trial for the offense, *ex necessitate rei*.

SANDERS, J. (dissenting). I do not agree that the evidence of the wife is incompetent, and therefore concur in the dissenting opinion of Judge **POFFENBARGER**. I think the case entirely free from error, and would affirm the judgment.

(104 Va. 786)

UNITED MODERNS v. RATHBUN et al.
(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—BURDEN OF PROOF.

In an action on a beneficial certificate, where the constitution and laws of the order are introduced in evidence, the burden is on plaintiffs to show any change in such laws subsequent to the issuance of the certificate in suit affecting their rights.

2. SAME — NONPAYMENT OF ASSESSMENTS — WAIVER OF DEFAULT.

A beneficial certificate required insured to comply with the constitution and laws of the order, and provided that a failure to pay dues or assessments should constitute a forfeiture of all right to benefits. The constitution provided that members failing to make payments as they became due, thereby elected to terminate their

membership. Insured failed in health and fell in arrears in the payment of assessments, whereupon his friends undertook to keep his certificate in force for him. Accordingly the financial agent of the order received a payment of back assessments from a friend of insured, who afterwards sent a check to insured's mother for insured's salary, without reserving anything for the payment of assessments. The following month, when the financial agent of the order called on the friend for later assessments, the latter asked him to see insured's mother, and, if she did not pay the assessments, to come back to him. Insured's mother refused to pay the assessments, the financial agent did not return to the friend, and insured died in default. *Held*, that there was no waiver of the default on the part of the order.

3. APPEAL—DISPOSITION OF CAUSE—ENTRY OF PROPER JUDGMENT.

Where a case is submitted to the presiding judge without a jury, and he passes upon the law and the evidence, the Court of Appeals hears the cause as on a demurrer to the evidence, and will enter such judgment as the lower court should have rendered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4581.]

Error to Circuit Court, Elizabeth City County.

Action by Fred W. Rathbun and others, by their next friend, against the United Moderns. There was a judgment for plaintiffs, and defendant brings error. Reversed.

Jones & Woodward, for plaintiff in error.
S. Gordon Cumming, for defendants in error.

KEITH, P. Plaintiff in error, the United Moderns, a beneficial society, issued a policy of life insurance to Frederick G. Rathbun, for the benefit of his infant children, for the sum of \$1,000.

On becoming a member, as appears from the policy, Rathbun stipulated that he would "comply with all and singular of the constitution, laws, and regulations of this order," and the policy further provided that "the member shall not be personally liable for dues or assessments, but a failure to pay shall forfeit all rights to benefits as provided in the constitution and laws aforesaid." The certificate of insurance also contained the following statement signed by Rathbun:

"This certifies that I accept the within certificate and the benefits conferred, fully understanding and agreeing that the same is to be and remain a liability upon the order only upon condition:

"First. That the statements made by me in my application for membership and to the medical examiner are true;

"Second. That I pay or cause to be paid all assessments, dues or money payable to the order, promptly, on or before the day the same becomes delinquent;

"Third. That I fully comply with the constitution, laws and regulations of the order. The within certificate to be and remain null and void for and during any such failure or default upon my part, as aforesaid."

Article 13, § 1, of the constitution of the order provides: "The first monthly payment

falls due on the date of the issuance of the beneficiary certificate, and thereafter one monthly payment shall fall due on the first day of each succeeding calendar month and must be paid on or before the last day of the month in which it falls due, and no notice shall be required from the order for such payment. And section 2 that: "Members failing to make all payments as they become due, do elect, by reason of such failure, to terminate their membership in the order, and shall thereupon stand suspended by the non-payment of the call, and under the law, do elect and agree, by reason of such failure, not to hold the order for any liability whatsoever, and do thereby surrender all rights as a beneficiary member; provided, that if the member is in good health and shall pay any past due payment within ninety days of the time it became due, together with all other payments that may have come due in the meantime, and shall also accompany his payment with his certificate that he is in good health, and the local financier shall remit such payment to the supreme recorder within fifteen days after receipt of same, his beneficiary certificate shall become reinstated from the date of payment, provided that the member is in fact in good health at the time, but the fact of payment and furnishing certificate shall not bind the order unless the member was in fact in good health."

Just here it may be proper to notice an objection made by defendants in error to the proof of the constitution and by-laws, which is that it does not appear that they were the constitution and by-laws in force at the time the certificate of membership was issued to the decedent.

The constitution and laws of the order were proved. The members are presumed to know the constitution and by-laws, and, if a change had been made in them affecting the rights of defendants in error, the burden was upon them to introduce proof to that effect. Greenleaf on Ev. (15th Ed.) § 41.

On the 14th of September, 1903, the insured died, and, a demand having been made by the beneficiaries in the policy upon the association, payment was refused upon the ground that the insured was not, at the time of his death, a member in good standing, but had forfeited his rights under the policy by failure to pay the premiums as they fell due. Thereupon suit was instituted by the next friend of the beneficiaries, in the circuit court of Elizabeth City county, which terminated in a judgment against the plaintiff in error for the full amount of the policy, and to this judgment a writ of error was awarded by this court.

The first error assigned is that plaintiffs in the court below had not complied with the terms of the policy, which provides that "Every member and the beneficiary of every member shall before instituting any suit in the civil courts of the country against the

order, first present their claims or contentions, together with the facts and proofs relied upon, to the proper officer, committee or authority of the order entitled to consider the same, and in the event of an adverse ruling by any subordinate authority to which an exception is taken shall exhaust all remedies within the order by appeal as a preliminary to any other proceedings."

We think the evidence shows a sufficient compliance with this provision, and that sufficient efforts to secure a settlement from the order without suit were made and proved unavailing; that the beneficiaries were justified in resorting to the courts for relief; and this assignment of error is therefore overruled.

It appears from the evidence that the insured was an organist in St. John's Church, in the town of Hampton; that in the spring and summer of 1903 his health became impaired, and that he failed to pay certain assessments promptly, as they fell due; but that, upon the payment of the money and the production of a physician's certificate as to the condition of his health, he was reinstated, and continued to pay his dues, though at intervals he would fall a month or two behind and would then be reinstated in accordance with the rules of the order.

About the middle of July he went to Lebanon, Ohio, and entered a sanatorium; the church of which he was the organist, in consideration of his long and faithful service in that capacity, agreeing to continue to him the payment of his salary.

The financial agent of the association mentioned to the rector of the church that there was a premium due on Rathbun's policy, and the rector told him that he knew Rathbun was sick, and that, being sick and having unusual expenses, he was in straits for money, but that the vestry of the church and he (the rector) personally did not mean that this insurance should lapse; and thereupon the rector and the agent went to the treasurer of the church to make arrangements with respect to the payment of the dues. It seems that both the rector and the financial agent of the order looked upon the arrangement as a continuing one. The treasurer advanced the money, and put the slips or tickets which the agent of the order had brought with him into his private cash drawer, and, it appearing that the salary of Rathbun as organist had been paid up to the 1st of July, the treasurer carried the tickets over until the next payment.

On the 1st of August the treasurer of the church drew a check in favor of Mrs. Rathbun, mother of Mr. Frederick G. Rathbun, for the amount of his July salary, without reserving anything (as perhaps he should have done under the arrangement) for the payment of the premiums. To the little girl who carried the check to Rathbun's mother, he said: "Tell your grandmother that I hold

certain slips for insurance of your father's, and I suppose she wishes to cash them out of this check." In about an hour afterwards Mr. Rathbun, the father of the insured, came to the office, paid the money, and took the slips away with him. On the 1st of September the treasurer paid the amount of the August salary.

Some time in August the financial agent of the order again came to the treasurer of the church to collect the assessments then due, in accordance with the arrangement before entered into. The treasurer told him that he had already sent a check to Mrs. Rathbun, the mother, and he had no doubt that, if he would present the slips to her, they would be paid, and asked him to see her. He said to the agent that, if she did not pay them, to come back and let him know and he would pay them. This the treasurer says was the substance of what occurred between them; that after Rathbun died some one said to him that they were sorry the insurance in the Moderns had lapsed, and he said he had attended to that—that "I told Mr. Guthrie to see Mrs. Rathbun and, if she didn't pay it, to come back to me, and he had never been back."

The financial agent went from the office of the treasurer to the home of Rathbun's mother, as he had been directed to do, to collect the premiums for July and August. The money was not paid, and the reason for it will fully appear from the testimony of the rector, who, after Rathbun's death and burial, had a conversation with the mother of the deceased, who said to him: "I was deceived in Fred's condition. He kept on writing that he was better, and when Mr. Guthrie came to me we were so hard up for money—Fred had written for money and had said that he would be home in a few days." The rector stated that Rathbun wrote him the same kind of a letter—that he was improving; that he kept his mother in the dark, and she was under the impression that he was better; that "she thought it would be all right when Fred got home (he assured her he would be home in a few days), so she just let it slip. So that was her excuse for not doing what she knew she might have done—gone to Mr. Heffelfinger or come to me—if she had known her son was in danger."

The whole of the sad story may be summed up as follows: The health of the insured failed, and he was compelled to go to a sanatorium. He fell in arrears in the payment of his dues, and his friends undertook to make an arrangement by which his salary should be continued and the premiums upon his insurance paid. The necessities of his family were urgent, and, instead of reserving a part of his salary to meet the exigency, the whole of it was paid to his mother and father for the support of his infant children, in reliance upon the hope that, his health being restored, he would soon be able to return,

present the necessary certificate of a physician, as he had before done, pay the money, and be reinstated to his rights in the order. But these hopes were disappointed. He died and, at the time of his death, as the proof shows, was delinquent in the payment of certain dues.

Granting that the financial agent had the power to bind the association to look to the treasurer of the church for the payment of the dues, it is plain that the departure from the agreement was not due to any fault on the part of the association. Indeed, it cannot be said that there was anything to censure in any one connected with the transaction. Had either the rector or the treasurer known the situation, it is certain that it would have been promptly relieved. The misfortune is due to the urgent needs of the mother who had the care of the infant children upon her hands, and who listened, as all of us do, to the delusive promises of hope. But the hard fact remains that at the time of his death Rathbun was in default in the payment of dues for July and August, and there is in our judgment no sufficient proof of waiver on the part of the company.

As was said in *Knights of Honor v. Oeters*, 95 Va. 610, 29 S. E. 322: "There can be no recovery on the certificate on his life which was payable only on condition of his being in good standing at the time of his death." And, in the same case, speaking of benefit societies, it is said: "They are not organized for the purpose of making money, but for fraternal and benevolent objects. Their schemes of benevolence, by which they aim to provide benefits for their members in time of sickness, and indemnity to their families upon their death, cannot be maintained, unless the rules and regulations prescribed by their constitution and by-laws for the attainment of these objects are substantially upheld. This it should be the policy of the law and the aim of the courts to do. Otherwise, their schemes for furnishing to the working classes and men of moderate incomes a cheap and simple substitute for life insurance cannot be accomplished."

In *Bacon on Benefit Societies*, § 354, it is said: "If the policy is conditioned to be void if the stipulated premium be not paid at the appointed day, time is of the essence of the contract; and, if the premium be not paid, the policy is void, unless the condition be waived. A beneficiary takes the policy subject to the condition requiring prompt payment of premium, and no notice of lapse is necessary." See, also, section 355; *Metropolitan L. Ins. Co. v. Hall* (decided at the present term) 52 S. E. 345.

The case was submitted to the judge, without a jury; he passed both upon the law and upon the evidence; and it is heard before us as though there had been a demurrer to the evidence. It is our duty to enter such judgment as the circuit court should have render-

ed, and we are forced to the conclusion that there was no liability upon the plaintiff in error, and that the judgment should have been rendered in its favor.

(104 Va. 524)

RANKIN et al. v. TOWN OF HARRISONBURG.

(Supreme Court of Appeals of Virginia. Nov. 23, 1905.)

1. EMINENT DOMAIN—ERECTION OF DAM—FLOODING ADJACENT LANDS—COMPENSATION.

Where the effect of raising a dam across a river 10 feet for the formation of a municipal water power would be to throw back the water for a long distance beyond the boundary line of the lands of riparian owners, to flood the banks of the river, to impose a greater volume of water on the bed, destroy a ford, and render the adjacent lands more liable to overflow, and greatly to alter the natural flow and condition of the stream, such facts of themselves were sufficient to entitle such owners to compensation.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 254.]

2. SAME—APPORTIONMENT—OWNERS IN SEVERALTY—AGREEMENT.

Where riparian proprietors owned land on both sides of a stream in severalty, which would be damaged by the raising of a dam to create a municipal water power, but no one of them owned the right to abut a dam on both banks of the river within the distance measured by the eddy water of the proposed dam, such owners were entitled to orally agree that the compensation to be received for such water power should be distributed among them in particular proportions, and to execute a deed inter se before any interference with the rights sought to be condemned to carry such oral agreement into effect.

3. SAME—RIGHT TO COMPENSATION.

Where a town sought to condemn a water power by raising a dam across a river, the fact that the riparian owners whose lands would be damaged by the raising of the dam were owners in severalty, and no one of them owned land on both sides of the river, was no defense to the city's liability for compensation for the rights taken.

Error to Circuit Court, Rockingham County.

Proceedings by the town of Harrisonburg for the condemnation of a water right to secure a water power for a municipal electric plant. From a decree disallowing an award of damages to Henry L. Rankin and others, they bring error. Reversed.

Rehearing denied.

Sipe & Harris, for plaintiffs in error. T. N. Haas and J. B. Stephenson, for defendant in error.

KEITH, P. The town of Harrisonburg gave notice to Henry L. Rankin and others that at the November term of the circuit court of Rockingham county it would apply for leave to raise the dam across the Shenandoah river, which it had acquired under a conveyance from the Rockingham Milling Company, from a height of 5 feet to 15 feet, in order to secure water power for an electric light plant for the use of the town. This

notice was served upon divers persons owning land abutting upon the river, and in due course commissioners were appointed, who submitted a report to the court, to which numerous exceptions were filed. Some of these exceptions have reference to the form of the proceedings, and are brought to the attention of this court in the petition for a writ of error; but, at the hearing, it was agreed that all errors merely of procedure should be waived and that our judgment should be rendered upon the controlling question in the case, arising upon the tenth paragraph of the report of the commissioners, which is in the following words:

"From the end of the eddy or back water of the old dam at the Shaver or Ammon mill site, which was 5 feet high, up to the river to the end of the eddy or back water which will be made by the new dam, a distance of about a mile and a half, there is a fall of about 10 feet in the river which the applicant gets the benefit of in the development of its power by raising the dam from the elevation of the said old dam to the height of 15 feet. This 10 feet of fall occurs in that part of the river which is abutted by the lands of Dr. Rankin and Mrs. Burke on the east and south, and by the lands of Mrs. Walker on the west and north. Your commissioners ascertain that the water power gained by the applicant by this 10 feet of fall through the lands of Rankin, Burke, and Walker, as aforesaid, is worth the sum of \$3,000, and that the applicant shall pay the sum of \$3,000 as compensation therefor.

"It appeared by statement of counsel of Mrs. Walker, Mrs. Burke, and Rankin that it was agreed by their said clients that the compensation to be allowed for this water power owned by them should be divided among them in the proportion of one-half to Mrs. Walker, one-fourth to Dr. Rankin and one-fourth to Mrs. Burke. Your commissioners therefore report that, of the said sum of \$3,000 to be paid by applicant as compensation for said ten-foot fall in the river, through the lands of Mrs. Walker, Mrs. Burke, and Dr. Rankin, as aforesaid, \$1,500 thereof shall be paid to Mrs. Walker, \$750 thereof shall be paid to Mrs. Burke, and \$750 thereof shall be paid to Dr. Rankin."

The town of Harrisonburg excepts to paragraph 10 of the report, by which it is required to pay \$3,000 as compensation for the water power, on the ground that "the said supposed water power for which said compensation or damages of \$3,000 is found and allowed is not proper to be taken into consideration as an element of damages to be compensated for by applicant, because there is no developed or existing water power in the distance mentioned in said report through which the eddy water of the proposed dam of applicant will extend, and no such power can, under the physical conditions existing, be created or developed without the construction of a dam across the river, and neither

the said three persons, nor any two of them, as co-tenants, nor any one of them in severalty, own or owned both banks of the river, or land on both banks, in the distance measured by said eddy water, nor do they or any two of them, as co-tenants, or any one of them severally, own the right to abut a dam on both banks of the river at any place within the said distance, but they, the said three persons, own their lands in severalty, the land of Mrs. Walker lying on one side of the river and the lands of Mrs. Burke and Dr. Rankin lying on the other side of the river, the middle of the river being the boundary of said lands. Wherefore it cannot be said that any one of them separately possesses, or that all or any two of them jointly possess a water power to be damaged or compensated for as such."

Upon the issue thus presented the circuit court decided in favor of the town of Harrisonburg, and refused to allow any compensation to Henry L. Rankin, Columbia J. Burke, and Emma E. Walker, but provided that the town of Harrisonburg should, at its expense, "construct where the private ford now is across the said Shenandoah river, just above the three springs, and connecting the land of said Henry L. Rankin, on the east side of the river, with the land of said Emma E. Walker, on the west side, or immediately near by, and in lieu of and as compensation for the destruction of said ford by the reflux water, a suitable and adequate ferry, which ferry the applicant shall forever maintain and keep in repair, but shall not be required to man or operate it, the same to be appurtenant to the farms of said Henry L. Rankin, Columbia J. Burke, and Emma E. Walker and for the use of the owners thereof without charge," etc.

To this order, Rankin, Burke, and Walker obtained a writ of error.

The facts set out in paragraph 10 of the report of the commissioners, and in the exceptions filed by the town of Harrisonburg, show that there has been an actual taking of the property of plaintiffs in error for the use of the defendant in error. The plaintiffs in error own the lands abutting upon the stream. They own its banks and the bed over which the water flows. The effect of raising the dam to an additional height of 10 feet is to throw back the water of the river for a long distance beyond the boundary line of plaintiffs in error, to flood its banks, impose upon the bed a greater volume of water, destroy the ford, render the adjacent lands more liable to overflow, and greatly to alter the natural flow and condition of the stream. This would of itself entitle the plaintiffs in error to compensation.

"Although, as will be seen in a subsequent section, there are a few cases which apply to the damming back of water, the rule that to entitle one riparian owner to complain of acts of another he must show that

he has been injured, those decisions are not only against the weight of authority, but also are unsupported by principle. Any swelling of the stream over the line is an invasion of the rights of the upper owner, who has a right to the stream in its natural condition, which he may protect, not only for present needs, but for possible future ones. It constitutes a direct trespass upon his property, which he may seek the aid of the courts to redress, and he is not bound to show that he is specially injured to maintain the action. The right of the upper owner is strengthened if injury is done to him, as by the flooding of a building, or of a mining claim, or of a ford. * * * As a general rule, a riparian proprietor is restricted in the management of his property by the maxim '*Sic utere tuo ut alienum non lædas*,' and he cannot take the initiative and construct a dam on a stream that will cause the water to overflow and injure the land of his neighbor that may lie opposite or above his own premises, either when the water is at its usual height, or in an ordinary freshet, or that so obstructs its flow as to prevent the land of the other riparian proprietor from being properly drained. The maxim of the common law, that the owner of the soil has absolute dominion over it above and below the surface, and that damage caused to others by his rightful command over his own soil is *damnum absque injuria*, has no application to such a case. Throwing the water back on the upper land is a nuisance in and of itself, of which the upper owner may complain whenever he desires to do so, whether it is a direct injury to him or not. He has a right to have his land free from the water, and can object to its presence whenever he chooses; and the lower owner has no right in the premises." *Farnham on Waters and Water Rights*, vol. 2, § 657.

Nor do we find anything in the case of *Mumpower v. City of Bristol*, 90 Va. 151, 17 S. E. 853, 44 Am. St. Rep. 902, which militates against this view of the law. In that case it was held that "the owner of a dam cannot enjoin the owner of a dam above from damming back water for operating his machinery, although such use at times keeps back the water to the extent of depriving the lower owner of water." The facts in that case and the law applicable to them bear no analogy to the subject now under consideration.

It further appears that, anticipating the objection successfully urged before the circuit court by the town of Harrisonburg, plaintiffs in error entered into a verbal agreement that the "compensation to be received for the said water power, whether the same should be granted by the owners or taken and appropriated against their consent, should be distributed among those owning the premises in the proportion of one-half to Mrs. Walker and one-fourth each to Rankin and

Mrs. Burke," and on the 25th of January, 1905, while this proceeding was pending before the circuit court, they executed a deed, *inter se*, by which they bound themselves to carry into effect this verbal agreement. When, in answer to the objection urged by the town of Harrisonburg, that no one of plaintiffs in error "separately possesses, or that all or any two of them jointly possess, a water power to be damaged or compensated for as such," this agreement was offered in evidence, objection was made to the verbal agreement on the ground that it was void under the statute of frauds, and, to the deed, that it could not take effect because it undertook to change the title to the property in dispute *pendente lite*.

If the statute of frauds applies, it must be because it is a contract for the sale of real estate, or for the lease thereof, for more than a year. There is no other provision of the statute of frauds which can have any bearing upon it. If the parol agreement must be held to be void upon that ground—that is, as being a contract for the sale of real estate—it would seem to be conclusive of the first question considered; that is to say, that an interest in real estate belonging to plaintiffs in error was being taken for the use of defendant in error. But assuming, and there is nothing to the contrary, that the parol agreement was fairly entered into between the parties, it was mutually binding upon them, and it was proper for them to execute the deed which carried it into effect.

But, however that may be, there is another view of the case which seems to be conclusive. It is not denied by defendant in error that plaintiffs in error in severalty own parcels of real estate, which, if united in one ownership, or if held as co-tenants, would constitute an entirety of much value. The contention is that "there is no developed or existing water power in the distance mentioned in said report through which the eddy water of the proposed dam of applicant will extend, and no such power can, under the physical conditions existing, be created or developed without the construction of a dam across the river, and neither the said three persons, nor any two of them, as co-tenants, nor any one of them in severalty, own or owned both banks of the river, or land on both banks, in the distance measured by said eddy water, nor do they or any two of them, as co-tenants, or any one of them severally, own the right to abut a dam on both banks of the river at any place within the said distance." They owned, however, in severalty, rights as abutting owners upon the river, which, if held as co-tenants, or if brought under the control of a single owner, constitute a valuable property right. If that be so, it is plain that the right to constitute themselves co-tenants (as they unquestionably had a lawful right to do before the interference with that right on the part of

the town of Harrisonburg), by which interests held in severalty, and which, existing in severalty, are valueless according to the argument of the town of Harrisonburg, would be made valuable, is of itself a thing of value; and that right is destroyed, if the town of Harrisonburg be allowed to come in and condemn the share of one or of two, as completely as though the whole had been taken.

And, again, it cannot be denied that, if the town of Harrisonburg can acquire the rights now held by plaintiffs in error, it will have obtained property of very considerable value. Can it be that it can come in and by force of the right of eminent domain take without compensation the several parts constituting a valuable entirety? The parts are equal to the whole, in law and in logic, and, if the entirety be of value, the parts which constitute the entirety must potentially be of an equal value.

Water privileges and water power can now be put to uses not dreamed of in the past. By the generation of electricity, power can be transmitted to a distance, no absolute limit to which has yet been fixed, and thus become subservient to all the uses to which, in the marvelous growth of modern industry, force in its varied manifestations of heat, light, and motion is applied. Water power, therefore, so far from being less valuable than heretofore, acquires an additional value as the possibilities of the generation and transmission of force by means of electricity are from day to day disclosed, and the courts should be careful not to introduce or to sanction refinements by which the value of those rights to riparian owners may be diminished or impaired.

Having reached the conclusion that plaintiffs in error were entitled to recover damages, we think the evidence sufficient to justify the amount awarded them in paragraph 10 of the report, and that the judgment of the circuit court should be reversed.

(104 Va. 773)

HALL et al. v. HALL et al.

(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. EQUITY—PRACTICE—DECREE—ISSUES.

Where, in a suit in equity against the heirs and distributees of a decedent for the settlement of the estate, complainants asserted certain demands and the cause was referred to a commissioner, who reported that the demands had been paid, a decree finding that the demands were fraudulent and without consideration was unwarranted; no such issue having been raised by the pleadings in regard to such demands, and none in the commissioner's report.

[Ed. Note.—For cases in point, see vol. 19. Cent. Dig. Equity, § 1001.]

2. APPEAL—REPORT OF COMMISSIONERS—REVIEW.

A report of a commissioner in chancery, except as to errors apparent on its face, is *prima facie* correct; and where the evidence is conflicting the appellate court will not reverse the

action of the trial court in overruling an exception to a report, unless the findings of the commissioner are clearly erroneous.

8. EQUITY—REPORT OF COMMISSIONER—EXCEPTIONS.

Exceptions to the report of a commissioner in chancery partake of the nature of special demurrers, and serve to direct the attention of the court with reasonable certainty to the specific points of the controversy.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 910.]

Appeal from Circuit Court, Buckingham County.

Suit by T. H. Hall and others against R. F. Hall and others. From a decree in favor of defendants, complainants appeal. Reversed.

Beasley & Moon, for appellants. Jno. R. Moss and S. S. P. Patteson, for appellees.

WHITTLE, J. This is a suit in equity brought by appellants, who are heirs at law and distributees of Thomas S. Hall, deceased, against the other heirs and distributees and the widow and administrator of the decedent, for the settlement of his estate.

The cause was referred to a commissioner in chancery to take the usual accounts; and, among other demands asserted against the estate, there were certain debts secured by a deed of trust due to William C. Hall, father of the grantor, Thomas S. Hall, deceased, and assigned by him to his grandchildren, who were the children of the said intestate.

The commissioner reported that these debts had been paid in full, and the appellants excepted. Subsequently, without passing upon the exceptions, the report was recommitted to the commissioner for supplemental inquiry; but no steps were taken before him upon the resubmission, and no further report was made with respect to the claims in question, but the parties took additional evidence elsewhere.

The cause was heard upon the report of the commissioner, the exceptions and the depositions of witnesses; and the court passed the decree under review, which adjudged appellants' deed of trust and the debts secured "fraudulent and without consideration," and confirmed the report of the commissioner.

No issue was raised by the pleadings in regard to the deed of trust, and none upon the commissioner's report, save by the exception of appellants to the finding that the debts had been paid. Nevertheless the court by the decree complained of rejected appellants' demand, on the theory that the deed of trust was "fraudulent and without consideration."

There is no warrant, under the equity practice which obtains in this jurisdiction, for such procedure. As observed, there was no issue made, either by the pleadings or before the commissioner, that the deed of trust was fraudulent and the debts secured without consideration; and consequently appellants could not have anticipated such defense, and

were afforded no opportunity to contest the grounds upon which the court rested its decree. It is settled practice in this class of cases that the validity of any demand preferred against the estate of a decedent may be controverted, without pleadings and in an informal manner, before the commissioner to whom a general account of indebtedness of the estate is referred. *Conrad's Adm'r v. Fuller*, 98 Va. 16, 34 S. E. 893.

In that case (at page 20 of 98 Va., and page 894 of 34 S. E.) the court says: "After a decree for a general account in a creditors' suit * * * all the other creditors may come in under the decree and prove their debts before the commissioner to whom the cause is referred. *Simmons v. Lyles*, 27 Grat. 922, 929; *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 508; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572; 1 Bar. Chy. Pr. (2d Ed.) 286 et seq. * * * The practice in some parts of the state, following the English rule, is to require the creditor coming in under a decree to prove a claim against the estate of a decedent to accompany it with an affidavit that the debt remains due. Such affidavit is not intended as evidence before the commissioner in proof of the debt, and must not be so considered. It puts the claimant upon his conscience as to the bona fides of his claim, and thus frequently protects the decedent's estate from paying debts which have already been paid. 2 *Daniel's Chy. Pr.* (5th Ed.) 1209; *Flading v. Winter*, 19 Vesey, 199; *Morris v. Mowatt*, 4 Paige, 142."

In such case, however, the parties are given full opportunity to produce evidence for and against the debt, and to be heard before the commissioner, whose report upon exception is subject to review by the court. The principle is well settled that where a commissioner returns with his report, involving controverted questions of fact, the evidence upon which it is based, the court will, upon exceptions, "review and weigh the evidence, and if not satisfied that the commissioner has reached a right conclusion will overrule his finding." *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. 458.

But the report, except as to errors apparent on its face, is *prima facie* correct, and where the evidence is conflicting the appellate court will not reverse the action of the trial court overruling an exception to the report and confirming it, unless the findings of the commissioner are clearly erroneous. *Maddock's Admx. v. Skinker*, 93 Va. 479, 25 S. E. 535; *Triplett v. Woodward*, 98 Va. 187, 35 S. E. 455; *Kent v. Kent*, 34 S. E. 32, 2 Va. Dec. 674.

The exceptions to the report partake of the nature of special demurrers, and serve to direct the attention of the court with reasonable certainty to the specific points of controversy. *Robinnett v. Robinnett*, 92 Va. 124, 22 S. E. 856.

A comprehensive monographic note on the general subject of commissioners in chancery

will be found appended to the case of Whitehead's Adm'r v. Whitehead, 23 Grat. 373.

The evidence in this case has received careful consideration and fails to sustain any of the grounds of objection alleged against the validity of appellants' demand. Indeed, it was admitted by counsel for the appellees, in the argument of the case before us, that there was no evidence to justify the report of the commissioner that the debts had been paid; and, even if the question of fraud had been properly raised, the evidence is clearly insufficient to sustain it.

For these reasons, the decree of the circuit court must be reversed, and the cause remanded, with directions that the deed of trust, so far as the debts of appellants are concerned, be established as a subsisting lien upon the real estate thereby conveyed, and for further proceedings to be had therein.

(104 Va. 705)

ALLISON'S EX'R v. WOOD.

(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. APPEAL—AMOUNT IN CONTROVERSY—STATUTORY REDUCTION OF AMOUNT—EFFECT.

Acts 1902-04, p. 590, c. 373, Code 1904, p. 1837, § 3455, reducing the minimum jurisdictional sum of the Supreme Court of Appeals on a writ of error to any "final judgment" from \$500 to \$300, adopted subsequent to the rendition of a judgment in a controversy involving less than \$500, but prior to the adjournment of the term of court at which it was rendered, gives the Supreme Court of Appeals jurisdiction of a writ of error to review the judgment, for the judgment, for purposes of bringing a writ of error, was not final until the adjournment of the term.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 199, 200.]

2. SAME.

Acts 1902-04, p. 590, c. 373, Code 1904, p. 1837, § 3455, reducing the minimum jurisdictional sum of the Supreme Court of Appeals on a writ of error to any final judgment from \$500 to \$300, so as to make the section provide that no petition shall be presented for a writ of error to any final judgment which shall have been rendered more than one year before the presentation of the petition, nor to a judgment when the controversy is for a matter less in amount than \$300, is remedial in its nature, and sufficiently comprehensive to apply as well to judgments rendered before, as to those rendered since, its passage.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 199, 200.]

3. PAYMENT—PRESUMPTIONS—LAPSE OF TIME.

Presumption of payment arising from lapse of time is repelled by evidence of non-payment, and on the issue facts reasonably tending to establish the improbability of payment are admissible.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, § 188.]

4. SAME—EVIDENCE—ADMISSIBILITY.

In a suit brought in 1901 on a bond executed in 1873 and payable one day after its date, evidence of the record in an action and an ancillary attachment proceeding instituted in 1881 against defendant on the bond including the judgment erroneously rendered for plaintiff in the action and sundry executions issued on the

judgment which had been sent to various counties of the state in the effort to reach defendant's property was admissible to rebut the presumption of payment arising from lapse of time, though defendant was not legally served with process in the action.

5. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The error in excluding the record of an action and judgment therein was not cured by the admission of testimony showing that an execution had been levied on property belonging to defendant, for plaintiff had the right to submit the entire record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4200-4208.]

6. EVIDENCE—REPUTATION.

Evidence that a nonresident of the state paid his hotel and drug bills and other incidental expenses during his periodical visits to the state was incompetent to establish general reputation for financial standing and promptness in paying debts.

Error to Circuit Court, Culpeper County.

Action by J. B. Allison's executor against Calvin Wood. There was a judgment for defendant, and plaintiff brings error. Reversed.

Barbour & Rixey, for plaintiff in error.
Grimsley & Miller, for defendant in error.

WHITTLE, J. On May 25, 1873, the defendant in error, Wood, executed a bond for \$140, payable one day after date, to Allison, plaintiff in error's testator, at which time both the obligor and obligee resided in Washington county, Va. Allison died in the year 1879, and the same year Wood removed from Washington county and settled in the Valley of Virginia, where he remained until the year 1883 or 1884, when he became a resident of the state of North Carolina. After his removal to North Carolina it was his custom to make occasional trips to Virginia, varying from a week to a month in duration, for the purpose of dealing in live stock.

The bond was found among Allison's papers after his death, and in the year 1901 his executors, taking advantage of one of Wood's periodical visits to Virginia, instituted an action of debt thereon against him in the circuit court of Culpeper county. There was a verdict and judgment for the defendant, and the plaintiff brings error.

We are met at the threshold of the inquiry by a motion to dismiss the writ of error, on the ground that the sum in controversy is less than \$500, which, it is alleged, was the minimum amount of which this court had jurisdiction at the date of the judgment.

The judgment was rendered December 8, 1903, at which date the debt amounted to about \$400. Two days thereafter, on December 10, 1903, by act of the General Assembly which took effect from its passage, the jurisdiction of the court was enlarged so as to include cases in which the matter in controversy amounted to \$300, exclusive of costs. The circuit court adjourned for the term on December 19, 1903. The question to be determined, therefore, is, whether sec-

tion 3455 of the Code of 1904 (fixing the jurisdictional amount of this court at \$500, which was in force on December 8, 1903, when the judgment was rendered), or that section as amended (reducing the minimum jurisdictional sum to \$500, which became effective on December 10, 1903, two days after the judgment was rendered, but nine days before the court adjourned), is to govern the right of appeal in this instance.

The amended statute (Acts 1902-04, p. 590, c. 373; section 3455, p. 1837, Va. Code 1904) provides that "no petition shall be presented for an appeal from, or writ of error or supersedeas to, any final judgment, decree or order * * * which shall have been rendered more than one year before the petition is presented, * * * nor to a judgment, decree, or order of any court where the controversy is for a matter less in value or amount than \$300, exclusive of costs."

The act, it will be observed, deals with writs of error to final judgments, and by the rule of the common law no judgment becomes final until the end of the term at which it is rendered.

The rule is thus stated in the case of *Baker v. Swineford*, 97 Va. 112, 33 S. E. 542: "At common law, no judgment became final until the end of the term at which it was rendered, regardless of the duration of the term; and, until final, no court could direct an execution to issue on it. Section 3600 of the Code, however, confers on courts authority to direct executions to issue on judgments under the conditions therein set forth, but such judgments do not thereby become final so as to deprive the court, during the term, of the power to correct, or if need be, annul them if erroneous."

It is true that for certain purposes a judgment takes effect from its date; e. g., it constitutes a lien on the real estate of the judgment debtor from that time (Va. Code 1904, § 3567); and with respect to the limitation on appeals, this court, in accordance with the language of the statute, has held that time is to be computed from the date at which the judgment was rendered. *Buford v. North Roanoke Land Co.*, 94 Va. 616, 27 S. E. 509.

But a different principle obtains in determining the right of appeal. During the term of the court at which the judgment is rendered, the trial court is clothed with exclusive jurisdiction over it, and may, in its discretion, modify, amend, or annul the same; and the jurisdiction of this court does not attach until after that jurisdiction of the trial court has terminated.

The due and orderly administration of justice demands the observance of the line of demarcation between the jurisdiction of trial courts and the jurisdiction of this court, and, in the absence of special statutory provision to the contrary, the jurisdiction of the

former must cease before the jurisdiction of the latter accrues. The tendency of the rule is to prevent the confusion which might otherwise result from investing different tribunals with jurisdiction over the same subject at the same time.

But there is another quite sufficient reason why the right of appeal in this case is controlled by the amended act. The statute is remedial in its nature, and its language is sufficiently comprehensive to apply as well to judgments rendered before, as to those rendered since, its passage.

The rule of construction in such case is thus stated in 2 Cyc. pp. 553, 554: "Generally, a provision imposing a pecuniary limitation upon appellate jurisdiction, without an express exception made to exempt particular cases from its operation, applies to causes pending before the adoption of the provision, upon the principle that the right is a mere privilege and not a vested right. Even when judgment is rendered before the passage or taking effect of the act, the pecuniary provision applies if appellate proceedings have not already been instituted. But such general provision is not applicable to cases in which appeals have been perfected or writs of error sued out before the adoption or taking effect of the act."

See, also, *Id.* p. 521, note 92, where it is said, that the right of appeal depends upon the law in force at the time the appeal is granted, and not when the judgment was rendered.

That is the view taken by this court in the case of *McGruder v. Lyons*, 7 Grat. 233, where it is held that "the act of the Code limiting appeals to the court of appeals to \$200, applies to cases decided before the act went into effect, where the application for an appeal is made since." The case arose under chapter 182, § 3, p. 683, of the Code of 1849, which, on the point involved, is substantially the same as the present statute. In construing it, Judge Allen observes: "The words are general, and as they merely apply to the remedy, they extend to and comprehend all petitions to this court, or a judge thereof in vacation, for an appeal, writ of error or supersedeas, whether the judgment, decree, or order was prior to or after the 1st July, 1850, when the new Code took effect."

We are therefore of opinion that the objection to the jurisdiction of this court is not well taken.

On the merits, the defendant rested his case upon the presumption of payment from lapse of time. Whereupon, to repel that presumption, the plaintiff offered in evidence a copy of the record in an action at law, and an ancillary attachment proceeding, instituted in March, 1881, in the circuit court of Rockingham county, Va., against Wood, on the bond in controversy, including the judgment erroneously rendered in behalf of the plaintiffs in that action, and sundry executions issued upon the judgment, which had

been sent to various counties of the state in the effort to reach property of the defendant. But it appeared that the defendant was never legally served with process in the action, and upon that ground the court excluded the record, and would not suffer it to be read to the jury.

The evidence was not offered upon the hypothesis that the record was binding upon the defendant; but was intended, along with other circumstances, to exclude the conclusion that might be drawn from lapse of time unaccompanied by an effort on the part of the plaintiffs to enforce their demand, that they tacitly admitted payment of the bond.

Presumption of payment arising from lapse of time is a presumption only of fact, which may be repelled by evidence or circumstances tending to show nonpayment, in which respect it differs from the bar created by the statute of limitations, which is conclusive though the debt has not been paid. Upon such issue, facts and circumstances which reasonably tend to establish improbability of payment, are always admissible. Thus it has been held "that the institution of legal proceedings, though irregular, by the creditor within the time relied on to raise the presumption of payment, would rebut such presumption which might otherwise have arisen." 22 Am. & Eng. Ency. of Law (2d Ed.) p. 605.

The text is sustained by the following cases: *McCormick v. Elliot* (C. C.) 43 Fed. 469; *Allen v. Sawtelle*, 7 Gray (Mass.) 165; *McCullough v. Montgomery*, 7 Serg. & R. (Pa.) 17; *James v. Jarrett*, 17 Pa. 370; *Palen v. Bushnell*, 18 Civ. Proc. R. 53, 13 N. Y. Supp. 785; *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707.

But it is said, "such proceedings should not be allowed to have this effect if instituted for the sole purpose of repelling the presumption of payment, and not in good faith, with the sincere object of recovering the debt claimed." *James v. Jarrett*, supra.

The rejected record tended to rebut the presumption of payment by showing that the plaintiffs had not abandoned their claim, but had actively and persistently, though unsuccessfully, endeavored to collect it through the medium of the courts. It was therefore admissible, pertinent evidence for that purpose, and the circuit court erred in excluding it.

It is true that the court admitted testimony showing that an execution, issued on the void judgment, had been levied by the sheriff of Culpeper county upon cattle belonging to the defendant and found in that county, but that was only a link in the chain of testimony, and did not cure the error complained of. The plaintiffs were entitled to submit the entire record, and not an isolated part of it, to the consideration of the jury.

The admission by the circuit court, over the objection of the plaintiffs, of the testimony of witnesses for the alleged purpose of

proving the general reputation of the defendant for financial ability and promptness in meeting his obligations, is also assigned as error.

The witnesses relied on for that purpose resided in Culpeper county, Va., and confessedly did not know the general reputation of the defendant in the community in the particulars referred to. The facts which the testimony tended to prove, that the defendant, during his periodical visits to Culpeper county, paid his hotel bills, drug bills, and other incidental expenses, were plainly inadmissible to establish general reputation for financial standing and promptness in paying debts. The general reputation of the defendant, in the community in regard to the possession of the characteristics attributed to him, was the ultimate fact to be established, and adequate knowledge of the prevailing opinion on the subject is a prerequisite to the admissibility of such evidence. The authorities are practically agreed that evidence of particular opinions and particular acts is inadmissible to prove general reputation. See 16 Cyc. 1273, and note 89, where the subject is discussed and authorities cited. See, also, *Carter v. Com'th*, 2 Va. Cas. 169.

Tested by the foregoing principle, the evidence in question was inadmissible, and ought to have been excluded.

There were other assignments of error, but they need not be noticed, as they involve questions not likely to arise on the next trial of the case.

The judgment of the circuit court must be reversed and annulled, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with this opinion.

GARDWELL, J., absent.

(104 Va. 759)

WINDER v. NOCK et al.

(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. TRUSTS—CARE REQUIRED OF TRUSTEE.

The care required of a trustee in an express trust is that required of an ordinarily prudent business man.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 233.]

2. SAME—CREATION OF TRUST.

Where a contract between plaintiff and defendant provided that plaintiff should have an equal share in the rents and profits of certain land, and that defendant should sell the property for the best price possible, the proceeds to be divided, defendants' position as to plaintiff was that of a trustee.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 25, 34-36.]

3. SAME—DILIGENCE OF TRUSTEE—EVIDENCE.

In a suit by a cestui que trust against the trustee, evidence considered, and held to show that the price for which the trustee sold certain land was adequate.

Appeal from Circuit Court, Northampton County.

Suit by John L. Winder against L. Floyd Nock and others. From a decree in favor of defendants, complainant appeals. Affirmed.

Wise & Watkins and J. S. Parsons, for appellant. Stewart K. Powell, Benj. T. Gunter, N. B. Westcott, Ashby & Read, and E. J. Spady, for appellees.

HARRISON, J. Mrs. John L. Winder, the wife of appellant, and Samuel P. Fisher, her son by a former marriage, who together owned a farm in Northampton county containing 17½ acres, sold and conveyed the same in May, 1902, to the appellee L. Floyd Nock. For the part owned by Fisher the appellee paid \$1,000 in cash, and for the part owned by Mrs. Winder he paid the sum of \$3,000 in cash. Contemporaneously with the deed from Mrs. Winder, the appellee and her husband, the appellant, made the following contract:

"This contract and agreement, made this 10th day of May, 1902, between L. Floyd Nock, of the first part, and John L. Winder, of the second part:

"Whereas, the said L. Floyd Nock did on the 5th day of May, 1902, purchase from Samuel P. Fisher and wife all of the said Samuel P.'s right, title, interest, and estate in and to a tract of 85¼ acres, more or less, situated near Read's Wharf, Northampton Co., Va., for the sum of one thousand dollars (\$1,000.00), and has this day purchased from Mrs. Rose A. Winder, wife of said John L. Winder (her husband), her tract of 85¼ acres, more or less, adjoining that purchased from the said Samuel P. Fisher and wife, and also her contingent interest in the said Samuel P. Fisher tract, together for the sum of three thousand dollars (\$3,000.00), to her in hand paid this day; and whereas, the said sums of \$1,000.00 and \$3,000.00, respectively, were paid by the said L. Floyd Nock and the deeds for the said property were made to him, with the understanding and agreement between the said Nock and the said Winder that the said Winder is to be joint and equal owner in the proceeds of sale with the said Nock, subject to the aforesaid debt of four thousand dollars (\$4,000.00), the one-half of which amount, with interest on same from this day, is to be paid by said Winder to said Nock; and whereas, the said Nock and said Winder are to share equally the rents and profits of said land and the said Winder is to look after the property and collect the rents for which he is to receive a commission of ten (10) per cent. out of the gross amounts of rents received by him; and whereas, the said Nock is to sell the property as soon as practicable for the best price possible, the same having been purchased for said purpose, and for which and making the financial arrangements he is to receive a commission of five (5) per cent. on

the gross amount of sales, which as well as the cost of advertising is to be deducted before any division between said Nock and said Winder; and whereas, the said Winder is to have the premises whitewashed and such other improvements made as he and said Nock may agree upon, with a view of making the said premises attractive to a purchaser, and the labor and material is to be paid for by them jointly: Now this agreement witnesseth, that the said Nock and said Winder do each hereby bind himself to a faithful performance of the stipulations and agreements herein contained to be done and performed by them severally.

"Witness our hands and seals, this 10th day of May, 1902.

"L. Floyd Nock. [Seal.]

"John L. Winder. [Seal.]"

"Witness: J. H. Nicholson."

On the 1st day of July, 1902, the appellee L. Floyd Nock and his wife, sold and conveyed this farm to Francis H. Dryden, of Worcester county, Md., in consideration of \$4,300 cash. Contemporaneously with this deed the grantee therein executed a deed of trust to Nock, as trustee, securing \$4,000 to certain parties who had loaned the same to Dryden to enable him to pay the \$4,300 in cash to Nock for the farm.

In February, 1903, the bill in this cause was filed by John L. Winder, alleging that under the contract of May 10, 1902, he and the appellee, Nock, were jointly interested in the purchase that day made of the Fisher farm, and that appellee held the legal title thereto in trust for himself and appellant; that Dryden, the purchaser had actual notice of the contract between himself and appellee, and was a mere pretended purchaser; that the sale by Nock was not bona fide, had been made without sufficient advertisement, at an inadequate price, and without the knowledge or consent of appellant, for the purpose of defrauding him of his just rights in the premises; and that Dryden participated in this purpose and intent. The prayer of the bill is that the deed from Nock and wife to Dryden and the deed of trust from Dryden to Nock be set aside and annulled, and that Nock be required to account for the \$4,300 of purchase money received by him, and to pay the same to the beneficiaries under the deed of trust; that the farm be sold and the proceeds divided between Nock and himself; and that Nock and Dryden be required to account for rents.

The defendants Nock and Dryden filed separate answers to the bill, in which each denies every material allegation of the bill, especially denying that there was any collusion or fraudulent purpose connected with the sale, and declaring that it was in all respects bona fide and for a full and adequate price.

From the decree of the circuit court dismissing the bill, this appeal has been taken:

it being insisted that the sale by Nock to Dryden should be set aside upon the ground of breach of trust and fraud.

The claim of appellant, that Nock held the legal title to the farm in trust for the joint benefit of himself and appellant, is most earnestly contested; it being insisted that under the terms of the contract of May 10, 1902, appellant had no interest in the farm itself, and that his only interest was in the proceeds of sale in excess of the \$4,000 paid by Nock for the farm and the cost of selling.

The contract is not clear upon this point, but in the view we take of the case it is immaterial whether appellant owned a joint interest in the farm, or only an equal interest with appellant in the proceeds of sale in excess of cost, for in either case Nock occupied the relation of trustee to Winder, and was bound to act in good faith in making the sale.

The settled rule is that only the care of an ordinarily prudent business man is required of a trustee.

In *Minor's Institutes*, the learned author says: "It is indeed observable that whenever a fiduciary is called to account and a liability is sought to be fixed upon him, the inquiry must ever be whether, in the transaction in question, he acted within the scope of his powers, with good faith and ordinary prudence. * * * This is, indeed, nothing more than the application of an old principle, which has long governed trusts of all kinds, namely, that nothing more should be required of a trustee than to act in good faith and with the same prudence and discretion that a prudent man is wont to exercise in the management of his own affairs." *Minor's Inst.* vol. 4 (3d Ed.) 1482, 1495, 1496, citing numerous Virginia cases and other authorities.

It is to be observed that the same contract which is relied on as creating this trust relation, reposed in Nock unrestrained power "to sell the property as soon as practicable for the best price possible; the same having been purchased for said purpose." There is no limitation as to the time of selling, except that it shall be sold as soon as practicable. There is no contract requirement as to the extent that the property should be advertised, nor is there any suggestion that appellant was to be notified or consulted with respect to the sale. The whole matter of finding a purchaser and making a sale was left exclusively in the hands of Nock. The gravamen of appellant's complaint is that the farm was sold for an inadequate price, and that this constituted a breach of trust and was in fraud of appellant's rights. It is clear that unless this charge is well founded appellant has not been injured, and therefore cannot justly complain.

The evidence of value, as in most cases of this nature, is conflicting; but a careful consideration of all the testimony leads to

the conclusion that its decided weight is in favor of holding that the price obtained was the fair value of the property at the time the sale was made. Eleven witnesses on behalf of the appellant fix the value of the farm at from \$5,500 to \$8,000. With much the larger proportion of these witnesses the estimate of value ranges from \$7,000 to \$8,000. Sixteen witnesses, introduced on behalf of appellees, fix the value of the farm at from \$3,000 to \$5,000. Nearly all of these witnesses estimate the value of the farm at from \$3,000 to \$4,300. A careful scrutiny of the evidence shows very clearly that the witnesses who practically concur in the view that the price at which the farm was sold by the appellee Nock was its fair and reasonable value, have been longest and best acquainted with the land, and are better informed as to its value than those who speak on behalf of appellant. The record further shows that during the years from 1890 to 1902, inclusive, the latter being the year of the sale, the assessed value of the farm for purposes of taxation varied from \$1,990 to \$2,205. So that the farm was sold for about twice its assessed value. It is not likely that this land was assessed at one-fourth of its real value, which would be the case if the estimate of value placed upon it by appellant's witnesses was reliable.

Upon the whole case, we are of opinion that the appellee Nock acted within the scope of his powers in making the sale complained of, that \$4,300 was the fair and reasonable value of the farm in question, and that the appellant suffered no injury by its sale at that price. There is no direct proof in the record of any fraudulent intent on the part of the appellees, and, in view of the conclusion that the appellant has not been prejudiced by the sale, we deem it unnecessary to comment upon the suggested suspicious circumstances attending the sale; for if the view of those circumstances taken by the appellant could be sustained, it would not affect the result.

For these reasons, the decree complained of must be affirmed.

CARDWELL, J., absent.

(104 Va. 777)

AMERICAN TOBACCO CO. v. POLISCO.
(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a child run over by a vehicle driven by defendant's servant, the question as to the driver's negligence held one for the jury.

2. TRIAL—ERRONEOUS INSTRUCTION—CURE.

In an action for injuries to a child run over by a vehicle driven by defendant's servant, the court instructed that, if the driver at the time of the accident was looking where some persons were using a punching bag and did not see the child, plaintiff was entitled to recover. Other instructions told the jury in effect not

that the failure to look was carelessness, but that if the driver negligently failed to look, and negligently and carelessly drove on, and that he could by the exercise of reasonable care have seen the child and could have avoided the accident, they should find for plaintiff. *Held*, that the error in the first instruction, in taking from the jury the consideration of circumstances other than the driver's conduct in looking at the bag, was not cured by the other instructions.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trial, §§ 564, 705, 718.]

3. APPEAL—HARMLESS ERROR—INCONSISTENT INSTRUCTIONS.

Where two instructions are inconsistent and contradictory, the verdict will be set aside, unless it clearly appears that taking the instructions as a whole the defect could not have misled the jury.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trial, §§ 564, 705, 718.]

4. SAME — PRESUMPTION AS TO EFFECT OF ERROR.

A misdirection or mistake of the court appearing in the record is to be presumed to have affected the jury, and the judgment will be reversed unless it plainly appears that the error could not have affected their verdict.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4043.]

5. MUNICIPAL CORPORATIONS—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—CHILDREN.

A child a little over five years of age cannot be held guilty of contributory negligence in running across a street and into a wagon.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 124.]

6. SAME—CARE AS TO CHILDREN.

Where the driver of a vehicle by the exercise of reasonable care could have seen a child who ran across a street and ran into the wagon, and thus avoided injury to her, but failed to do so, he was guilty of negligence.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1515; vol. 25, Cent. Dig. Highways, § 459.]

7. SAME—TRIAL—ISSUES.

Where, in an action for injuries to a child owing to the alleged negligence of the driver of defendant's vehicle, the declaration charged that the driver was looking to one side of the street, and that while so doing the child attempted to run across the street, and, not being observed by the driver, was struck and run over by the wagon, the allegations were sufficient to warrant a recovery on a showing that the child ran across the street and ran into the wagon.

Error to Corporation Court of Danville.

Action by Joseph Pollsco against the American Tobacco Company. Judgment in favor of plaintiff, and defendant brings error. Reversed.

Peatross & Harris and Cabell & Cabell, for plaintiff in error. J. P. Harrison and Thos. F. Hamlin, for defendant in error.

CARDWELL, J. Joseph Pollsco, the father, and as the next friend of his infant daughter, Becky Pollsco, a little over five years of age, brought this action against the American Tobacco Company to recover damages for injuries alleged to have been sustained by her in consequence of the carelessness and negligence of the driver of a

wagon of the defendant company passing over and along Craghead street, in the city of Danville.

The trial in the lower court resulted in a verdict and judgment against the defendant company for \$1,800, which we are asked to review and reverse.

The declaration filed consists of two counts, in both of which the charge is made that at the time the vehicle he was driving ran over the child the driver was looking to one side of the street where some persons were assembled witnessing others sporting with a punching bag at or near the sidewalk, and, while the driver was thus looking to that side of the street, the child attempted to run across the street from the opposite side to her father's store, situated diagonally from the point at which she started, and, not being observed by the driver, was struck and run over by the wagon, and sustained serious permanent injuries.

No attempt was made at the trial to show that the driver was not skillful, experienced, trustworthy, and reliable, nor was there any evidence that he was driving rapidly or recklessly; so that his negligence, if any there was, consisted in looking to the side of the street where the group at the punching bag was, and not keeping a reasonably careful lookout along the street in front of the wagon.

The case does not belong to that class of cases to which *Persinger v. Coal Co.*, 102 Va. 350, 46 S. E. 325, and *Con. Brewing Co. v. Doyle*, 102 Va. 399, 46 S. E. 390, cited by counsel for plaintiff in error, belong, and which hold that a defendant is not liable for damages resulting from an event which was not expected, and could not have been anticipated by a person of ordinary prudence; but to that class which have dealt with similar occurrences to the one out of which this case arises, on the streets of populous cities, in which it has been uniformly maintained that on a street of a city a driver of a vehicle is held to reasonably expect to meet people, young and old, in the street or crossing the street, and the law requires him to keep a lookout for them in order to avoid injuring them, and not to turn aside and put his attention and sight on other objects; and that whether or not an injury to a person on the street by being run over by a vehicle passing thereon was proximately caused by the negligence of the driver in not keeping a proper lookout along the street in front of him was a question for the jury. Among the cases last referred to are *Wiswell v. Doyle*, 160 Mass. 42, 35 N. E. 107, 39 Am. St. Rep. 451; *Kennedy v. Sullivan* (N. J.) 43 Atl. 535; *McDonnell v. Brewing Co.* (Sup.) 44 N. Y. Supp. 652; *Nugent v. Metropolitan St. Ry.* (Sup.) 61 N. Y. Supp. 476; *Summers v. Bergner Brewing Co.*, 143 Pa. 114, 22 Atl. 707, 24 Am. St. Rep. 518; *Barnes v. S. City R.* (La.) 17 South. 782, 49 Am. St. Rep. 401; *Evers v.*

Phila. Tr. Co., 176 Pa. 376, 35 Atl. 140, 53 Am. St. Rep. 675.

It is, however, properly conceded in the argument here on behalf of plaintiff in error that whether or not the conduct of its driver, and especially whether or not his looking to the side of the street at the group assembled at the punching bag, instead of looking steadily ahead, constituted actionable negligence, was a question for the jury to determine from the evidence, under proper instructions from the court. Therefore the only question for our determination is whether or not the jury was properly instructed.

The trial court, on the motion of defendant in error, gave five instructions, to four of which—Nos. 1, 2, 4, and 5—plaintiff in error objected.

No. 1 is as follows: "The court instructs the jury that if they believe from the evidence that at the time the child, Becky Polisco, was struck and run over by defendant's wagon, defendant's driver was looking at the punching bag, and therefore did not see the child, then they must find for the plaintiff and assess her damages at such amount as the evidence warrants, not to exceed \$5,000."

It is admitted by counsel for defendant in error that this instruction, standing alone, may be too broad a statement of the law; but it is insisted that it is only an incomplete, and not an erroneous, instruction, the defects of which are covered by other instructions given.

It is true that the jury were in effect told in defendant in error's instructions Nos. 2, 4, and 5, not that the failure to look was carelessness, but that if he (the driver) negligently failed to look, and negligently and carelessly drove on, and that he could, by the exercise of reasonable care, have seen the child, and could have avoided the accident, then they should find for the plaintiff.

We see no objection to these instructions, but they are plainly inconsistent with instruction No. 1, which erroneously took from the jury the consideration of other circumstances in the case, and told them that, if they found from the evidence that the driver of the wagon was looking at the punching bag when the child was run over and injured, this was negligence that would justify their finding a verdict in her favor.

While instructions are to be read as a whole, and defects in one instruction may be cured by a correct statement of the law in another, where the court considers that, taking the instructions as a whole, the defect could not have misled the jury, yet, if two instructions are inconsistent and contradictory, the verdict will be set aside, as it is impossible to say whether the jury was controlled by the good or the bad in arriving at a conclusion. *Richmond Trac. Co. v. Hildebrand*, 90 Va. 48, 34 S. E. 888; *Wash. Alex.*

& *Mt. V. Elec. Ry. Co. v. Quayle*, 95 Va. 741 30 S. E. 391.

It is also well settled that a misdirection or other mistake of the court appearing in the record is to be presumed to have affected the jury, and the judgment will be reversed, unless it plainly appears from the whole record that the error did not affect, and could not have affected, their verdict. *Norfolk Ry., etc., Co. v. Corletto*, 100 Va. 355, 41 S. E. 740, and authorities cited. That, however, is not the case here, as it is impossible for this court to say whether the jury in finding their verdict were guided by the erroneous instruction No. 1, given for defendant in error, or by the other instructions given, and which were free from error. The jury might very well have regarded that it was unnecessary for them to consider the other instructions in the case, as they had been told in instruction No. 1 that, if they believed from the evidence that it was a fact that the driver of the wagon was looking at the punching bag at the time the wagon struck and injured the child, they should find a verdict in her favor, leaving out of view any other fact or circumstance which the evidence may have proved or tended to prove.

The refusal of the court to give plaintiff in error's instruction No. 10 is assigned as error. It is as follows: "The court instructs the jury that if they believe from the evidence that the child ran across the street and ran into the defendant's wagon, and that this was the proximate cause of the injury, then the plaintiff cannot recover under the allegation of negligence in the declaration."

Since the child could not, by reason of her age, be held guilty of contributory negligence, this instruction was too broad, and therefore misleading. She might have run across the street into the wagon; yet, if the driver could, by the exercise of reasonable care in keeping a lookout as to where he was driving and what objects the wagon might come in contact with, have seen her, and thus avoided doing her damage, the plaintiff in error was liable for the injury, and the allegations of the declaration in the case were sufficient to warrant a recovery on that ground. The instruction was properly refused.

The circumstances which occasioned the asking by plaintiff in error of instruction No. 11, which was refused, are not likely to arise at the next trial of the case. Therefore it is unnecessary to consider the ruling of the court in refusing the instruction.

For the error in defendant in error's instruction No. 1, hereinbefore pointed out, the judgment complained of will be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial, to be had in accordance with the views expressed in this opinion.

(104 Va. 788)

**CHESAPEAKE & O. RY. CO. v. BEASLEY,
COUCH & CO.**

(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

**1. CARRIERS — LIABILITY AS INSURER OF
GOODS CARRIED FOR HIRE.**

A common carrier is an insurer of the goods it undertakes to carry for hire, and is bound to deliver the same safely, and from this duty it can only be exonerated by the act of God or of a public enemy.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 481.]

**2. SAME—PASSENGER'S EFFECTS—LIABILITY
DURING AND AFTER TRANSPORTATION.**

A carrier's liability, as such, for a passenger's baggage, continues during transportation and for such a time thereafter as affords the passenger a reasonable opportunity to remove it.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1541, 1542.]

3. SAME—DILIGENCE OF PASSENGER IN REMOVING BAGGAGE.

A passenger reached his destination at 7:25 o'clock in the evening of a severe winter day, and his baggage was removed to the station to be weighed. The station was locked an hour later, and the agent left for the night. There was no reasonable way in which the baggage could have been removed at night, except by breaking the seal of a loaded freight car and making passageway through it, and it did not appear that such passenger knew that that was possible. *Held*, that the carrier was liable, as such, where the goods were destroyed during the night by fire.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1541, 1542.]

4. SAME—LIMITATION OF LIABILITY.

Code 1887, § 1296 (Va. Code 1904, § 1204c, subsec. 25), providing that no agreement by a carrier for "exemption" from liability for injury or loss occasioned by its own neglect shall be valid, prohibits not only contracts exempting the carrier from liability, but also from making contracts limiting liability.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 654, 659, 667, 937, 1554.]

Buchanan and Harrison, JJ., dissenting.

Error from Circuit Court, Botetourt County.

Action by Beasley, Couch & Co. against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. *Affirmed*.

R. L. Parish, for plaintiff in error. Benj. Haden, for defendant in error.

KEITH, P. On March 1, 1903, H. A. Dudley, a traveling salesman representing the defendant in error, purchased of plaintiff in error a 1000-mile ticket, upon which he was entitled to travel in the passenger trains of plaintiff in error and to carry with him free of charge 150 pounds of baggage. The price of this ticket was one-half a cent per mile less than the regular fare, and in consideration of this reduced charge, Dudley signed a contract on the back of the ticket, which provides, in part, as follows: "That in the event of loss or damage to baggage, no claim shall be made therefor in excess of \$100.00."

On February 1, 1904, Dudley had three trunks, weighing 600 pounds, checked on this ticket at Buena Vista, in Rockbridge county, to Eagle Mountain Station, in Botetourt county, paying 90 cents for the baggage in excess of 150 pounds. The train reached Eagle Mountain Station about twenty-five minutes after seven in the evening. Dudley went to a hotel, and his baggage was taken by the agents of the railroad company to its baggage room to be weighed. About an hour after the arrival of the train, the agent closed the station, locked up the baggage, and went home. Shortly after midnight the station was consumed by fire, and the baggage destroyed.

This suit was brought by the defendant in error, as assignee of H. A. Dudley, to recover damages for the destruction of the three trunks, which contained sample goods. Upon a demurrer to the evidence by the defendant company, judgment was given by the circuit court in favor of the plaintiff for \$605.42, the amount ascertained by the verdict of the jury to be the value of the plaintiff's goods.

The first contention of plaintiff in error is that the fire resulted from no negligence on its part, and that its liability was not that of a common carrier but a warehouseman.

A common carrier is an insurer of the goods it undertakes to carry for hire, and is bound to deliver the same safely, and from this duty can only be exonerated by the act of God or of a public enemy. A carrier's liability, as such, for a passenger's baggage, continues during transportation, and for such a time thereafter as affords the passenger a reasonable opportunity to remove it. In determining what is a reasonable time for removing the baggage after reaching its destination, the peculiar circumstances surrounding each case must be looked to, such as the character of the station, the opportunities afforded by the common carrier for delivering baggage when called for, etc. *Penn. Co. v. Liveright* (Ind. App.) 41 N. E. 350; *Wald v. L. E. & St. L. R. Co.*, 92 Ky. 645, 18 S. W. 650; *Mote v. Chicago, etc., R. Co.*, 27 Iowa, 22, 1 Am. Rep. 212; *Roth v. Railroad Co.*, 34 N. Y. 548, 90 Am. Dec. 738; *Burnell v. Railway Co.*, 45 N. Y. 184, 6 Am. Rep. 61.

The record shows that the weather on the night in question was unusually severe. The station was so situated and blocked with freight cars as to make it practically impossible to deliver the trunks that night. The agent testifies that after the train left he first put away his express; that then he would weigh the trunks before allowing them to be removed; that he left the station in about an hour after the train arrived, locking the trunks up in the baggage room, and went to his home; and that he would not have returned that night for any cause less than fire. He says that, if the trunks had been demanded before he left the station, they would have been delivered, but further says that there were only two ways

in which the trunks could have been removed, one by taking them out on the railroad track and wheeling them down, which he says a reasonable man would hardly have attempted, and the other was to break the seal of a loaded freight car and make a passageway through it; that this last was the only practicable way in which the trunks could have been gotten from the depot and delivered that night; that the station hands had gone away some little time before he left; and that the trunks could not then be removed. He further says that Dudley was not informed that the trunks could be removed by opening the sealed and loaded freight car and taking them through it; and that appearances were such as to justify him in believing that they could not have been gotten out of the depot in that way.

We are of opinion, upon the whole evidence, that Dudley was not afforded a reasonable opportunity to remove his baggage on the night of his arrival at Eagle Mountain. Indeed, it is quite clear that the railroad company did not contemplate the removal of the baggage that night.

The second assignment of error is to the action of the circuit court in giving judgment in favor of the defendant in error for \$605.42, with interest, the amount ascertained by the jury to be the value of the three trunks and their contents, instead of \$100, the amount agreed upon, as shown by the contract, in the event of loss or damage to the baggage; the language of the fourth clause of the contract being, in part, as already seen, as follows: "That in the event of loss or damage to baggage, no claim shall be made therefor in excess of \$100.00."

The decision of this question involves the construction of our statute upon the subject.

When the mileage ticket which contains this contract was purchased, section 1296 of the Code of Virginia of 1887 was in force. It declared that, "No agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct, shall be valid." The law in force on February 1, 1904, when Dudley took passage upon this ticket, was passed on January 18, 1904, and is found in Va. Code 1904, § 1294c, subsec. 25, which reads as follows: "No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid"—language which is similar to, but not wholly identical with, section 1296 of the Code of 1887, in place of which it stands.

In *Richmond & Danville R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849, this subject was under consideration, and it was said:

"There is no doubt that a common carrier cannot lawfully stipulate for exemption from liability for the consequences of his own

negligence or that of his servants. This was decided in an elaborate opinion by the Supreme Court of the United States, in *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and by this court in *Railroad Co. v. Sayers*, 26 Grat. 328; and the principle is now brought into the Code, section 1296 of which declares that 'no agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct shall be valid.'

"But that is not the question before us. The question here is whether, when the shipper signs a bill of lading, not exempting the carrier from liability for the negligence of himself or his servants, but limiting the amount in which the carrier shall be liable, in consideration of the goods being carried at reduced rates, such a contract, fairly entered into, is valid and binding; and we see no reason why, when its terms are just and reasonable, it should not be. The test to be applied in all such cases is, was the contract fairly entered into, and are its terms just and reasonable?"

"At common law, it is true, the carrier is chargeable as an insurer, unless loss or damage occur by the act of God or the public enemy. But, as the law now is, he may, by special contract, restrict his liability for losses otherwise occurring. Indeed, he may by such agreement exempt himself absolutely from any liability for damage not caused by the negligence or default of himself or his servants. And the owner and shipper, by entering into the contract, 'virtually agree that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.'" In support of these propositions the court cites *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344, 12 L. Ed. 465; 2 Pars. Cont. (6th Ed.) 233; *Nicholson v. Wilson*, 5 East, 507, where Lord Ellenborough remarked that there is no case to be met with in the books in which the right of a carrier thus to limit, by special contract, his own responsibility has ever been, by express decision, denied; and *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556. The opinion then goes on to say: "The leading case on the subject is *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, in which it was decided that, where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property to be transported, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which

the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. * * * "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

It is to be observed that in *Hart v. Pennsylvania Railroad Co.*, which seems to have controlled the decision in *R. & D. R. Co. v. Payne*, supra, there was no statute involved; while with us the statute expressly declares that a contract, by which a common carrier undertakes to "exempt" itself from liability for injury or loss occasioned by its own neglect or misconduct, is void. The decision of this case must depend upon the meaning to be attributed to the word "exempt" in our statute.

If the carrier may limit its liability, though disabled by statute from exempting itself from liability, then the act of the Legislature is of little worth. The common law imposes upon railroad companies, as common carriers, the obligation to pay in full for property lost by them, which they have undertaken to transport, or damages to the extent of any injury which such property may have sustained. *St. Louis Ry. Co. v. Sherlock* (Kan. Sup.) 51 Pac. 899.

It is conceded that a contract, though resting upon a consideration mutually agreed upon between the parties and fairly entered into, would be void if it exempted the carrier from all liability. The value of the property lost in this case is fixed by the verdict of the jury at something more than \$600; the recovery is limited by the contract to \$100. The common-law liability, therefore, of the carrier is, by virtue of this contract, if it be sustained, effaced and obliterated, to the extent of \$500, or five-sixths the value of the property. It seems to us that to the extent to which the carrier is relieved from liability which the law would otherwise have imposed upon it, it is to be considered and

treated as having undertaken to exempt itself, by force of its contract.

But it is said the limitation must be a reasonable one. If, in the teeth of the statute, we are permitted to indulge in argument or conjecture as to what is in a particular case reasonable, where would the line be drawn? In the case before us the recovery is diminished from \$600 to \$100. Is that the limit of reasonableness? By what standard is five-sixths of the valuation determined upon as a reasonable limitation or restriction? Could not the estoppel upon the conscience of the shipper be urged with as much force if the value of the goods had been fixed by the contract at \$50 or \$20? It would still have been an agreement between parties capable of contracting, fairly entered into, and for a valuable consideration. It is void, not because it is unreasonable, but because the Legislature has seen fit to declare that all such contracts, whether reasonable or unreasonable, are invalid.

We do not perceive the force of the reasoning which would give operation and validity, by way of estoppel, to a contract which the lawmaking power has declared to be void as repugnant to public policy. In the case of *Hart v. Penn. R. Co.*, supra, there was, as we have said, no statute affecting the contract. We do not believe that the Legislature, in passing the statute, either as it appears in the Code of 1887, or in that of 1904, meant to strike at contracts which exempt from liability, and leave untouched and in full force those which by limitation and restriction accomplish substantially the same purpose. Experience has shown that the shipper does not stand upon an equal footing with the carrier. He is at a disadvantage in contracting with the carrier. This the Legislature well knew, and this was the evil which it intended to suppress. The statute was designed to go to the very root of the trouble, and to declare all such contracts invalid; and it was not contemplated, in our judgment, by the Legislature, that any such halting and half-hearted remedy should be applied to the situation as a prohibition upon contracts which exempt, while leaving the carrier free to impose such terms of restriction of liability as would still leave the shipper at its mercy.

In *Page on Contracts*, vol. 1, p. 567, it is said: "Under statutes forbidding carriers to limit their common-law liability by contract, a limitation on the amount of damage is invalid. Under a statute forbidding a carrier to exempt himself by contract from his liability, the shipper is not bound by the value fixed by him, even if fixed too low in fraud of the railway company." In support of this, the case of *Lucas v. Railway*, 112 Iowa, 594, 84 N. W. 673, is cited.

The Iowa statute is almost identical with our own. It provides that no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons

or property by railway from liability of a common carrier which would exist had no contract, receipt, rule, or regulation been made or entered into—a provision somewhat more elaborate, but in all essential respects identical with our own.

The syllabus of the Iowa case, *supra*, is as follows: "As the limitation, in a contract of shipment of a horse, of the carrier's liability to \$100, the 'released value of the horse' named in the contract, renders the contract void, under Code, § 2074, providing no contract shall exempt a railway from liability of a common carrier which would exist had no contract been made, fraud of the shipper in making representations to secure a cheaper rate of freight will not prevent his proving the full value of the horse."

This case is pertinent to the present discussion in two aspects. The statute of Iowa uses the word "exempt" as ours does, and yet the limitation by contract was held by the court to be in conflict with the statute, and therefore invalid. In other words, the limitation, to the extent that it diminished the common-law liability of the carrier, was treated as an exemption from liability, and "limit" and "exempt" were construed as words of synonymous meaning. In that case, too, it appears that, so far from the court imputing validity to the contract by way of estoppel, it declares that the "fraud of the shipper in making representations to secure a cheaper rate of freight will not prevent his proving the full value of the horse." Such was the vigor of the statute that it served to destroy the contract, and the shipper was permitted to recover the full value of the property shipped, although a cheaper rate of freight had been secured by false representations upon his part.

In Louisville, etc., R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 811, a mare had been shipped without inquiry as to her value, and the shipper had received a receipt or contract which provided, in general terms, that in case of injury to any horse shipped under it for which the railroad company might be liable, the amount claimed should not exceed \$100. In construing this contract and passing upon its validity, the court said:

"Manifestly the stipulation does not contemplate total exemption from liability; it only provides for partial or limited exemption. Upon that distinction the nice and important question arises: Can a stipulation of the latter character stand before the law, when one of the former kind cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the mare if lost or destroyed, can the limitation of its liability to \$100 be upheld in the courts, if it should appear that her death resulted

from the negligence of the company, and that she was in fact worth eight times that amount, as the jury found her to be? We unhesitatingly answer: No. The carrier cannot by contract excuse itself from liability for the whole nor any part of a loss brought about by its negligence. To our minds it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in each case.

"With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter it may thereby substantially evade and nullify the law which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation, whether by stipulation for exemption in whole or in part from the consequences of its negligent acts."

The contract construed in that case is almost identical with the one before us. There was no statute, and the court dealt with it as one controlled by the common law. The opinion is convincing and is supported by numerous authorities. It would be easy to multiply adjudicated cases and text-writers treating "exemption" and "limitation" of liability as convertible terms. This will be apparent from an inspection of Railroad Co. v. Sayers, *supra*, and the authorities there cited.

We rest our conclusion upon the force of the statute law of the state. If the statute was meant to declare the common law, and to cover the whole subject embraced by the common law, then it cannot be doubted, we think, that the Legislature never intended to diminish the protection which the common law afforded to the shipper, and that interpretation must be given to the statute which makes it coextensive with the common law. If, however, the statute was not intended to cover the whole subject, but merely to prohibit total exemption from liability, then the partial exemption, the restriction, the limitation upon liability, rests where it was at the common law.

It has been suggested that, as the section under consideration has been, in substance, re-enacted since the decision in *R. & D. R. Co. v. Payne*, supra, the Legislature is to be deemed to have approved that decision. There would be more force in this position had that case turned upon an exposition of the statute; but it is plain from the opinion that the statute was introduced by way of recital, and that the controlling influence with the court in its conclusion was the case of *Hart v. Railroad Co.*, supra. In this view we are strengthened by the fact that, in the petition for the writ of error in *Railroad Co. v. Payne*, no allusion is made to the statute, though it is adverted to in appellant's reply brief, and it is altogether probable that the court meant to adhere to the view entertained by it when *Melendy & Russell v. Barbour, Receiver*, 78 Va. 544, was decided. In that case the parties agreed that the carrier should not be liable under any circumstances, nor for any cause, beyond the sum of \$200, for injury to or loss of any animal carried pursuant to the agreement, although the actual value of the animal might exceed that amount. This limitation was earnestly insisted upon by the carrier, but was thought to be of so little force that it is not mentioned in the opinion of the court; and, notwithstanding the contract limiting the value to \$200, the decree of the court below, allowing the plaintiffs to recover \$1,000, was reversed in this court as inadequate, and the cause remanded to the circuit court with instructions to frame an issue and impanel a jury to try the question as to damages incurred by appellants through the negligence of the defendant company. It thus appears that the contract in that case was wholly disregarded, and the rights of the parties were fixed precisely as they would have been had there been no contract.

The conclusion of the whole matter may, in our view, be summed up as follows: At common law the carrier could not by contract limit or restrict his liability for injury or loss caused by the negligence of himself or his servants. The object of the Legislature was to give to this recognized common-law principle the force of a statute; and it would indeed be a singular outcome of an effort on the part of the Legislature to give an added sanction to the common law, if by ingenious construction the power to limit should be deduced from the prohibition to exempt.

BUCHANAN, J. (dissenting). In so far as the opinion of the court overrules the decision in the case of *Richmond & Danville Railroad Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849, I dissent from it.

It was held in that case that, while section 1296 of the Code of 1887 did not permit a common carrier to exempt itself from liability for its own negligence, or the negligence of its servants, yet it did not prevent it from entering into a contract limiting the

amount for which it should be liable, in consideration of the goods being carried at reduced rates, provided the contract was fairly entered into and its terms were just and reasonable.

Whatever may be thought of the correctness of that decision, the question decided is, in my judgment, no longer an open one in this state. That decision was made in January, 1890, nearly 15 years ago. By an act approved January 18, 1904 (Acts 1902-04, p. 968), the statute law of the state in reference to public service corporations was revised so as to conform to the provisions of the present Constitution of the state. Whilst many radical changes were made by the act, no alteration was made in the language of section 1296 of the Code of 1887, except to make it apply to all transportation companies, in performing their duties as common carriers; and as amended it was re-enacted as clause 25 of chapter 3 of that act (page 980) and now appears as clause 25 of section 1294c of the Code of 1904.

It is a well-settled rule of construction that, when a foreign statute, which has been construed by the courts of that state, has been incorporated into the laws of this state, it must be presumed that the Legislature intended to adopt the interpretation placed upon the statute by the courts of the foreign state. *Doswell v. Buchanan's Ex'rs*, 3 Leigh, 365, 23 Am. Dec. 280; *Danville v. Pace*, 25 Grat. 1, 5, 18 Am. Rep. 663; *N. & W. Ry. Co. v. O. D. Baggage Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722; *N. & W. Ry. Co. v. Cheatwood's Adm'x*, 103 Va. 356, 367, 49 S. E. 489.

If this be true of a foreign statute incorporated into our laws, it must a fortiori be true in the re-enactment of a statute which has been construed by this court.

In *Mangus v. McClelland*, 93 Va. 786, 789, 790, 22 S. E. 364, 365, it was said that: "It was a familiar rule of construction that, where a statute has been construed by the courts, and is then re-enacted by the Legislature, the construction given it is presumed to be sanctioned by the Legislature, and thenceforth becomes obligatory upon the courts. See *Anable's Case*, 24 Grat. 563, where this rule of construction was held to be binding upon courts even in criminal cases, and a fortiori it is binding upon them in civil cases." See, also, *Swift & Co. v. Wood*, 103 Va. 494, 496, 49 S. E. 643, where it is reiterated that such a construction is obligatory upon the courts.

In my humble judgment, the construction placed upon section 1296 of the Code of 1887 by this court, in *R. & D. R. Co. v. Payne*, supra, is as much binding upon the courts since the re-enactment of that section as clause 25 of section 1294c of the Code of 1904, as if the Legislature had declared in the body of the statute that it should not be construed as prohibiting a common car-

rier from entering into a contract limiting the amount of its liability in consideration of the goods being carried at reduced rates, provided the contract be fairly entered into and its terms be reasonable and just. To hold otherwise, it seems to me, with all deference to the majority of the court, is not merely overruling a former decision of this court, but is repealing to that extent an act of the Legislature.

HARRISON, J. (dissenting). I concur in the view that the liability of the plaintiff in error, in this case, was that of a common carrier, and not that of a warehouseman. I am constrained, however, to dissent from the conclusion reached by a majority of the court that the plaintiff in error was not entitled to limit its liability, in the event of loss or damage to baggage, in consideration of a reduced charge for transportation.

A common carrier cannot lawfully stipulate for exemption from liability for the consequence of its own negligence, or that of its servants. This is the common-law doctrine, which has been more than once announced by this court. *Railroad Co. v. Sayers*, 26 Grat. 328.

At the time of the purchase of the ticket here involved (March 1, 1903), this common-law rule had been carried into section 1296 of the Code of 1887, which provides as follows: "No agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct, shall be valid."

When the fire was first discovered, it was burning on the inside of the station building. Its origin does not clearly appear, but, assuming that it was the result of negligence on the part of the agents of the defendant company, the question to be determined is whether, in view of section 1296, *supra*, a common carrier can make a valid and binding contract, not exempting the carrier from liability for the negligence of itself or its servants, but limiting the amount in which the carrier shall be liable, in consideration of carriage at a reduced rate.

This question was settled in this state by a well-considered opinion, in which it is held that the statute was merely declaratory of the common law, and that such a contract fairly entered into is valid and binding; the court saying: "We see no reason why, when its terms are just and reasonable, it should not be. The test to be applied in all such cases is, was the contract fairly entered into, and are its terms just and reasonable?" *Richmond & D. R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849.

In the case at bar there is no question that the contract was fairly made, that Dudley secured a reduced charge for transportation, and that he signed the contract, agreeing to a valuation of \$100 for any loss or dam-

age to his baggage, in consideration of the reduced charge for travel.

The cases involving this question are numerous and conflicting; different rules prevailing in different states. In the *Payne* Case, *supra*, this court followed the view repeatedly announced by the Supreme Court of the United States. I think the weight of authority and the better reason is in favor of that rule. It rests upon the theory that the agreement to limit the liability, in consideration of a reduced charge, is nothing more than a contract in advance, by which the parties agree upon and fix the value of the thing transported so that the shipper cannot pay for shipping property of one value at a reduced rate, and when loss occurs demand payment upon another and higher valuation. The traveler or the shipper has two courses open to him, either of which he has the free and untrammelled right to adopt. He can either pay the regular fare and carry his goods at an unlimited valuation; or he can pay the reduced charge and carry them at the valuation then agreed upon in consideration of such reduced cost of transportation. No reason is perceived why such a contract, fairly made, should not be valid and binding. It is not inconsistent with public policy; indeed, it has been said that to permit a party to repudiate such a contract would be repugnant no less to public policy than to fair dealing. *Hart v. Penn. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, and cases cited. The principle settled by this case has been followed in a number of subsequent decisions of the Supreme Court. See the more recent cases of *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033; *Penn. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268, and the cases there cited.

Apart, however, from the merits of the question at issue, it is, in my opinion, upon well-settled principles, beyond the reach of further judicial inquiry, so far as this jurisdiction is concerned. As already seen, this court, in *Richmond & D. R. Co. v. Payne*, *supra*, construed section 1296 of the Code of 1887, holding that, notwithstanding the statute, a common carrier could limit its liability in consideration of reduced charges for transportation, if the contract was fairly entered into and its terms were just and reasonable. By act approved January 18, 1904, before this cause of action arose, section 1296 of the Code of 1887 was re-enacted by the Legislature, in practically the same words, as follows: "No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid." Acts 1902-04, p. 968; clause 25, § 1294c, Va. Code 1904. It has now been 15 years since section 1296

of the Code of 1887 was construed in *R. & D. R. Co. v. Payne*, supra. During all of that time, although recently re-enacted by the Legislature, no change has been made in the statute which affects the interpretation then given to it.

In *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364, this court said: "It is a familiar rule of construction that, when a statute has been construed by the courts, and is then re-enacted by the Legislature, the construction given to it is presumed to be sanctioned by the Legislature, and thenceforth becomes obligatory upon the courts. See *Anable's Case*, 24 Grat. 563, where this rule of construction was held to be binding upon courts even in a criminal case, and a fortiori is binding upon them in civil cases."

This doctrine has long been accepted and acted upon as settled law in this state, in those cases where foreign statutes are adopted by our Legislature, as well as where our own statutes are re-enacted. *Doswell v. Buchanan's Ex'rs*, 3 Leigh, 365, 23 Am. Dec. 280; *Danville v. Pace*, 25 Grat. 1, 18 Am. Rep. 663; *N. & W. Ry. Co. v. Old Dom. Bag. Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722; *Swift & Co. v. Wood*, 103 Va. 496, 49 S. E. 643.

In the light of these authorities, I am of opinion that, whatever may be the view of this court upon the question involved, as an original proposition, it cannot now be reopened. With full knowledge of the judicial interpretation given the statute, it has been accepted and acquiesced in for 15 years, and, now that it has been re-enacted, "the construction given to it is presumed to be sanctioned by the Legislature, and has therefore become obligatory upon the courts."

For these reasons, I am of opinion that the judgment should be reversed.

(104 Va. 806)

NORFOLK & W. RY. CO. v. GEE.

(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. TORTS—NATURE OF LIABILITY.

Where an act is lawful in itself, injury resulting therefrom is not actionable, unless the act is done at a time, or in a manner, or under circumstances indicative of a want of proper regard for the rights of others.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Torts, §§ 1-5.]

2. RAILROADS—OPERATION—FRIGHTENING ANIMALS—ACTIONS FOR INJURIES—PLEADING.

A declaration against a railroad for injuries caused by plaintiff's horse taking fright at a hand car standing near a crossing is demurrable, where it fails to show that the hand car was by its nature an object calculated to frighten horses of ordinary gentleness.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 182.]

3. SAME—IMPROPER CROSSINGS—ACTIONS FOR INJURIES—PLEADING—PROXIMATE CAUSE.

A declaration against a railroad for personal injuries sustained at a crossing, alleging

as negligence defendant's failure to keep its right of way at the crossing sufficiently smooth and level to admit of safe and speedy travel over the crossing, as required by Va. Code 1904, p. 669, § 1294d, cl. 39, is demurrable, where it fails to state the nature of the defects complained of, or facts showing that the condition of the crossing was the proximate cause of the injuries sustained, which, it was alleged, resulted from plaintiff's horse taking fright near the crossing and plaintiff's inability to control the horse, owing to the defective crossing.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1108, 1109.]

Error to Circuit Court, Nottoway County.

Action by Ella Gee against the Norfolk & Western Railway Company. There was a judgment in favor of plaintiff, and defendant brings error. Reversed.

William Hodges Mann, for plaintiff in error. G. S. Wing, for defendant in error.

BUCHANAN, J. The first assignment of error is to the action of the court in not sustaining the defendant railway company's demurrer to each of the five counts of the plaintiff's declaration. The court sustained the demurrer to the first and fourth counts, but overruled it as to the others.

This action was instituted by the plaintiff to recover damages for injuries, caused by the alleged negligence of the railway company, received at a public crossing near Burkeville. The second count of the declaration avers that on the day of the injury the plaintiff was driving in a one-horse buggy along the public road where it crosses the track of the railway company, as she had the right to do, but that "the defendant company had so carelessly and negligently performed the duties it owed to the traveler on the said highway at the crossing, and that the said defendant company, or its servants and agents, had so needlessly, carelessly, and negligently placed a car, with long arms projecting above the same, commonly known as a 'hand car,' at or so near said crossing as to render the said crossing unsafe for the traveling public along the said highway at said crossing, when in vehicles to which horses were attached, of all of which the defendant company had notice." It further avers that by reason of said negligence her horse took fright at the hand car, and in shying to avoid the same, without fault on her part, the buggy was broken to pieces, and the plaintiff was thrown out with great violence, and the injuries complained of (which are set forth) inflicted.

The objection made to the declaration is, that the averments of fact in the count do not show that the hand car was an object so unusual or extraordinary as to have a natural tendency to frighten horses of ordinary gentleness and training.

Injury alone will not support an action of this kind. There must be a concurrence of wrong and injury. If a person does an act which is not unlawful in itself, he cannot be made liable in damages for resulting injury,

unless he does the act at a time, or in a manner, or under circumstances, which will render him chargeable with a want of proper regard for the rights of others.

Mr. Elliott, in his work on *Roads & Streets* (section 616, 2d Ed.), in discussing the liability of a municipality for injuries resulting to travelers from horses becoming frightened at objects on or near the highway, says that "where a horse of ordinary gentleness becomes frightened at objects naturally calculated to frighten horses, which the corporation has negligently placed, or permitted to be placed, and remain, in the highway, and injury results without contributory negligence, the corporation will be liable therefor. This liability extends to objects on the margin of the highway and within its limits, although they may not be within the traveled path."

Judge Thompson, in his *Commentaries on the Law of Negligence* (volume 1, § 1257), says: "A person who negligently or unlawfully places or leaves on the highway an object which, from its appearance, is likely to frighten a horse of ordinary training and docility, is liable to a traveler for any damage which is the proximate result of the horse taking fright at such object." See, also, sections 1258, 1259, 1 *Shear. & Red. on Neg.* 355.

In *Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496, where numerous cases are cited and the question quite fully discussed, the horse of a traveler took fright at a small barrel mounted on wheels, which the owners of the property through which the highway ran were using in whitewashing their fences, and which they moved from time to time as the work progressed. They left it standing covered over with a white cloth, and having a shovel projecting a short distance above the top, all day Sunday on one side of the beaten highway track. In an action for damages thus caused it was held that unless there was something of an unusual or extraordinary character in the structure and appearance of the apparatus, which would naturally tend to frighten horses of ordinary gentleness and training, it was not negligence to use it; and its reasonable use for no longer a time than was naturally required on the highway in whitewashing the fence of defendants would not subject them to liability, although some horses might and did take fright at seeing it.

If the rule stated in the authorities cited be correct as to objects on the highway, and we think it is, certainly no higher degree of care, if as high, should be required of a person placing or leaving near the highway, on his own premises, appliances in use thereon. The count under consideration does not show clearly whether the hand car was on the highway or on the defendant company's own premises outside of the highway. Neither does it show that the hand car was an object so unusual or extraordinary as to have

a natural tendency to frighten horses of ordinary gentleness and training. While the question of whether or not the object is of that character is largely for the determination of the jury, from its nature, situation, and other like circumstances, under proper instructions of the court (*Elliott on Roads*, § 616; *Piollet v. Simmers*, supra), a count is demurrable which fails to show that the object which it is averred frightened the horse was by its nature calculated to frighten horses of ordinary gentleness. *North Alabama Ry. Co. v. Sides* (Ala.) 28 South. 116; *Keeley Brewing Co. v. Parnin* (Ind. App.) 41 N. E. 471, 472.

The third count is substantially the same as the second, except that it makes the additional averment that the servants and agents of the defendant negligently hung wearing apparel and bright tin buckets on the arms of the hand car, and that these objects caused the horse to take fright.

If that count had averred, in addition, that the hand car, with these objects upon it, was so unusual or extraordinary in appearance as to have a natural tendency to frighten horses of ordinary gentleness and training, it would, we think, have stated a good cause of action.

The negligence relied on in the fifth count is based on the failure of the defendant to keep its right of way at the crossing "sufficiently smooth and level to admit of safe and speedy travel over such crossing," as required by section 1096, Code 1887 (clause 39, § 1294d, p. 669, Va. Code, 1904). The count avers that the public road on which the plaintiff was traveling was located prior to the building of the railway, and that it was the duty of the defendant company to keep the said crossing, to the full width of its right of way, sufficiently smooth and level to admit of safe and speedy travel; that on the day of the accident the defendant had not exercised ordinary care and prudence in complying with this duty, but on the contrary, through its negligence, the public road at the crossing, and within the defendant's right of way, was rough, gullied, and obstructed; that, the plaintiff attempting to cross the defendant's track on the day of the accident, as she had the right to do, her horse became alarmed at or near the crossing, and, by reason of the negligence of the defendant in not exercising ordinary care to keep its right of way at that point sufficiently smooth to admit of safe and speedy travel, she was unable to control her horse as she could otherwise have done; that the buggy in which she was riding was drawn by her horse with great violence against the crossing signpost of the defendant, the buggy broken to pieces, plaintiff thrown out of the buggy, and the injuries complained of inflicted.

Under the averments of this count it was the duty of the defendant to keep its right of way at the crossing in the condition re-

quired by the statute, and, if its failure to do so was the proximate cause of the plaintiff's injuries, then the defendant would be liable in damages therefor. But the court fails to show the nature of the gullies and obstructions which it avers were in the highway, or how they prevented the plaintiff from controlling her horse, or such a state of facts as show that the condition of the highway was the proximate cause of the plaintiff's injuries.

We are of opinion, therefore, that the circuit court erred in not sustaining the defendant's demurrer to the 2d, 3d, and 5th counts of the declaration, and that for this error its judgment must be reversed, and the cause remanded, with leave to the plaintiff to amend her declaration, and for further proceedings not in conflict with the views expressed in this opinion.

Errors are assigned to the action of the court in giving and refusing certain instructions. As precisely the same questions involved in these instructions are not likely to arise upon the next trial, upon new and different pleadings, it is unnecessary to consider those assignments of error further than to say that, in so far as the action of the circuit court in giving and refusing instructions on the former trial are in conflict with the views expressed in this opinion in disposing of the demurrer to the declaration, it was erroneous.

(104 Va. 813)

PENDLETON'S ADM'R v. RICHMOND, F. & P. R. CO.

(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. TRIAL—DEMURRER TO EVIDENCE.

Evidence, on demurrer thereto, must be taken as true.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Trial, § 355.]

2. CARRIERS—DUTY OF PASSENGER—ORDINARY CARE.

The fact that one waiting at a railroad station is to be regarded as a passenger, and entitled to that high degree of care for his protection due from a common carrier of passengers, does not relieve him of the duty of exercising ordinary care for his own safety.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1363-1366.]

3. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a railroad for wrongfully causing the death of decedent, evidence that decedent was waiting at defendant's station for a train, was familiar with the locality and with the position of the tracks, knew that the train was approaching, had an unobstructed view thereof, and was struck while crossing the track to the opposite platform, and while walking with his head down and seemingly in a state of abstraction, showed contributory negligence on decedent's part.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1365.]

Error to Law and Equity Court of City of Richmond.

Action by Pendleton's administrator against the Richmond, Fredericksburg &

Potomac Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

John A. Lamb and Meredith & Cocke, for plaintiff in error. Leake & Carter, for defendant in error.

KEITH, P. This action was instituted to recover damages for the death of Thomas O. Pendleton, who died from injuries received at the town of Ashland, Va., while crossing the track of the defendant in error in order to take a train to the city of Richmond.

Upon the trial there was a demurrer to the evidence, and the judgment of the law and equity court upon that demurrer was for the defendant.

The railroad tracks at Ashland run about north and south. There are three tracks—that on the west, over which trains pass moving to the south; immediately to the east of that track, one over which trains pass moving north; and still further to the east a side track, which is next to the station house.

The injury complained of occurred on the 15th of October, 1903, about 10 o'clock in the evening. The train which caused the accident was about 10 minutes late, and there is evidence which tends to prove (and which, upon the demurrer to the evidence, must be held to have proved) that the train was running at a greater rate of speed than that prescribed by the ordinance of the town of Ashland; that it gave no warning of its approach by blowing its whistle or ringing its bell; and that the headlight upon the engine was feeble and dim. The railroad company, under these circumstances, it may be conceded, would be liable for damages, unless it can be shown that its negligence was not the proximate cause of the injury inflicted upon plaintiff's intestate, but that he was guilty of contributory negligence.

The decedent, upon the night in question, was at the depot awaiting with others the approach of the south-bound train, intending to take passage for Richmond. It was, as we have said, about 10 minutes late, and when those who were waiting for it became aware of its approach, they left the depot, crossed the side track, the north-bound track, and the south-bound track, in order to be in a position to board the train upon its arrival. Pendleton was somewhat in the rear of the party, and it appears from the testimony of eyewitnesses to the occurrence, that when last seen he was between the two principal tracks, with one foot raised over the east rail of the south-bound track; but whether with the intention of stepping forward or moving back the witness was unable to say. There was no obstruction to his view. The approaching train was plainly visible for a distance of not less than ——— feet, and, while the evidence shows that the headlight was an indifferent one, it also ap-

pears that the train could plainly be seen. The deceased when last observed was approaching the south-bound track diagonally; that is to say, the track running north and south, while he was moving toward the southwest. This is shown by the testimony, and by the injuries which he received, which were upon the right side and shoulder, and to the rear. It appears that he was walking along with his head down, and seemingly in a state of abstraction. He knew the train was coming. He was going to meet it. It was plainly visible. He had but to lift his eyes and it could have been seen and the accident have been avoided.

It was earnestly argued that his attention had been disarmed and his vigilance lulled to sleep by a colored man in the employment of the railroad, with whom he had conversed as to the train, its detention, and probable time of its arrival. The duty of this employé was to take the mail bag, carry it across the tracks, and put it upon the train; and when the south-bound train approached, he with others passed in safety from the depot, and the decedent, following this employé and others, who were, like himself, intending to take passage upon the train, received the injuries of which he died.

These seem to us to be the controlling facts. There is much other evidence in the case, but it was introduced to prove the negligence of the road, which is conceded, or circumstances which we deem to be immaterial. The controlling facts in the situation are that this unfortunate young man, who was entirely familiar with the locality, with the position of the tracks, and with the approach of the train, undertook to pass where others had passed in safety, and, taking no thought for his own protection, walked heedlessly into the peril which he could so easily have avoided.

We have frequently held that when the question arises on a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined, until one or the other of these conclusions has been drawn by the jury; that the inference to be drawn from the evidence must be either certain and incontrovertible, or it cannot be decided by the court; and that negligence cannot be conclusively established by a state of facts upon which fair-minded men will differ.

This case is so plain as to its facts that there can be no diversity of opinion as to them, and there is as little difficulty about the law. The deceased is to be regarded as a passenger and entitled to that high degree of care for his protection which is due from a common carrier of passengers; but this did not relieve him from the duty of exercising ordinary care for his own safety, and this it is manifest he did not do.

We are of opinion that there is no error in the judgment complained of, which is affirmed.

CARDWELL, J., absent.

(104 Va. 871)

HOBACK v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. JURY—VENIRE FACIAS—SUFFICIENCY.

Under Code 1904, p. 2114, § 4018, requiring the writ of venire facias, in case of a felony, to command the officer to summon 16 persons of his county or corporation from a list furnished him by the clerk issuing the writ, a venire facias directing the officer to summon persons from a list furnished him by the judge, instead of the clerk, was properly quashed.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Jury, § 295.]

2. SAME—JURY LIST.

Under Code 1904, p. 2114, § 4018, authorizing the judge to order more than 20 names to be drawn and placed in the jury list in a felony case, but providing that he shall in such cases specify the number of names to be drawn and the number of persons to be summoned, a letter from the judge directing the clerk to summon 30 first-class men for the first day of the term to serve as veniremen is insufficient to authorize the clerk to draw a list of that number.

3. SAME—VENIRE FACIAS—SUFFICIENCY.

Where a first venire facias was quashed, a second one commanding the officer to summon 16 persons from a list furnished by the judge, to which was attached a list of 16 names from among those summoned under the first writ, was insufficient, under Code 1904, p. 2114, § 4018, requiring the writ to command the officer to summon 16 persons from a list containing 20 names furnished by the clerk.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Jury, § 295.]

4. SAME—SECOND WRIT—STATUTORY PROVISIONS.

Code 1904, p. 2115, § 4019, providing that, when a sufficient number of jurors cannot be had from those summoned and in attendance, the court may direct another venire facias, and cause to be summoned from the bystanders or from a list furnished by the judge, as many as may be necessary to complete the panel, does not apply where the first writ, issued under section 4018, has been quashed, but only gives authority to complete the panel after the return of a valid writ issued under section 4018.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Jury, § 313.]

5. SAME.

The provision of Code 1904, p. 2114, § 4018, that the names of jurors in felony cases shall be drawn and furnished by the clerk, and not selected by the judge, is mandatory, notwithstanding the further provision that no irregularity or error in drawing the names for the jury list or in summoning the persons named shall be ground for a new trial, unless objection was made before the jury was sworn, and the error was intentional or such as to probably cause injustice to the commonwealth or to the accused.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Jury, §§ 307-309.]

6. CRIMINAL LAW—APPEAL—HARMLESS ERROR—SELECTION OF JURORS.

That the jurors selected and summoned under an invalid venire facias were from among those summoned under a previous writ which had been quashed does not render the error harmless.

Error from Circuit Court, Floyd County. Fred S. Hoback was convicted of murder in the second degree, and brings error. Reversed.

A. A. Phlegar and J. C. Wysor, for plaintiff in error. The Attorney General, Wm. A. Anderson, and R. L. Jordan, for the Commonwealth.

HARRISON, J. The plaintiff in error was found guilty of murder in the second degree, and sentenced by the circuit court of Floyd county, in accordance with the verdict of the jury, to penal servitude for a term of eight years. To this judgment a writ of error was awarded, bringing the case before us for review.

It appears from the record that the judge appointed to hold the court at which the prisoner was tried wrote to the clerk of the court to summon "thirty first-class men for the first day of the term to serve as veniremen." Upon receipt of this letter the clerk drew from the box provided by law the names of 30 persons, and with these names attached thereto issued a writ of venire facias, addressed to the sheriff, in these words: "We command you, that you summon and cause to come before the circuit court of the county of Floyd, at the courthouse, on the 17th day of July, 1905 (being the first day of July term of said court), thirty persons of your county, to be taken from a list furnished you by the judge of said court, who are qualified," etc.

On motion of the prisoner, by counsel, this writ was properly quashed; it being, on its face, in direct contravention of the express mandate of the statute, which requires that "the writ of venire facias, in case of a felony, shall command the officer to whom it is directed to summon sixteen persons of his county or corporation, to be taken from a list furnished him by the clerk issuing the writ, who are qualified," etc. Va. Code 1904, p. 2114, § 4018.

In addition to the error appearing on the face of this writ, that the 30 persons mentioned were to be taken from a list furnished the officer by the judge, instead of by the clerk, the manner of drawing the persons named was irregular. It is true the judge could have ordered, for good cause shown, more than 20 persons to be drawn and placed in the list, but in such case the law requires that he shall specify the number of names to be drawn and the number of persons to be summoned, providing that the number drawn shall not be more than four in excess of the number to be summoned. Va. Code 1904, p. 2114, § 4018. These provisions of the law with respect to drawing the jury were wholly disregarded; the letter of the judge to the clerk merely directing him to summon 30 persons, without specifying the number to be drawn, or how many of the number drawn were to be summoned.

After quashing the writ mentioned the court issued a second writ of venire facias, addressed to the sheriff, in these words: "We command you to summon and cause to come before the circuit court of the county

of Floyd, at the courthouse, on this 17th day of July, 1905, being the first day of July term of said court, sixteen persons of your county, to be taken from a list furnished you by the judge of said court, who are qualified," etc. To this writ was attached a list containing the names of 16 persons taken by the judge from among those summoned under the first writ of venire facias, which had been quashed. Upon this writ the sheriff made the following return: "By virtue of the foregoing writ, I summoned the above-named persons from a list furnished me by the judge of the circuit court of Floyd county." Not having secured a panel from these 16 names, a third writ of venire facias was issued, summoning two additional persons, whose names were taken by the judge from the list of those present in response to the first writ, which had been quashed. Before the jury thus summoned was sworn the prisoner, by his counsel, moved the court to quash this writ of venire facias, and also to quash the list of jurors accompanying such writ, upon the ground that it commanded the sheriff to summon 16 persons from a list furnished by the judge of the court. The action of the court in overruling this motion constitutes the first assignment of error.

This second writ of venire facias fails entirely to conform to the express mandate of the statute, which secures to one accused of a felony a jury of 20 persons, drawn by the clerk of the court or his deputy in the manner prescribed by the statute, and requires that 16 of the number so drawn shall be summoned.

It is contended on behalf of the commonwealth that, although the first writ of venire facias was quashed, the 30 persons summoned under it remained and continued to be a legal list of drawn jurors summoned in compliance with the statute, and that, when the second writ of venire facias was issued, it was done in pursuance of section 4019, p. 2115, Va. Code 1904, which provides as follows: "In any case of felony, when a sufficient number of jurors to constitute a panel of sixteen free from exception cannot be had from those summoned and in attendance, the court may direct another venire facias, and cause to be summoned from the bystanders, or from a list to be furnished by the court, so many persons as may be deemed necessary to complete the said panel."

This position is, we think, untenable. Mr. Abbott, in his Law Dictionary (volume 2, p. 364), defines the term "quash" as follows: "To annul, overthrow or vacate by judicial decision." When, therefore, the first writ was quashed, it was annulled, overthrown, or vacated; in other words, it was as though it had never been issued, and the court was without a jury present from which to make up a panel. The persons present, who had been summoned under the first writ, were mere bystanders, and were no longer under the control of the court. The list was a part

of the writ, and when the latter was annulled by the court's action the former was vacated also. After quashing the writ, the only course open to the court was to begin de novo and have a jury drawn and summoned in accordance with the provisions of section 4018. When the opportunity for a drawn jury, provided by section 4018, has been given and jurors summoned, and the panel cannot be completed from that number, then under section 4019 the judge, to expedite the trial, may select the persons to be summoned to complete the panel; but section 4019 has no application in a case like this, where there was no panel to complete. If it were otherwise, the valuable rights secured to the accused by section 4018 could be wholly disregarded and denied him. The clerk would only have to issue an invalid writ, the court quash it, and then under section 4019 issue a new writ, summoning a jury selected by the judge.

As already seen, the statute (section 4018, p. 2114, Va. Code 1904; Acts 1904, p. 16, c. 17) expressly provides that the writ of venire facias, in case of a felony, shall command the officer to whom it is directed to summon 16 persons of his county or corporation, to be taken from a list furnished by the clerk issuing the writ. The law in force prior to the adoption of section 4018 provided that the judge should furnish the list; but the Legislature saw fit to change this law and to require that the list be drawn by the clerk in accordance with the provision of section 4018. The letter and policy of the statute was to give the prisoner in the first instance a drawn panel, and in that way to secure a fair and impartial jury. Each of the three writs in this case directed the jury to be summoned from a list furnished by the judge. Neither writ conformed to the positive mandate of the law, and was, therefore, no process at all.

In *Jones' Case*, 100 Va. 846, 41 S. E. 952, this court, quoting from a prior case, says: "Omission to direct a new venire facias, or omission of any statutory essential apparent on the record, is error. * * * These provisions of the statute in respect to impaneling juries are not directory merely, but imperative. They are rules which are made essential in proceedings involving life or liberty, and it is the right of the accused to demand that they be complied with. To disregard them is to deprive the accused of that due process of law which is provided by the Legislature, and which is required by the fundamental law of the land." Further, on page 847 of 100 Va., page 953 of 41 S. E., it is said: "This the statute requires, and if one of the formalities which it prescribes may be disregarded, all may be set at naught."

The argument at bar has been elaborate to show the guilt of the prisoner, but, if that fact was established with ever so much

certainly, it would furnish no ground for removing any bar which the law has erected to protect the accused. The right of the guilty man is exactly the same when on trial as that of the innocent person, and his right to go unpunished until he is formally convicted, after making every defense to which the innocent are entitled, is one of the main pillars whereon rests our liberty and security in the pursuit of happiness. The guilty man is entitled to be convicted according to law, or in default thereof to be acquitted. Hence it is, says Mr. Bishop, "that before any person can be made to suffer for a crime he must be caught and held in the exact meshes which the law has provided; or, in other words, he must be proceeded against, step by step, according to the rules ordained by the law. It is of no avail to pursue him in a way indicated by better rules. The law's rules must be applied, or the law's penalty cannot be imposed." Bishop's Crim. Pro. § 89; *State v. McCormick*, 84 Me. 566, 24 Atl. 938; *Hatch v. State*, 8 Tex. App. 416, 34 Am. Rep. 751.

This learned author further says: "A court inquiring after the regularity of its proceedings never asks whether or not the defendant is guilty." Section 92. And in section 93 he says: "The function of human law is merely to conserve the outward order of society. And a part of this order, not less essential than any other, consists in adhering to the exact methods which the law has laid down for bringing criminals to justice."

The learned Attorney General, on behalf of the commonwealth, insists that the act of February 10, 1904 (Acts 1904, p. 16, c. 17 [Va. Code 1904, p. 2114, § 4018]), was designed to modify the rule in *Jones' Case*, supra, and to make all of the provisions of the act, as to drawing names, making out and signing the list, and summoning persons named on the list, directory. In support of this contention the last paragraph of section 4018 is relied on, which is as follows: "No irregularity or error in drawing the names, or in making out, or copying, or signing, or failing to sign, the list, or in summoning the persons named on the list shall be cause for summoning a new panel, or for setting aside a verdict or granting a new trial, unless objection thereto was made before the jury was sworn, and unless it appears that such irregularity, error, or failure was intentional, or is such as to probably cause injustice to the commonwealth or to the accused."

The first writ having been quashed, and everything done in pursuance of it having, as already seen, fallen with it, neither the writ nor anything done under it could possibly contribute to the support of the second writ of venire facias. That writ must stand upon its own merits or fall by reason of its demerits. It was under this second writ alone that the persons who tried the prisoner

were obtained. Before the jury thus summoned was sworn the prisoner made his motion to quash the writ, not because of any irregularity or error in drawing the names, for none had been drawn after the first writ of venire facias was quashed, nor for any irregularity or error in making out or copying or signing or failing to sign the list, or in summoning the persons named on the list, but because the persons summoned were taken from a list furnished by the judge, and not from a list drawn and furnished by the clerk, as required by the express mandate of the statute.

The last paragraph of section 4018 has no application to the conditions here presented, and was never intended to cure or relieve the fundamental error in the mode of selecting the jury which tried the prisoner. If the paragraph relied on were given the operation suggested, it would render nugatory all the preceding part of section 4018, which prescribes the method of drawing and summoning a jury in a felony case. That the jury shall be drawn and furnished by the clerk, and not selected by the judge, is mandatory, and the court is powerless to deprive the accused of that right.

It seems to be thought that, because the judge selected the names to be summoned from among those who had been summoned under the quashed writ, the prisoner has been done no injury, and therefore has no right to complain. To this contention we cannot give our assent. It was a jury selected by the judge, which the law forbids. If the judge had selected the panel to be summoned under the second writ from any other bystanders or from among names in the box, it would have been equally as lawful as selecting such panel from among the 30 persons brought together by the first writ of venire facias, which had been declared null and void.

This is not, as suggested, a technical view of this matter. Jurors as triers of the fact wield far more power than the judge on the bench in the trial of an accused person, and the Legislature has seen fit to safeguard the rights of the commonwealth and the accused by the enactment of mandatory provisions for the constitution of this important branch of the judicial system, which the courts are not at liberty to disregard, even if they deemed it expedient to do so.

Our conclusion is that the plaintiff in error has been tried by a jury selected by the judge without authority of law, has been deprived of the drawn jury prescribed by the statute, which was his right, and therefore has not had that fair and impartial trial which is guaranteed to him by the law.

The questions raised by the other assignments of error will not necessarily arise again, and therefore they are not dealt with in this opinion.

For these reasons, the judgment complained

of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views expressed in this opinion.

(140 N. C. 262)

JONES v. PENNSYLVANIA CASUALTY CO.

(Supreme Court of North Carolina. Dec 12, 1905.)

INSURANCE — HEALTH INSURANCE — POLICY — PROVISOS — CONSTRUCTION.

Where a health policy insured against certain named diseases, including blood poisoning, and a proviso declared that the policy should not apply to any disease which was the result of injury or other disease the proviso was inoperative as to blood poisoning, which always results from injury or other disease.

Appeal from Superior Court, McDowell County; Justice, Judge.

Action by Nelson C. Jones against the Pennsylvania Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action on insurance policy for an indemnity of \$5 per week for 26 weeks. A jury trial was waived, and from the findings of fact by the court it appeared that the plaintiff, being the holder of an ordinary health policy in defendant company, on the 29th of November, 1902, received a small scratch on the hand; that the same began to inflame, blood poisoning developed, and on December 3, 1902, the plaintiff's arm was of necessity amputated; that the plaintiff was rendered incapable of performing any kind of manual labor and continued so disabled for a term of 26 weeks, for which time he sues for the stipulated indemnity; that all the formal preliminary requirements have been complied with on the part of the plaintiff, and proof of the plaintiff's disability for 26 weeks duly filed with defendant company. There was judgment for the plaintiff at the contract rate, and the defendant excepted and appealed.

J. W. Pless, for appellant. D. E. Hudgins, for appellee.

HOKE, J. (after stating the case). The policy (section 4) contains a definite stipulation for indemnity at \$5 per week, not to exceed 26 weeks, in case of disability arising from certain specified diseases; blood poisoning being one expressly named. This disease being evidently the direct and controlling cause of the disability, as a matter of first impression the right of the plaintiff to recover would seem to be clear. The policy, however, having given this assurance of indemnity, then takes up the matter of provisos by way of restriction, and stipulates further: (1) That this policy shall not apply to any illness or disease whatever except those named. (2) That it shall not ap-

ply to any disease which is complicated with, or results from, any disease not herein named, etc. (3) Nor to any disease or illness which results from injury, etc. (4) Nor in effect to any disease which develops or results from those diseases that are named, etc. There are many other limitations and restrictions in the policy, for as my Lord Coke would say, "the 'etc.' meaneth much"; but those set out are enough to show that, if these provisos can prevail, blood poisoning is entirely withdrawn from the operation of the policy, and any and all stipulation for indemnity concerning it effectually removed. So far as we are informed, blood poisoning is not considered as one of the primary or idiopathic diseases. It is a toxic condition of the blood caused either from or through a surface wound or some internal lesion, or from the breaking down of tissue incident to an existent or precedent disease, and thereby producing suppuration. As to this disease, therefore, these provisos remove every possible condition where the disease can occur, and, if upheld, would as stated entirely set aside the definite contract for indemnity contained in a former clause of the policy. Such a result cannot be permitted and is not sustained by authority. It is established doctrine in construing these policies that doubts shall be resolved in favor of the insured. As stated in Vance on Insurance, p. 592: "Probably the most important general rule guiding the courts in the construction of insurance policies is that all doubt or uncertainty, as to the meaning of the contract, shall be resolved in favor of the insured." And speaking of certain kinds of special insurance, this author further says: "This rule, it is well settled, applies in full force to those contracts of special insurance which, unfortunately for both insurers and insured, are often filled with numerous conditions, the legal significance and economic purpose of which are alike uncertain." In Kendrick v. Insurance Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592, it is held: "The uniform rule of construction of insurance policies is that, if reasonably susceptible of two constructions, one shall be adopted which is most favorable to the insured."

Another principle applicable to the case before us, and equally well established, is that, while clauses in a contract apparently repugnant must be reconciled if it can be done by any reasonable construction, yet a proviso which is utterly repugnant to the body of the contract and irreconcilable with it will be rejected; likewise, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside. Hawkins v. Lumber Co. (at this term) 51 S. E. 852; Bishop on Contracts, §§-386, 387; Devlin on Deeds, § 838; Beach on Modern Law of Contracts, § 718.

Our conclusion is that, as to blood poisoning, the various restrictive provisos are entirely repugnant to the definite stipulation of indemnity contained in the main body of the contract, are contrary to the general intent and purpose of the policy, and cannot avail to defeat the plaintiff's recovery.

Judgment affirmed.

(140 N. C. 246)

FINCANNON et al. v. SUDDERTH et al.

(Supreme Court of North Carolina. Dec. 12, 1905.)

1. BOUNDARIES — CONFLICTING CALLS — EFFECT.

Where certain deeds called for a rock near a small branch and 22 poles north of a railroad, "being a corner of a tract of land owned by the heirs" of S. and known as the J. tract, and running west with the line of the S. tract 228 poles to a stake on the old D. line, the call for the corner of the lands owned by the heirs of S. controlled the call for the rock.

2. SAME—SURVEYOR'S LINE.

Where, in a suit to determine a disputed boundary line, a surveyor testified that when he surveyed the land he understood that a certain rock was the corner of the land of S., when in fact such rock did not correctly mark the corner, and the surveyor made an incorrect survey based on such supposition, the lines run by him and the corners marked would not control a call in the deed for the actual corner of the land owned by the heirs of S.

Appeal from Superior Court, Burke County; W. R. Allen, Judge.

Action by W. A. Fincannon and others against Edward Sudderth and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Plaintiffs claim the locus in quo under deeds from their father, Isaac Fincannon, executed in 1887 for the purpose of making a division of his lands. They alleged that defendants had trespassed thereon. Defendants denied plaintiffs' title. For the purpose of fixing their boundaries, plaintiffs introduced a grant issued 1794 to John Hughes, in which the call for the southwest corner is a small post oak—running thence east, etc. This is indicated on the plat so: "L. P. O." They introduced a deed from C. A. Cilley, commissioner appointed in a proceeding instituted for the purpose of partitioning the lands of John Sudderth, to B. A. Berry bearing date March 25, 1882, describing the land conveyed as a part of the John Hughes grant. They next introduced a proceeding for the partition of the lands of B. A. Berry, and a deed from the commissioners to Mrs. Sudderth, calling for "a post oak and running east with Cannon's line 158 poles to a small pine," etc. They introduced a deed from B. A. Berry to Isaac Fincannon dated 1876, a deed from Dean to Berry dated 1871. These deeds call for "a rock near a small branch and 22 poles north of the railroad, being a

corner of a tract of land owned by the heirs of S. A. Sudderth, deceased, and known as the Johnson tract and runs west with the line of the Sudderth tract 228 poles to a stake in the old Jonathan Duckworth line," etc. They introduced three deeds executed April 21, 1887, from Isaac Fincannon to each of the plaintiffs; all calling for the Berry line as the northern boundary. Plaintiffs introduced one Hudson, who testified that he had seen line run from the post oak. It had been pointed out as John Sudderth corner. He looked at it; three tracks on it; letters "J. S." on west side; had never seen land run from rock. Mr. Denton testified that he ran Sudderth land by Cilley deed; began at post oak and ran east; old marked line; thickly marked; found pointers at end of line. There was testimony that Berry said the post oak was his corner. Defendants introduced Mr. Huffman, who testified that he surveyed the land when Berry conveyed to Fincannon for the purpose of making deed. "Begun center of railroad; ran north to rock; understood it to be corner of S. A. Sudderth's tract and Hughes grant, also known as 'Johnson tract'; rock there. Begun at E; then to G, at Duckworth's line; then to I; then to J; from E to G known as line of Sudderth tract; was marked then and now; at G, pointers; do not think I marked line; marked line from G to I; never heard of line from P. O. till this suit," etc. There was evidence tending to show that Fincannon had been in possession of land to line from post oak east for many years. Plaintiffs insisted that their northern boundary was the southern boundary of Berry line, from post oak east, that the call for rock was a mistake, and that the controlling call was for Sudderth-Johnson land. They requested his honor to instruct the jury: "The calls in the deed under which plaintiffs claim are: Beginning on a rock near a small branch and 22 poles north of the railroad, the same being a corner of a tract of land owned by the heirs of S. A. Sudderth, deceased, or the heirs of John Sudderth, deceased, and known as the Johnson tract, and runs west with the line of Sudderth tract 228 poles to a stake in the old John Duckworth line; and the court charges you that, if the jury can find and fix the line of the tract so called for, and if it was marked or defined at the time the plaintiffs' deed was executed, the calls of the plaintiffs' deed would be controlled by the call for the Sudderth or Johnson tract, and would go to and run with it to the old Jonathan Duckworth line, if the Jonathan Duckworth line can be located, and this would fix the boundary of the plaintiffs' land." His honor declined this instruction and intimated that he would charge the jury that, if they found from the evidence that, at the time of the execution and delivery of the deeds under which plaintiffs claim, there was a contemporaneous survey of the lands conveyed thereby for the purpose of locating the lines and boundaries thereof,

and the line was located and run with the line E G, and that it was the intention of the grantor and grantees that it should run with the red line, then said line would be the boundary of the plaintiffs' land, notwithstanding the calls in said deeds." Plaintiffs excepted, submitted to judgment of nonsuit, and appealed.

J. T. Perkins, for appellants. Avery & Ervin, for appellees.

CONNOR, J. (after stating the case). The sole question presented by the plaintiffs' exception to his honor's ruling is whether, by a proper construction of the deed from Berry to Isaac Fincannon, the call for the Sudderth-Johnson tract shall control the other calls, thus making the southern boundary of that tract their northern boundary. The third rule for construing the language used in deeds in respect to boundary, laid down by Chief Justice Taylor, in *Cherry v. Slade's Adm'r*, 7 N. C. 90, is: "Where the lines or corners of an adjoining tract are called for in a deed or patent, the lines shall be extended to them without regard to distance, provided these lines and corners be sufficiently established, and that no other departure be permitted from the words of the patent or deed than such as necessity enforces or a true construction renders necessary." The reason of the rule is stated with his usual clearness by the learned Chief Justice. This is the leading case on the question of boundary in our reports and has been uniformly followed; the last case in which it is discussed being *Hill v. Dalton* (at this term) 52 S. E. 278. Applying the rule to the deed in question, we would hold that the words "being a corner of a tract of land owned by the heirs of S. A. Sudderth, and known as the Johnson tract, and runs west with the line of the Sudderth tract 228 poles to a stake in the old Jonathan Duckworth line," would control the other calls when contradictory.

The defendants, however, contend that another rule should be invoked and applied, by which the call for the "rock," followed by the other calls running therefrom, shall control and thereby discard the call for the Sudderth-Johnson land. In *Cherry v. Slade's Adm'r*, supra, the rule is thus stated: "Whenever it can be proved that there was a line actually run by the surveyor, was marked, and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the deed or patent." It was this rule which his honor intimated he would instruct the jury to apply in locating plaintiffs' deed. There can be no question that this court has frequently approved and applied it. The last instance in which it was discussed, and the cases in which it was applied reviewed, is in a well-considered opinion by Mr. Justice Douglas, in *Elliott v. Jefferson*, 133 N. C. 207, 45 S. E. 558, 64 L. R. A. 135. We could add nothing to the exhaustive and

satisfactory review of the authorities in that case. Quoting the language used in *Safret v. Hartman*, 50 N. C. 185, he says: "This rule presupposes that the patent or deed is made in pursuance of the survey, and that the line was marked and the corner that was made in making the survey was adopted and acted upon in making the patent or deed, and therefore permits such line and corner to control the patent or deed, although they are not called for and do not make a part of it." The plaintiffs insist that there is no evidence tending to show that at the time of, and with a view to the making of, the deed by Berry, or at any other time, the line contended for by defendants was surveyed and marked and corner marked. The only witness introduced by defendants was Mr. Huffham, who says that he surveyed the land and understood the rock to be the corner of S. A. Sudderth's land and Hughes' grant, also known as Johnson tract; he found marks but did not mark line. It is evident that he supposed that he was on Sudderth line. This testimony does not bring the case within the rule which defendants invoke. It is evident from the other testimony that Fincannon's northern boundary was regarded and treated as the Sudderth line. The evidence appears to be conclusive that the post oak is the beginning point in the Sudderth-Johnson line, being the same as the Hughes' grant, and that Berry claimed it as his corner. After his death the same line was recognized by his representatives, the deed made by the commissioners in the proceeding for partition calling for "a post oak and running east with Cannon's [which we understand to be Fincannon's] line." There is no evidence as to how the rock came to be at the point found by Huffham, or how long it had been there. It is much more probable that a mistake was made in locating the rock than that the parties intended to depart from the old marked Sudderth line. It was in evidence that Fincannon had been in possession to the Sudderth line for 35 years, and that Berry never cut wood south of that line. There is no serious controversy in respect to the law. We think that his honor gave undue weight and force to Mr. Huffham's testimony. It does not bring the case within the principle upon which defendants' contention must rest. The plaintiffs were entitled to the instructions for which they prayed.

The judgment of nonsuit must be stricken out, and a new trial had. It is so ordered.
New trial.

(140 N. C. 280)

WHITAKER v. COVER et al.

(Supreme Court of North Carolina. Dec. 15, 1905.)

1. BOUNDARIES—CONFLICTING CALLS—COURSES AND DISTANCES.

Where a grant called for the east line to extend 320 poles to a stake, then with the line of another numbered grant south 320 poles to

a corner, the call for the line of such other grant controlled the call for distance to the stake.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 23.]

2. SAME—QUANTITY OF LAND.

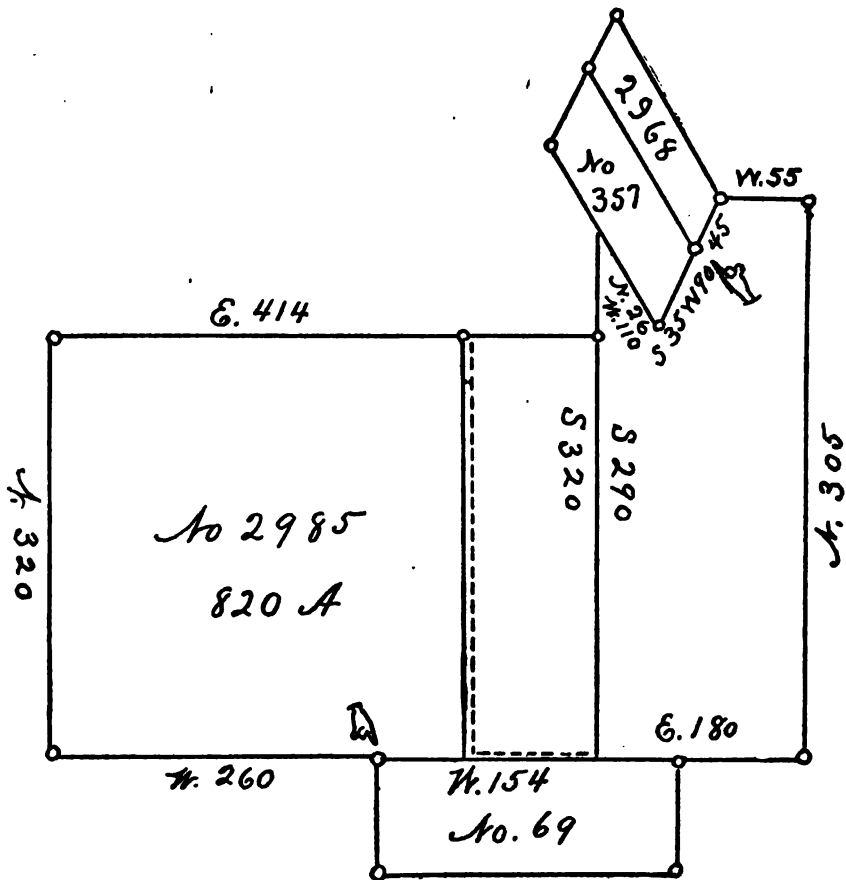
That there would be a difference in the quantity of land, if a call in a grant is stopped at the end of the distance and not extended to the line of another grant called for, cannot prevent the application of the rule requiring land to be located according to the primary calls of the deed.

Appeal from Superior Court, Cherokee County; Ferguson, Judge.

Action by W. T. Whitaker against S. E. Cover and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Civil action for the recovery of money. The case was submitted on the facts agreed as follows: "W. T. Whitaker sold and conveyed to S. E. Cover et al. a certain tract of land in Cherokee county, containing, as shown by state grant No. 3,632, 640 acres, at the price of \$3 per acre. The calls in said state grant are as follows: Beginning on a chestnut tree standing in the line of No. 69, and runs west 260 poles to a stake; then north 320 poles to a stake; then east 320 poles to a stake; then with the line of No. 2,229 south 320 poles to the southwest corner of said number on the line of No. 69; then with that line west 60 poles to the beginning. From the third corner running east 320 poles to a stake, and then south with the line of No. 2,229, would increase the distance 93 poles, and the acreage from 640 to 820 acres. W. T. Whitaker insists and contends that the line running east must go to the line of No. 2,229, and then with that line south, and that said S. E. Cover et al. are due and owing him \$3 per acre for all lands in excess of 640, which said state grant calls for; and that the state grant covers and will hold the land to No. 2,229. S. E. Cover et al. contend that the east line calling for a stake but not in the line of No. 2,229, must stop when the 320 poles are reached at the stake, and that by stopping at the end of the call in the east line and running south to the line of No. 69 and then 60 poles to the beginning corner gives the complement of 640 acres called for in the grant. A plat and certificate of said land is hereto attached and made a part of this case agreed. The parties agree that, if the east line should be extended to the line of No. 2,229, and if the court so decides, S. E. Cover et al. will owe W. T. Whitaker for all land in excess of 640 acres called for in the state grant, \$3 per acre. If the court decides that the east line stops at the end of 320 poles, then S. E. Cover et al. will owe W. T. Whitaker nothing, having paid Whitaker for 640 acres." Judgment was given for the plaintiff, and the defendants appealed.

The following is the plat referred to:



E. B. Norvell and Axley & Axley, for appellants. R. D. Gilmer, Ben Posey, and J. D. Mallonee, for appellees.

WALKER, J. (after stating the case). The only question in this case is whether the line described as running "east 320 poles to a stake" should stop when the distance gives out or should be extended to the line of patent No. 2,229; the next call being "then with the line of No. 2,229 south 320 poles to the southwest corner of said number on the line of No. 69." We have no doubt as to what our answer to this question should be. The affirmative of the proposition has been settled by a long, and we think unbroken, line of precedents in this state. Counsel for the defendants have called our attention to *Brown v. House*, 116 N. C. 859, 21 S. E. 938, and they contend that it marks a distinct departure from this established doctrine. If there were any irreconcilable conflict between the decision in *Brown v. House* and what we now decide, we should refuse to follow it; but an examination of that case will disclose that the court recognizes the settled rule to be that the general calls in a grant or deed control in locating the land described in the instrument, subject, however, to the exception that, when a natural

object or monument is also called for and can be identified and located, it will control a call by course and distance. It is added that the courts have held that the line of an adjacent tract, if known and established at the date of the execution of the grant or deed, will have the same effect. We have given substantially the language there employed. The court, however, thought that the call then under consideration, namely, "south 360 chains to a stake supposed to be Stokeley Donelson's line, thence with his line east 390 chains to his northeast corner," was not within the well-known exception just stated, as it was too vague and uncertain to control the course and distance, and stress was further laid upon the fact that the line was only 360 chains long, whereas, if extended in order to reach Donelson's line, $1\frac{1}{4}$ miles must be added to its length. Whether these reasons are cogent enough to take even that case out of the exception, we need not say, as there are no facts in this case of the kind which influenced the court in reaching its conclusion in that case. Here the call is a positive as well as a definite one, and the excess of distance only 94 poles in the third line, if we go to the line of tract No. 2,229, and, besides, that line is an established one and was actually

located by the surveyor as appears by the annexed plats and field notes. Upon this showing, it is not necessary to disturb *Brown v. House*, as our case comes clearly within the exception.

But the learned counsel confidently relied on *Harry v. Graham*, 18 N. C. 76, 27 Am. Dec. 226, as showing that this case is not governed by the exception. The call in that case was "running north 45 degrees, west 220 poles to a black oak, near his [the grantee's] own line." If the black oak could not be found, it was held that the word "near" would not carry the line 30 poles further to reach another tract belonging to the grantee, but that it must be stopped at the end of the distance mentioned in the grant. The court in that case also recognizes the exception to the general rule that calls for the line of another tract will control course and distance, and intimates that it would have been applied to the call of the grant then being construed, notwithstanding the use of the word "near," if the next preceding call in the grant had not enabled the surveyor to fix with certainty the place where the black oak once stood; it being N. 45 degrees, W. 220 poles from a chestnut and red oak, which were found. The call for the grantee's line was not therefore the more certain one. That case, instead of militating against the position we take, is, we think, a direct and strong authority in support of it. In *Haughton v. Rascoe*, 10 N. C. 21, the call was "N. 12 E. 530 poles, then along the thoroughfare" and it was held, as a matter of course, and without discussion, that the line should be extended (beyond the distance given) to the thoroughfare. Judge Gaston, who argued the case for the defendant, seems not to have contested the point. The deed in *Sandifer v. Foster*, 2 N. C. 237, contained this call: "Thence south to a white oak; thence along the river to the beginning." The court decided, according to what it said had been "uniformly held in our courts," that the river was the boundary, although the distance gave out before reaching that object, and the white oak stood half a mile from the river. The call of the grant in *McPhaul v. Gilchrist*, 29 N. C. 169, was "N. 87, W. 199 poles to a hickory, thence the courses of the swamp to the beginning," and the court held that, though the distance from the last corner to the swamp was greater by 9 chains and 50 links than that given in the grant, and though there was no hickory to be found, and no proof of its existence, yet the line should go to the swamp and thence pursue its courses. To the same effect are the following cases: *Pender v. Coor*, 1 N. C. 228; *Prest. of Lit. Fund v. Clark*, 31 N. C. 58; *Hartsfield v. Westbrook*, 2 N. C. 258; *Cherry v. Slade's Adm'r*, 7 N. C. 82; *Hays v.*

Askew, 53 N. C. 226; *Gause v. Perkins*, 47 N. C. 222; *Baxter v. Wilson*, 95 N. C. 137.

In *Corn v. McCrary*, 48 N. C. 496, *Pearson, J.*, uses language which has a strong bearing upon the facts of this case: "The line of another tract which is called for controls course and distance, being considered the more certain description, and it makes no difference whether it is a marked or an unmarked, or mathematical line [as it is termed in the case], provided it be the line which is called for. In deciding whether it be the line called for, the fact of its being a marked line may have an important bearing; but in our case it is assumed to be the line called for, which disposes of the question." And later, in *Graybeal v. Powers*, 76 N. C. 66, the same learned judge, speaking for the court, reaffirms the principle that, whenever the line of another tract is called for, whether it be a marked or a mathematical line, the course must be disregarded, if the line so designated as the end of the call is sufficiently established. In *Campbell v. Branch*, 49 N. C. 313, *Battle, J.*, for the court, said: "The description about which there is the least liability to error must be adopted, to the exclusion of the other. It is equally well settled that the call for the line of another tract of land, which is proved is more certain than, and shall be followed in preference to, one for mere course and distance." The subject is fully treated in *Rowe v. Lumber Co.*, 133 N. C. 433, 45 S. E. 830, and in *Hill v. Dalton* (N. C.) 52 S. E. 273, and *Fincannon v. Sudderth* (at this term) 52 S. E. 579. Wherever the principle has been held not to affect a call by course and distance, it will be found to be due to some peculiarity in the facts which rendered inapplicable the reason upon which it is based, namely, that an uncertain description should yield to one which is certain and less liable to disappoint the intention of the parties.

The difference in the quantity of the land, or the number of acres, if the call is stopped at the end of the distance and if extended to the line of lot No. 2,229, cannot be allowed to prevent the application of the principle embodied in the exception to the general rule requiring the land to be located according to the primary calls of the deed; the exception being "unless there are others more certain." "Ordinarily, the number of acres mentioned in a deed constitutes no part of the description, especially when there are specifications and localities given by which the land may be located; but in doubtful cases it may have weight, as a circumstance in aid of the description; and in some cases, in the absence of other definite descriptions, may have a controlling effect." *Harrell v. Butler*, 92 N. C. 20; *Baxter v. Wilson*, *supra*.

There was no error in the judgment of the court upon the case agreed.

Affirmed.

(140 N. C. 194)

BETTIS v. AVERY et al.

(Supreme Court of North Carolina. Dec. 5, 1905.)

1. SLAVES—INHERITANCE.

Code, § 1281, rule 13, provides that the children born prior to January, 1868, of colored parents living together as man and wife are declared legitimate, with all the rights of heirs at law and next of kin with respect to the estate or estates of any such parents, or any one of them. *Held*, that such act merely legitimated a child born of slave parents, and extended the right of inheritance to the estate of the father, which right was previously restricted to the mother's estate, but did not extend the right of inheritance to property descending from collateral relatives.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Slaves, § 115.]

2. BASTARDS — INHERITANCE — COLLATERALS — STATUTES.

Code, c. 28, § 1281, rule 9, provides that, when there shall be no legitimate issue, every illegitimate child of the mother and the descendant of such a deceased child shall be considered an heir and shall inherit her estate, but such child or descendant shall not be allowed to claim as representing such mother any part of the estate of her kindred, lineal or collateral. *Held*, that such rule referred only to a lineal descent from a mother to her illegitimate child and its descendants, and did not entitle a legitimate child of an illegitimate mother to inherit from her mother's collateral kinsman.

3. SAME.

Code, c. 28, § 1281, rule 10, declares that illegitimate children shall be considered as legitimate between themselves and their representatives, and their estates shall descend accordingly, provided that, when any legitimate child shall die without issue, his inheritance shall vest in the mother. *Held*, that the illegitimates referred to in such section were those who were children of the same mother who were entitled to inherit as between themselves and their representatives as if they were legitimate, and did not entitle a legitimate child of an illegitimate mother to inherit from her collateral relative.

4. SAME.

Code, c. 28, § 1281, rule 10, provides that illegitimate children shall be considered legitimate as between themselves and their representatives, and in case of the death of such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all the children had been born in wedlock. *Held*, that the "descent" so referred to was between brothers and sisters, and had no application to collaterals.

Appeal from Superior Court, Burke County; W. R. Allen, Judge.

Action by Clara Bettis against Wash Avery and others. From a judgment for plaintiff, defendants appeal. Reversed.

The plaintiff brought this action to recover the tract of land containing 21½ acres described in the pleadings, and it was heard upon the following case agreed: (1) Matilda Greenlee, who died before 1861, was the mother of Adam Bettis and Clarissa Greenlee. (2) Clarissa Greenlee was the mother of Austin Greenlee. (3) Adam Bettis was the father of the plaintiff, Clara Bettis. (4) Matilda Greenlee, Adam Bettis, Clarissa Greenlee, and Austin Greenlee were slaves. (5) Clarissa Greenlee died about 20 years ago, Aus-

tin died afterwards, about 17 years ago, and Adam Bettis died a year or two before Austin. (6) Adam Bettis and his wife were married during slavery and lived together as man and wife before emancipation and afterwards, until the date of the death of one of them, which was some time after the year 1866; their child (the plaintiff, Clara) having been born prior to the 1st day of January, 1868. (7) Austin Greenlee was the owner of the land in dispute, having acquired title by deed dated March 25, 1878. He died seised and possessed of the land in fee simple. (8) Austin Greenlee married Laura Greenlee, who died after the death of her husband, leaving a daughter by another marriage, named Malinda, who married Wash Avery. They are the defendants in this case. (9) Austin Greenlee died intestate in Burke county, without ever having had any children. (10) Laura, the widow of Austin Greenlee, lived on the land in dispute after the death of the said Austin and until within a year prior to the beginning of this action, which was commenced July 31, 1903. The court was of opinion that upon the said facts the plaintiff is the owner of the land, and rendered judgment in her favor, from which the defendant appealed.

S. J. Ervin, for appellants. F. H. Busbee & Son, for appellee.

WALKER, J. (after stating the case). The plaintiff's right to recover in this action depends upon the true meaning of our statute of descents in regard to former slaves and illegitimates, and their rights of property and inheritance growing out of their peculiar status. It seems to us that by a reasonable construction of our statute, whether it is based upon the letter or the evident intention of the Legislature, the plaintiff's claim to the land in dispute must fall. She would not have the shadow of a title if the case were decided according to the principles of the common law. But our statute has superseded those principles, and her right, if any she has, must rest solely on some provision of the statute. The Legislature took early action after the war to fix the marital relations of former slaves who were living together as man and wife by passing Acts 1866, p. 100, c. 40, § 5, and providing that those who thus cohabited at the date of the ratification of the act should be deemed to have been lawfully married as man and wife, with the provision for acknowledgment before the clerk or a justice of the peace and for making a record of the fact. This act was construed and held to be valid in *Long v. Barnes*, 87 N. C. 329, *State v. Adams*, 65 N. C. 537, and *State v. Whitford*, 86 N. C. 636. The act was upheld as constitutional, the necessary consent thereto being supplied by continuing cohabitation, and the provision as to acknowledgment was considered to be directory, so that a failure to comply with it, though a misdemeanor, did not affect the validity of

the marriage. This statute is not material in this case, except in so far as it establishes the legitimacy of the plaintiff. There are no facts stated which would cause it to change the status of Adam Bettis and Clarissa Greenlee as illegitimates, for their mother, Matilda Greenlee, died in 1861 a slave, nor are there any to show the legitimacy of Austin Greenlee, who was born in slavery of a slave mother, Clarissa Greenlee. The act of 1866 (Code, § 1842) was followed by Acts 1879, p. 186, c. 73 (Code, § 1281, rule 13), which provided that "the children of colored parents born at any time before the first day of January, 1868, of persons living together as man and wife are hereby declared legitimate children of such parents or either one of them, with all the rights of heirs at law and next of kin, with respect to the estate or estates of any such parents, or either one of them." This act merely legitimates the plaintiff as the child of Adam Bettis and his slave wife, which perhaps was already done by the act of 1866; but it cannot be held to transmit any title to the land in dispute from Austin Greenlee to her, as it refers exclusively to the descent to such a child of the "estate or estates of its parents, or either one of them," and merely extended the child's right of inheritance to the estate of the father, which before that was restricted to the estate of the mother. In this case the plaintiff is not claiming the land as the heir of her father or of her mother, but as heir of an illegitimate first cousin. That provision of the law therefore does not apply. *Tucker v. Bellamy*, 98 N. C. 31, 4 S. E. 34; *Jones v. Hoggard*, 108 N. C. 178, 12 S. E. 906, 907. These two special statutes may, therefore, be laid out of the case, and the plaintiff, having no right at common law, is driven to claim under the statute of descents, applicable to illegitimates generally. It is true that she is a legitimate, but she is claiming collaterally from an illegitimate who is not her brother; they being the children, respectively, of an illegitimate brother and an illegitimate sister. Her case must then be brought within the provisions of either rule 9 or rule 10 of chapter 28 of the Code. The first of those rules is as follows: "When there shall be no legitimate issue, every illegitimate child of the mother and the descendant of any such child deceased, shall be considered an heir, and as such shall inherit her estate; but such child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral."

It is apparent that the rule just quoted refers only to a lineal descent from a mother to her illegitimate child and its descendants, and not to any collateral descent from her kindred to the child as her representative. These are the very words of the act, and the language is too clear and unmistakable for any reasonable doubt as to what is meant. Again, we say, bringing our case to the test

of this rule, the plaintiff is not claiming as the illegitimate child of her mother, because, first, she is a legitimate, and, second, she is claiming under a collateral kinsman of her mother. So that, in every possible view, she is excluded from any benefit under that rule. *Flintham v. Holder*, 16 N. C. 345; *McBryde v. Patterson*, 78 N. C. 415; *Sawyer v. Sawyer*, 28 N. C. 407. If the plaintiff traces her right to inherit from Austin Greenlee back through her illegitimate father (Adam Bettis) to her grandmother (Matilda Greenlee), and then down from her through her illegitimate daughter (Clarissa Greenlee) to Austin Greenlee, the son of Clarissa, she is equally unfortunate, as such an inheritance is positively forbidden by the last clause of rule 9, which excludes the right to inherit, as the representative of an illegitimate mother, any part of the estate of the latter's kindred, either lineal or collateral; and the right cannot, therefore, be traced beyond the mother, nor through the latter's lineal or collateral kindred. The law breaks the connection at the mother in the ascending line when it is necessary to pursue that in order to reach the propositus, and expressly prohibits any direct lineal or collateral descent but that mentioned in the first clause, namely, from the mother herself to the illegitimate child or the descendant of any such child deceased, and the descent provided for in rule 10 as between illegitimates themselves and from them or their issue, as therein specially provided. Nor do we think that under rule 10 the claim of the plaintiff is rendered any better. She comes within neither its letter nor its reason, and certainly not within the former. This canon declares that: "Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock: Provided, that when any legitimate child shall die without issue, his inheritance shall vest in the mother in the same manner as provided in rule 6 of this chapter." Code, c. 28, § 1281. The illegitimates mentioned in the rule are those who are the children of the same mother, and they inherit as between themselves and their representatives as if they were legitimate. We have no such case as this presented in the record. The plaintiff is not a sister of Austin Greenlee, and therefore has not the same mother, but they are first cousins, being the descendants, respectively, of a brother and a sister. The second branch of the rule also refers to a descent as between brothers and sisters, and utterly excludes the idea that such a descent, as that the plaintiff now claims, was ever contemplated. The proviso to rule 10 cannot, of course, affect the question involved herein.

The plaintiff could not derive any title from Austin Greenlee through his mother, even if she had been living at his death, so as to take from him under the proviso, when considered in connection with the proviso to rule 6.

The plaintiff's counsel, however, strenuously insisted before us that it being admitted Adam Bettis, though illegitimate, was collaterally related to Austin Greenlee, also illegitimate, and there being no other nearer claimant than Malinda Avery, the stepchild of Austin Greenlee, or the child of his deceased widow, if Adam had been white and had survived Austin, he would have been his heir under rule 10 of the canons of descent, giving to illegitimates the rights of legitimates as between themselves and their legal representatives, and the plaintiff consequently would inherit as heir of her deceased father. This was his principal contention, and in support of it he relied upon *Tucker v. Tucker*, 108 N. C. 238, 13 S. E. 5. A full and sufficient answer to the argument is that rule 10 applies, by its very terms, to illegitimate children, and is intended to affect only inheritances as between them and their representatives. This is clear from the words in the first part of the rule, "Illegitimate children shall be legitimate as between themselves," and their estates shall descend "accordingly," and also from those we find in the latter part, when reference is being made to the death of any such illegitimate child or his issue without leaving issue, and the descent of his estate to such person as would inherit, namely, "If all such children had been born in wedlock"; the said words evidently describing the children as a class who would inherit from each other, with the qualification as to the "issue" of such a child or the "representatives" of such children. The case of *Tucker v. Tucker*, instead of sustaining the contention of plaintiff's counsel, seems to us to be directly the other way. In that case the court decides that the act of 1879 (Code, § 1281, rule 18) provided for the inheritance of an illegitimate child from both parents, instead of, as formerly, from its mother, "and not collaterally," and then says: "Prior to that act, such children had only the rights of other illegitimates, and, by section 1281 rules 9 and 10, could only inherit from their mother, when there was no legitimate child, and from one another." And again it says: "By virtue of emancipation and the Constitution, the plaintiff has the same rights as any other illegitimates, and, under rule 10, can succeed to the estate of his illegitimate brother."

In no view that we can take of the facts and the law, can the plaintiff recover. She cannot claim under the act of 1866, and she does not present any facts which entitle her to claim under rule 13, as she does not assert title derived directly from either of her parents. She can, then, only rely on rule 9 or rule 10. The reason just given why she cannot claim under rule 13 applies with equal

force to any claim under rule 9, and, besides, she is not an illegitimate child, but has been made legitimate by the acts of 1866 and 1879. As to rule 10, she does not claim directly from a brother or sister, or from the issue or heirs of either, but from an illegitimate first cousin. *Sawyer v. Sawyer*, 28 N. C. 408, 409. It is well argued in the brief of the defendant's counsel that in *Tucker v. Bellamy*, 98 N. C. 31, 4 S. E. 34, it was decided there is no statute which enables a niece to inherit from a deceased aunt, who was a slave; and, if that is so, how can a niece inherit from a descendant of such an aunt, unless there is some express provision to that effect? This is the plaintiff's case. It is true we should so construe these acts as to prevent an escheat, which is not favored by our system of laws and as it was the purpose to do so in passing them; but we must still give them a reasonable construction and decide according to their true meaning, regardless of the consequences. Besides, the defendant says there will be no escheat, as she is entitled to the land under rule 8, being the child of the widow of the propositus, Austin Greenlee. We do not say how this is, as it is sufficient to hold that the plaintiff cannot recover. It makes no difference whether the defendant has any title or not, for the plaintiff can succeed only on the strength of her own title as being good against the world or good against the defendant by estoppel. *Campbell v. Everhart* (at this term) 52 S. E. 201. It may be that the plaintiff's claim should appeal most strongly to our sense of what is just and fair, and also to our sympathy. If this be true, and we do not say that it is, as we cannot pass upon such matters, the law has declared against her, and what the law declares must stand for all that is right without question by us.

The court erred in its judgment, which is reversed, and the case is remanded, with direction to enter a judgment, upon the facts agreed, for the defendant.

Reversed.

(72 S. C. 532)

SEEGERS v. GIBBES, Mayor, et al.

(Supreme Court of South Carolina. Oct. 17, 1905.)

1. MUNICIPAL CORPORATIONS—BOND ISSUES—ELECTIONS—STATUTORY PROVISIONS.

Const. 1895, art. 8, § 5, authorizes cities and towns to acquire and operate waterworks systems. Act March 2, 1896 (Civ. Code, §§ 2008, 2009), authorizes cities and towns to construct and operate waterworks, and to raise funds for that purpose by the issue of bonds when approved by the qualified electors at an election by the municipal authorities. It further provides that at such election commissioners of public works shall be elected to sell and dispose of the bonds and to build and control the waterworks. Act March 9, 1896 (Civ. Code, §§ 2021, 2022), as amended by Act March 2, 1897 (22 St. at Large, p. 453), requires the municipal authorities of any city upon the petition of a majority of the freeholders to

order a special election for the purpose of "enlarging, extending, or establishing electric light plants, or other light or water works." *Held*, that the former act applies only to cities in which there are no waterworks, while the latter act applies to cities which already have a waterworks system, and at an election for the issue of bonds for the purpose of enlarging the system already installed no commissioners of public works need be elected as required by the former act.

2. SAME—CONSTITUTIONAL LIMITATIONS.

The amendment to the Constitution of February 8, 1901, which provides that the limitation imposed by the Constitution on the bonded indebtedness of cities shall not apply to indebtedness incurred "by the cities of Columbia * * * where the proceeds of such bonds are applied solely for the purchase * * * of waterworks plants, * * * and by the city of Georgetown, when the proceeds of such bonds are applied solely for the purchase * * * of waterworks plants * * * where the entire revenue arising from the operation of such plants or systems shall be devoted solely and exclusively to the maintenance and operation of the same," does not require the revenue arising from waterworks in the city of Columbia to be devoted solely to the maintenance and operation of such works, but the clause containing that requirement applies only to the city of Georgetown.

3. SAME.

The constitutional amendment of February 8, 1901, which provides that the constitutional limitations imposed by the section which it amends and by Const. art. 4, § 5, shall not apply to the bonded indebtedness incurred by certain cities, where the proceeds of the bonds are applied solely for the purchase and maintenance of waterworks plants, repeals, as to the cities therein mentioned, Const. art. 10, § 5, providing that municipal corporations or political divisions covering the same territory possessing the power to levy a tax and contract a debt shall so exercise the power to increase their debts that the aggregate debt over and above any territory of the state shall never exceed 15 per cent. of the value of all taxable property in such territory.

Petition for injunction by John C. Seegers against T. H. Gibbes, mayor, and others, as aldermen of the city of Columbia. Denied.

The following is so much of the petition as states the material facts:

"(3) That the assessed value of all the taxable property of the city of Columbia for state taxation next preceding the filing of this petition, as appears from the books of the county auditor for Richland county, is \$7,836,398.

"(4) That the present bonded indebtedness of the city of Columbia is \$925,548, composed as follows: Old bonded city debt, \$850,548; waterworks bonds outstanding, \$75,000; besides which and in addition thereto, there is now outstanding a contingent liability of the city of Columbia aggregating \$162,000, being the unearned interest on \$200,000 of canal bonds, the interest coupons of which were guaranteed by the city under the provisions of an act of the General Assembly of this state of the 24th December, 1887 (19 St. at Large, p. 1097), which said act authorized and requires the levy of a

sufficient tax to promptly pay the same, and which tax, together with the other taxes of the city, shall not exceed 2 per cent. of the assessed value of the property of the city in any one year. That under the powers contained in the act to incorporate the board of trustees of the Columbia Canal, and for other purposes connected therewith (19 St. at Large, p. 1090) the said board issued \$200,000 6 per cent. bonds (the coupons of which are guaranteed by the city as aforesaid), and secured the same by a mortgage upon the said canal and appurtenances and the lands held therewith; and under the powers contained in the act amendatory thereto of December 24, 1890 (20 St. at Large, p. 967) sold and conveyed the Columbia Canal before the same was completed to the Columbia Water Power Company, subject to all the contract liabilities and obligations made and entered into by the said board prior to such sale and transfer, amongst which obligations was that of paying the interest coupons on said canal bonds promptly as they should mature, and the said water power company, in addition thereto and as security for the prompt payment of the said coupons, has deposited with the National Loan & Exchange Bank of the city of Columbia \$18,000 West Shore Railroad Co. 4 per cent. gold bonds, maturing in the year 2361, guaranteed by the New York Central & Hudson River Railroad Co., with interest coupons attached, payable semiannually.

"(5) That the territory embraced within the city of Columbia is comprised within the territorial limits of Columbia township, a corporate political subdivision of this state, and the assessed value of all taxable property in Columbia township outside the limits of the city, as appears from the county duplicate of Richland county, is \$2,375,473, making, together with the property within the city, a total of \$10,211,877; and the said Columbia township now has an outstanding bonded indebtedness of \$19,700, against which there is now held in the hands of the sinking fund commissioners for Richland county and applicable to the payment thereof the sum of \$12,640.27, leaving a balance unprovided for of \$7,059.73. That the said \$12,640.27 in the hands of the sinking fund commissioners, as aforesaid, is the balance of the proceeds of the tax levied upon the property of the said township annually for the purpose of paying the interest and meeting and retiring the said bonds.

"(6) That the city of Columbia is now the owner of and operating a waterworks plant and system, but the same has become inadequate to supply the needs of the city, and on the 11th day of April, 1905, a petition duly signed by a majority of the freeholders of the said city, as shown by the tax books of the said city, was presented to the city council of said city, asking that an election

be ordered, submitting to the qualified electors of the said city the question: 'Whether for the purpose of enlarging, extending and repairing its waterworks, waterworks system and plant, the city shall issue coupon bonds, as provided by law, to the amount of \$400,000, or so much thereof as may be legally issued by the said city.'

"(7) In accordance with and pursuant to the said petition of freeholders, and under the provisions of the act of assembly of March 9, 1896, and acts amendatory thereto, being now section 2021 of the Code of Civil Laws of this state, the city council of the city of Columbia, in council assembled, by resolution ordered the said election, and requested and authorized the commissioners of election of Richland county to conduct the same according to law; and thereafter the said commissioners of election, prior to said election, published due notice of said election, as required by law, for the 9th May, 1905, in 'The State' and 'The Record,' two daily papers published in the city of Columbia.

"(8) That the said election was duly held on the 9th May, 1905, and a majority of the voters voting at said election voted in favor of the issue of said bonds, as petitioner is informed and believes, and the result is about to be so declared by said city council by ordinance, and in pursuance of said election the city council are preparing to issue and are about to issue \$400,000 coupon bonds for the purposes aforesaid, and to deliver the same to its waterworks commission for said purpose.

"(9) Your petitioner, upon information and belief, alleges that the said election is illegal and void, and not sufficient to authorize the issue of any bonds, for the reason: (a) That no 'Commissioner of Public Works' was voted for or elected at said election, as is provided for in section 2009 of volume 1, of the Civil Code of Laws of South Carolina. (b) Petitioner is informed and believes the city of Columbia and the said city council do not intend to devote the entire revenue of its waterworks as enlarged, extended and repaired as contemplated, solely and exclusively to the maintenance and operation of the same; whereas, your petitioner submits that by the constitutional amendment of 1901 their doing so is made a condition of the exercise of the power to issue bonds therein referred to, and your petitioner further submits that said city and city council should be required to do so.

"(10) Your petitioner is informed and believes that the city council of Columbia are without authority to issue \$400,000 worth of bonds for the purposes aforesaid, for the reason that: (a) \$400,000, in addition to the present bonded debt of the city, including the guaranty on the canal bonds of the coupons thereof, and the proportion of the bonded debt of Columbia township chargeable to its taxable property within the city,

will contravene section 5 of article 10 of the Constitution of this state, in that it will exceed 15 per cent. of the taxable property within the limits of the city. (b) The city council of Columbia claims that the amendment of 1901 to section 7 of article 8 of the Constitution, which is as follows: 'Provided, that the limitations imposed by this section and by section 5, art. 4, of this Constitution, shall not apply to bonded indebtedness incurred by the cities of Columbia, Rock Hill, Charleston and Florence, where the proceeds of said bonds are applied solely for the purpose, establishment, maintenance or increase of waterworks plans, sewerage system; and by the city of Georgetown, when the proceeds of said bonds are applied solely for the purchase, establishment, maintenance or increase of waterworks plant or sewerage system, gas and electric light plants, where the entire revenue arising from the operation of such plants or systems shall be devoted solely and exclusively to the maintenance and operation of the same, and where the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution, upon the question of other bonded indebtedness,' in repealing the 8 per cent. limitation as to the said cities, where the increase of bonded indebtedness is for the purpose therein specified, carried with it and also repealed by necessary implication the 15 per cent. limitation provided in section 5, art. 10, as to the said cities, where the increase of bonded indebtedness is for said purposes; whereas, your petitioner submits that said 15 per cent. limitation is wholly unaffected by said amendment repealing said 8 per cent. limitation as aforesaid, and that same still remains in full force as to said cities, even when the proposed increase is for the purposes aforesaid. (c) The said city council also claims that the clause in said amendments, 'where the entire revenue arising from the operation of such plants or systems shall be devoted solely and exclusively to the maintenance and operation of the same,' applies only to the city of Georgetown, whereas, your petitioner submits that it also applies to the other cities named in said amendment, including the city of Columbia; and further submits that, inasmuch as the city of Columbia does not intend that the entire revenue of its waterworks as enlarged, extended and repaired, as contemplated, shall be devoted exclusively to such uses, the said city has no power to increase its bonded indebtedness to any amount under the terms of said amendment.

"(11) Your petitioner submits that under a proper construction of section 7 of article 8, as amended, and section 5 of article 10, of the Constitution, the city of Columbia, if otherwise authorized to do so, has power to issue only \$75,097 of bonds for the pur-

poses aforesaid, as is shown by the following table:

Taxable property of the city is \$7,336,398 15 per cent. of which is.....	\$1,175,459 70
Old bonded debt of the city..	\$350,548 00
Waterworks bonds	75,000 00
Proportion debt of Columbia township	12,815 00
Outstanding guaranteed interest coupon canal bonds..	162,000 00
	<u>1,100,323 00</u>
Balance	\$75,097 70

"(12) That your petitioner is informed and believes that the said city council will issue bonds to the amount of \$400,000, unless restrained by the order of this court.

"Wherefore, he prays that the respondents and the city of Columbia be perpetually restrained and enjoined from issuing any bonds in excess of the said sum of \$75,097.70, and from delivering the same to its waterworks commission, and for such other and further relief as may be just, and your petitioner will ever pray," etc.

The return to the rule herein is as follows:

"(1) They admit the allegations of the first eight paragraphs of the petition, and also the allegation of paragraph 12 thereof.

"(2) Answering paragraph 9, they admit that no commissioners of public works were voted for or elected at said election, as alleged in said paragraph, but submit that the same is not necessary nor required for the validity of said election, for the reason said election was held under the provisions of sections 2021 and 2022 of the Civil Code of Laws of South Carolina, being an act entitled 'An act to authorize special elections in any incorporated city or town in this state for the purpose of issuing bonds for corporate purposes,' approved 9th March, 1896 (22 St. at Large, p. 88), and acts amendatory thereof—which does not require the election of commissioners of public works at such special election; and was not held under the provisions of sections 2008, 2009, of said Code, being the act entitled 'An act to authorize all cities and towns to build, equip and operate a system of water works and electric lights, and to issue bonds to meet costs of same,' approved 2d March, 1896 (22 St. at Large, p. 83), as alleged in the petition; and further, respondents allege the said city of Columbia is now, and was prior to the passage of the act of 2d March, 1896, the owner of and operating a system of waterworks and plant under the provisions of its charter, and already had and still has its duly elected and qualified waterworks commission, composed of five citizens, electors and freeholders of the city, under whose care and supervision the best source of water supply, plans and specifications for the repair, enlargement and extension of the waterworks plant and system have been procured and matured, and for the carrying out of which said bonds were voted and are now about to be issued and turned over to said

commission. Further answering paragraph 9, they admit they do not intend to devote the entire revenue arising from the operation of its waterworks system to the maintenance and operation thereof, for the reason that the same would be more than sufficient for this purpose, but they do intend to so devote so much thereof as may be necessary. But they allege that under the amendment of 1801 to section 7 of article 8 of the Constitution, the provision that 'the entire revenue arising from the operating of said plants or systems shall be devoted solely to the maintenance and operation of the same' relates only to the city of Georgetown, and not to the other cities named therein.

"(3) Answering paragraph 10, they allege that under the facts alleged in the petition they are by the Constitution and laws of this state vested with full power and authority to issue \$400,000 of bonds for waterworks purposes, for the reason: That in the absence of constitutional or statutory limitations, municipal corporations have the inherent power to contract debts to any amount for a proper public corporate purpose; that the limitation of 8 per cent. of the value of its taxable property as valued for state taxation, contained in section 7 of article 8, and section 5 of article 10, of the Constitution of this state, is a limitation upon this power; and the provisions in section 5, of article 10, providing: 'Whenever there shall be several political divisions or municipal corporations covering or extending over the same territory or portions thereof possessing a power to levy a tax or contract a debt, then each of such political subdivisions or municipal corporations shall so exercise its power to increase its debt under the foregoing eight per cent. limitation that the aggregate debt over and upon any territory of this state shall never exceed fifteen per centum of the value of all taxable property in such territory as valued for taxation by the state'—is a restriction upon the exercise of the power under said 8 per cent. limitation. And when, by the adoption and ratification of the amendments to article 8, § 7, the 8 per cent. limit was removed for the city of Columbia, the restriction upon the exercise of the limit imposed by the 8 per cent. clause necessarily fell with it; and they insist that under the amendment the city of Columbia has power to issue bonds for the purpose named under the conditions named to the full extent authorized by the election.

"(5) Answering paragraph 11, they allege that, even if the 15 per cent. restriction contained in section 5 of article 10 of the Constitution of 1895 applies, notwithstanding said amendment of section 7 of article 8 (which they deny), the amount of bonds as stated in the petition which the city is authorized to issue must be enlarged by the addition thereto of the items \$162,000 unearned guaranteed canal coupon bonds, and by \$7,398.57, the difference between \$541,649, the proportion of the bonded debt of Columbia township proper-

ly chargeable to the city territory, and \$12,815, the amount improperly charged in the statement in the petition, for the reasons: (a) The guaranty of the city on the interest coupons is now but a contingent liability fully secured by the mortgage property and the deposit of the water power company, and is not a bonded debt, within the meaning of the Constitution. (b) Even if such liability is to be deemed a part of its bonded debt, the amount with reference to the constitutional limitation of indebtedness should not be regarded as the aggregate of the interest coupons to the maturity of said bonds, but only such amount as according to the principle of the standard annuity tables would yield at 6 per cent. \$12,000 per annum for 13½ years (the period to maturity of the bonds), to wit, the sum of \$111,540. (c) The \$12,640.27 now in the hands of the Sinking Fund Commission for Richland county is the accumulations from the annual taxes levied under the acts of the Legislature for the purpose of creating a sinking fund for payment of these bonds before they mature, and when they mature, which under the law is solely applicable to the retirement of the said township bonds and in contemplation of law, will never again have to be collected by taxation; therefore the \$7,060, the amount now unprovided for by taxes collected, is the proper outstanding bonded debt of Columbia township, upon which the proportion should be estimated, and not \$19,700 as shown by said tables. Respondents therefore submit that in any event they should not be restricted to an issue less than \$244,495, or \$182,955."

J. S. Muller, for petitioner. H. N. Edmunds and Allen J. Green, for respondents.

WOODS, J. This proceeding in the original jurisdiction of this court was brought by the petitioner, John C. Seegers, a taxpayer and freeholder of the city of Columbia, on behalf of himself and all others in like situation who will come in and share the expense of the cause, to enjoin the city council from issuing bonds for a greater amount than \$75,097.70 for the purpose of enlarging, extending, and repairing the city waterworks; the allegation being that the council is about to issue illegally \$400,000 of bonds for that purpose. The facts are not in dispute, and they are fully set out in the petition and answer.

1. The petition first charges that the statute under which the election was held to authorize the issue of bonds to the amount of \$400,000 required that "commissioners of public works" should be voted for, and as no such officers were elected the entire election was illegal, and the issue of the bonds would be without authority. The act of March 2, 1896 (Civ. Code, §§ 2008, 2009), authorizes cities and towns to construct and operate waterworks, and to raise funds for that purpose by the issue of bonds, but re-

quires such bond issue to be approved beforehand by the qualified electors at an election held by the municipal authorities. This act requires that at such election three citizens shall be elected "commissioners of public works," who are vested with authority to sell and dispose of the bonds, and to build, operate, and control the waterworks. It will not be doubted, if the election is to be referred to this statute, the failure to elect the commissioners of public works would invalidate the election, because without these officers the whole scheme contemplated by the act would be defeated. This act relates to the construction, purchase, and operation of waterworks and electric light plants, and obviously was intended to carry into effect section 5 of article 8 of the Constitution of 1895, which is as follows: "Cities and towns may acquire, by construction or purchase, and may operate water works systems and plants for furnishing lights, and may furnish water and lights to individuals, firms and private corporations for reasonable compensation: Provided, that no such construction or purchase shall be made except upon a majority vote of the electors in said cities or towns who are qualified to vote on the bonded indebtedness of said cities or towns." On the 9th day of March, 1896, another act was passed (Civ. Code, §§ 2021, 2022), which provided: "That it shall be the duty of the municipal authorities of any incorporated city or town of this state, upon the petition of a majority of the freeholders of said city or town, as shown by its tax books, to order a special election in any such city or town for the purpose of issuing bonds for any corporate purpose set forth in said petition: Provided, that the aggregate bonded indebtedness of any city or town shall never exceed eight per centum of the assessed value of the taxable property therein." 22 St. at Large, p. 88. No mention is made in this act of the former statute of March 2, 1896, above recited, though it had been passed only seven days before. This last statute of March 9, 1896, was subsequently amended (Act March 2, 1897, 22 St. at Large, p. 453), and at the time of the election here under consideration the portion material to this discussion read as follows: "It shall be the duty of the municipal authorities of any incorporated city or town of this state, upon the petition of a majority of the freeholders of said city or town, as shown by its tax books, to order a special election in any such city or town for the purpose of issuing bonds for the purchasing, repairing or improving of city or town hall, or park or grounds therefor, markets and guard house, enlarging, extending or establishing electric light plants or other lights, or water works, or sewerage, erecting, repairing or altering school buildings, fire protection purposes, improvement of streets and sidewalks, or any corporate purpose set forth in said petition: Provided, that the aggregate bonded indebtedness of any city or town shall

never exceed eight per centum of the assessed value of the taxable property therein." Civ. Code, § 2021. This act contains no requirement for the election of commissioners of public works.

By referring to the portions of the Constitution and statutes we have italicized, it will be seen the statute first enacted was intended to provide for the construction and operation of waterworks and electric light plants where none had existed, and it was therefore reasonable that the General Assembly should require the election of commissioners of public works—new officers to take charge of a new municipal enterprise. The distinct characteristic of the latter act is that it provides for the issue of bonds, not only for establishing, but for enlarging or extending, waterworks and other public works. When these public works are already in existence under the management of municipal officers already provided, there would be far less, if any, reason at all, to require a complete change of administration upon their enlargement or extension. It may be, as far as these acts are in pari materia, that is, as far as they both relate to the establishment of waterworks, they must be construed as one act, and that the later act would not justify the issue of bonds for the construction and operation of waterworks where none had been in operation before, in pursuance of an election which did not include the choice of commissioners of public works. But that is not the question here, for the city of Columbia already has waterworks in operation and under the management of its municipal officers, and, although the site and mechanical construction may be entirely new, there would still be nothing more than the enlargement or extension of a specific public enterprise already in existence and in operation. The act of March 2, 1896, has no application, and the act of March 9, 1896, as amended, to which the election must be referred, does not require the election of commissioners of public works.

2. It is next contended the bond issue will be illegal because "the city of Columbia and the said city council do not intend to devote the entire revenue of its waterworks as enlarged, extended and repaired, as contemplated, solely and exclusively to the maintenance and operation of the same." The provision of the Constitution on which the petitioner relies as requiring the city of Columbia to devote the entire revenue of its waterworks to the purposes mentioned is so obviously limited in its application to the city of Georgetown that it is only necessary to quote the amendment itself to make the point clear: "Provided, that the limitation imposed by this section and by section 5, article 4, of this Constitution, shall not apply to bonded indebtedness incurred by the cities of Columbia, Rock Hill, Charleston and Florence, where the proceeds of said bonds are applied solely for the purchase, establishment, main-

tenance or increase of water works plants, sewerage system; and by the city of Georgetown, when the proceeds of said bonds are applied solely for the purchase, establishment, maintenance or increase of water works plant or sewerage system, gas and electric light plants, where the entire revenue arising from the operation of such plants or systems shall be devoted solely and exclusively to the maintenance and operation of the same, and where the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution, upon the question of other bonded indebtedness." If the intention had been to place Georgetown and the other cities mentioned upon the same footing as to the conditions upon which the municipal debt could be increased beyond 8 per cent. of the value of the taxable property, and the purposes to which the proceeds of the bonds and the earnings of the public works should be applied, respect for the intelligence of the framers of the amendment requires us to think they would have merely placed the word "Georgetown" after "Florence," and omitted what would have been the useless repetition of many words. The plain meaning is the city of Georgetown is allowed to exceed the 8 per cent. limit for gas and electric light plants, as well as for waterworks and sewerage, while the excess as to the other cities is restricted to waterworks and sewerage; and, on the other hand, Georgetown is restricted in the use of the revenue arising from these public enterprises to their maintenance and operation, while the other cities are not so restricted.

The petitioner next contends that, though the amendment to the Constitution last above quoted allows the city of Columbia to incur a bonded debt exceeding 8 per cent. of the taxable property of the city itself, the amendment did not affect the following provisions of section 5, art. 10, of the Constitution: "And wherever there shall be several political divisions or municipal corporations covering or extending over the territory, or portions thereof, possessing a power to levy a tax or contract a debt, then each of such political divisions or municipal corporations shall so exercise its power to increase its debt under the foregoing eight per cent. limitation that the aggregate debt over and upon any territory of this state shall never exceed fifteen per centum of the value of all taxable property in such territory as valued for taxation by the state. * * *" It is admitted, if this limitation of 15 per cent. is unaffected by the amendment, the issue of \$400,000 of bonds would be illegal, as the aggregate debt of the "several political divisions or municipal corporations" covering the territory embraced in the city of Columbia would exceed 15 per cent. of the taxable property of such territory. But for the unfortunate slip in mak-

ing the amendment of February 8, 1901, already quoted, apply to section 5, art. 4, which relates to an entirely different subject, instead of to section 5, art. 10, this question could not arise, for "the limitation" removed as to the amount of the bonded debt of the city of Columbia and other cities mentioned would have referred obviously to the 15 per cent. limitation, as well as to the 8 per cent. limitation; both being mentioned in that section. It must be confessed this mistake has given rise to doubt and confusion. The amendment by its terms, nevertheless, removed the 8 per cent. limitation as to the cities mentioned, because that limitation is provided in section 7, art. 8, which is expressly referred to in the amendment, and hence section 5, art. 10, was inconsistent with the amendment, as far as it provided for an 8 per cent. limitation, and this 8 per cent. limitation there repeated necessarily was also taken away. *Bray v. City Council of Florence*, 62 S. C. 57, 39 S. E. 810. It is true the 15 per cent. limitation might operate without the 8 per cent. limitation, but the terms of section 5, art. 10, under discussion, indicated these limitations were intended to operate together, the former to be a restriction on the latter; and hence we think the reasonable view is that they fell together. If the 15 per cent. limitation should be held in force, notwithstanding the repeal of the 8 per cent. limitation, the result would be that one municipal corporation could, by contracting a bonded indebtedness amounting to 15 per cent. of its taxable property, exclude another municipal corporation or political division of the state limited to the same territory from incurring any bonded indebtedness whatever, however great might be the necessity. To illustrate: A city coterminous with a school district might issue bonds to the amount of 15 per cent. of the taxable property of the common territory, and thus forever prevent the issue of bonds by the school district, though the necessity might be ever so great. The repeal of the 8 per cent. limitation defeated the original constitutional scheme as to the cities mentioned for the limitation of municipal indebtedness, of which the 15 per cent. limitation was a part. Even, however, if it be considered the mistake in the enactment of the constitutional amendment made this question a knot which cannot be untied, in cutting it we have effected the manifest purpose that the amendment was intended to serve.

The conclusions reached as to the questions herein discussed make the consideration of the other questions presented unnecessary. The judgment of the court denying the petition has already been filed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(73 S. C. 491.)

BROCK et al. v. KIRKPATRICK et al.
(Supreme Court of South Carolina, Oct. 10, 1905. On Rehearing, Oct. 30, 1905.)

1. APPEAL—REVIEW—SPECULATIVE EXCEPTION.

After trial and verdict rendered in favor of plaintiff, an exception by him to an order transferring the cause to the calendar for the trial of legal issues is speculative, and will not be reviewed.

2. SAME—PLEADING—DEMURRER.

An exception to a refusal to sustain a demurrer to so much of defendant's answer as sets up a certain defense cannot be sustained, where such demurrer had already been sustained by another judge on the ground that the facts stated in the answer were insufficient, reserving further consideration when sufficient facts were stated, and no amendment had been made.

3. JUDGMENT—PERSONS CONCLUDED—EXECUTORS AND DEVISEES.

Where a judgment was obtained on a note against an executor, and was acknowledged by him in his accounting on his final discharge, allowed as a claim against the state, and enrolled in the probate court as a judgment, on which judgment execution issued, it is binding on the estate, and the creditor, and is prima facie evidence in a suit by the creditor to subject lands of devisees to the payment of the debt without production of the note.

4. WILLS—DEBTS OF TESTATOR—ACTION TO ENFORCE—LACHES.

Where testator died in 1888, and within the year the executor converted the personality into money, and in 1890 an action was commenced on a note of testator in the common pleas, and judgment obtained in 1891, and lands in possession of devisees were levied on, but no sale was made, and proceedings to construe the will and for an accounting were begun in the probate court in 1890; in which proceeding judgment was rendered in 1892, and in 1893, on an allowance of the judgment of the court of common pleas in the probate court, execution issued from such court and was levied on the same land, and an injunction was obtained in an action commenced in 1893 against the enforcement of such levy, which injunction was made permanent in 1898, without prejudice, to bring an action to subject the lands devised to the debt, an action begun in 1899 held not barred by laches.

Appeal from Common Pleas Circuit Court of Abbeville County; J. E. McDonald, Special Judge.

Action by L. A. and T. H. Brock, partners, against Hannah Kirkpatrick and Annie Taylor. From the Circuit decree, plaintiffs appeal. Reversed.

See 48 S. E. 72.

Wm. N. Graydon, for appellants. M. P. DeBruhl and Frank B. Gary, for respondents.

SHAND, A. A. J. This is an action by L. A. and T. H. Brock, partners, against Hannah Kirkpatrick and Annie Taylor, devisees of Jane Taylor, deceased, to subject lands devised to them and in their possession to the payment of a debt due the plaintiffs by Jane Taylor at the time of her death. Jane Taylor gave to plaintiffs on 27th April, 1888, her promissory note for \$109.90, payable at one day, with annual interest at 10 per cent. The maker of this note died in December,

1888, leaving this note wholly unpaid. Soon thereafter her will was duly proved, and Richard T. Kirkpatrick duly qualified as executor. She left a personal estate of about \$1,200, and several tracts of land, all but two of which she had previously conveyed to her several children, these two defendants excepted, but these deeds seem not to have been delivered, and were recorded after her death. Of the two tracts not so intended to be conveyed, she directed one of 210 acres to be sold by her executor, and divided the other of 450 acres into two parcels, one of which, containing 200 acres, she devised to Hannah Kirkpatrick, and the other, containing 250 acres, to Annie Taylor. It is these two parcels that plaintiffs seek to subject to the payment of their claim against testator. In 1889, the executor of Jane Taylor's will made sale of her personal effects, realizing therefrom \$940.50, collected \$211.75 on debts due testator, and purchased himself at public outcry the 210-acre tract for \$800. Of the personalty sold for \$940.50 the legatees purchased to the amount of \$743.91; Hannah Kirkpatrick's purchases aggregating \$166.97, and Annie Taylor's \$83.29. These amounts were never paid by the devisees, but were charged against their interests. Soon after the purchase of the land by the executor he resold it for \$1,200, of which \$800 was in notes secured by a mortgage of the premises. The executor subsequently, about 1890, sold these notes and mortgage to the plaintiffs, who paid him therefor, and thereafter recovered judgment of foreclosure on the mortgage. A statement made by the probate judge in 1895 indicates that the debts due by testator at the time of her death amounted to less than \$925, and the subsequent expenses of administration, not including commissions, to \$221.65. In this statement the executor was charged with \$1,200 for the tract of land sold by him. In August, 1890, Mary Hughes and others, legatees and devisees of Jane Taylor, commenced a proceeding in the court of probate against the executor and other beneficiaries under the will of testatrix for the settlement of the estate. Creditors were not made parties. This case came to this court at the April term of 1892. See 37 S. C. 161, 15 S. E. 912. On December 3, 1890, the plaintiffs brought their action against R. T. Kirkpatrick, as executor of Jane Taylor, on the note for \$109.90 given by her to plaintiffs on 27th April, 1888. Judgment by default was entered 6th February, 1891, for \$125.56, and costs. Execution was issued same day, and was levied 5th November, 1891, on the 200 acres devised to Hannah Kirkpatrick as the lands of Jane Taylor, deceased. No sale was made under this levy. A like levy was again made on this same land on 16th September, 1893. Thereupon Hannah Kirkpatrick commenced her action against L. A. and T. H. Brock and the sheriff to enjoin a sale under this levy, alleging, among other

things, her exclusive possession of this land since her mother's death, the possession by the testatrix at her death of other property sufficient to pay all of her debts, and the pendency of the case of *Hughes v. Kirkpatrick*. Mr. Justice McGowan granted a temporary injunction on 23d September, 1893, which was continued by Judge Wallace on 11th October, and made perpetual by Judge Klugh by an order which bears no date, as printed in the "case" for appeal; but Judge McDonald says this order was made in October, 1898. This last order, however, was made "without prejudice to any rights which defendants have to bring an action for the purpose of subjecting plaintiff's said land to the payment of the said debt evidenced by said judgment." Meantime, on 28th February, 1893, the probate judge, in the case of *Hughes v. Kirkpatrick*, had declared that the executor was insolvent, and directed him to turn over all the uncollected assets of the estate, and that all persons indebted should pay their debts into the probate court. And on 20th February, 1895, on petition by the executor for a discharge, the probate court fixed 21st March as the day for a hearing, and notice was duly published. The act (Code Civ. Proc. § 41) requires a publication of this notice to be for "at least one month." This means a calendar month, and therefore from 21st February to 21st March is "one month," within the meaning of the statute. *Williamson v. Farrow*, 1 Bailey, 615, 21 Am. Dec. 492; *Sheets v. Selden's Lessee*, 2 Wall. 189, 17 L. Ed. 822; *Story Prom. Notes*, § 213. On the day appointed the executor, with his attorney, appeared. The judge of probate took up the matter, recited the proceedings and adjudications in the case of *Hughes v. Kirkpatrick*, and made a statement of receipts and disbursements by the executor, adding interest charges and deducting commissions, and making statement of the claims outstanding against the estate, including "judgment of L. A. and T. H. Brock, \$141.81, interest on \$128.56 from February 6, 1891, \$35.80—\$177.61."

The probate judge on 6th April, 1895, made a certified transcript of the claims allowed by him in the proceedings before him on 21st March, filed the same on the docket of judgments in his office and a transcript in the office of the clerk of the court of common pleas for Abbeville county, and on the same day issued his execution for these several amounts. Code Civ. Proc. § 69. One week thereafter a return of nulla bona was made by the sheriff on this execution. No return of nulla bona was ever made on the former execution issued from the court of common pleas. Four years afterwards, on 21st April, 1899, the plaintiffs commenced this action against Hannah Kirkpatrick and Annie Taylor to subject to the payment of plaintiff's debt the two parcels of land devised to the defendants. They alleged the judgment recovered by them in the court of

probate on a debt of the testator, upon which they had previously recovered a judgment in the court of common pleas, the issue of execution by the probate court and the return of nulla bona thereon, the death of Jane Taylor, the qualification of her executor, the devise to defendants, their possession of the land, and that the plaintiffs had made every effort, but without success, to recover from the executor. The complaint invited other creditors to join with plaintiffs in this action. To this complaint the defendants answered, and at the hearing moved to dismiss the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. Plaintiffs also demurred to certain of the defenses set up by the answer. These pleadings are fully printed in 60 S. C., at pages 322, 328, 38 S. E. 779, 85 Am. St. Rep. 847. The case was heard by Judge Gage on these demurrers. His decree and the judgment of this court on appeal settled these points: (1) That the complaint alleged, not only the judgment, but also, sufficiently, the note which had been sued to judgment, so that defendants could plead any defense to which the note was subject; (2) that it was not an action on a judgment, and therefore leave to sue was not necessary; (3) that plaintiffs had the right to have their debt paid out of any assets of testatrix without regard to a consequent derangement of testatrix's intended distribution; (4) that plaintiffs had the right to seek a recovery on their claim, either under action against the executor individually or against these defendants as devisees; (5) that the statute of limitations did not begin to run in favor of defendants under this action until a return of nulla bona on an execution issued to enforce the judgment obtained against the executor of the testatrix, and that the lands of testatrix in the possession of these defendants were not leviable under this execution. The question of homestead raised by the answer was left open, and seems not to have been again urged.

The case next came up before Judge Townsend, under order submitting the issue of title to a jury for trial, and on appeal to this court it was again held that the statute of limitations commenced to run in favor of defendants only from a return of nulla bona on execution issued to enforce the judgment alleged to have been entered against the executor. It was also held that there was no issue of title involved requiring a trial by jury as matter of right; the action being purely equitable. See 69 S. C. 231, 48 S. E. 72. The case was returned to the circuit court, where testimony was taken before the master under an order of reference to hear and decide all equitable issues. The several judgments and proceedings above stated were introduced in evidence, and there was some oral testimony, but the original note of Jane Taylor was not produced nor loss of it

proved. L. W. Perrin, Esq., the master, reported: (1) That the probate court had jurisdiction to render the judgment of 6th April, 1895, in favor of L. A. and T. H. Brock against R. T. Kirkpatrick, as executor; (2) that, the note not having been produced, no valid debt against the testatrix had been established, the judgments against the executor not being evidence of such indebtedness as against the devisees; (3) that plaintiffs had not lost their rights in this action by reason of their laches. The correctness of these findings and of the reasons of the master therefor was questioned by numerous exceptions taken by both plaintiffs and defendants. Upon these exceptions the case was heard at the regular term of court for Abbeville county, in October, 1904; Hon. J. E. McDonald, special judge, presiding. In a very carefully prepared decree, and with a full consideration of authorities, Judge McDonald overruled the master's first ruling, sustained the second, and overruled the third, thus decreeing that there was no valid judgment by the probate court on 6th April, 1895, that the debt was not proved, and that plaintiffs, by laches, had lost their right of action. He therefore gave judgment dismissing the complaint. From this judgment the plaintiffs have appealed to this court. We agree with Judge McDonald "that all of the issues raised by the pleadings, which were not necessarily and specifically passed upon by the Supreme Court on the two appeals herein," were still open for adjudication by him.

1. The first exception by plaintiffs is to an order of Judge Klugh ordering the case transferred to calendar 1 for the purpose of trying the plea of adverse possession set up in the answer of defendants. As this trial has been had, and a verdict rendered in favor of plaintiffs, it is now, at plaintiffs' instance, a speculative question, and, besides, comes too late after the hearing on the former appeal. See *Brock v. Kirkpatrick*, 69 S. C. 231, 235, 48 S. E. 72.

2. The exception as to Judge Klugh's refusal to sustain plaintiffs' demurrer to so much of defendants' answer as set up the right of homestead cannot be sustained, for the reason that such demurrer had been already sustained by Judge Gage to the claim, on the grounds that the facts as stated in the answer were not sufficient, reserving further consideration when sufficient facts were stated. No amendment to this defense has ever been made.

The first exception to Judge McDonald's decree complains that the circuit judge erred in saying that the *Hughes Case* was begun in the court of common pleas, whereas it was in the court of probate. This was an inadvertent misstatement, which in no way affects the judgment. The remaining 34 exceptions will all be disposed of in the further consideration of this appeal.

3. It has been already adjudicated in this

case that plaintiffs' right of action against the devisees arose on return of nulla bona. A return of nulla bona that would authorize action can be made only on execution issued to enforce a valid judgment in favor of plaintiffs. It is conceded that the only return of nulla bona was made on execution from the probate court. Where that court has rendered a valid judgment, and it has been duly transcribed and entered in his court and in the court of common pleas of the county—all of which was done in this case—an execution may be issued by the probate judge, directed to the sheriff, to enforce the judgment. Code Civ. Proc. § 69. So that the existence of a valid return in this case depends upon the validity of the probate court judgment. That judgment does not purport to have been rendered in the case of *Hughes v. Kirkpatrick*, as appellants contend, but in an ex parte proceeding for settlement and discharge instituted by the executor, at the hearing of which no one was present except himself and his attorney. It is true that the probate judge states the case of *Hughes v. Kirkpatrick*, but only as a recital of the principles established in that case, and as his guide in making this final settlement. It has been held by this court that a creditor cannot bring action in the court of probate for the mere recovery of his debt. *Haley v. Thames*, 30 S. C. 270, 9 S. E. 110. Also, that a claim presented and allowed in a proceeding in the court of probate to sell land in aid of assets, which necessarily involves the ascertainment of personal assets and liabilities, the administrators and heirs being parties by summons served, and creditors being called in, is a binding judgment. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667. Does the same principle apply to the determination by the probate court in this case that the estate of Jane Taylor was indebted to these plaintiffs for the amount stated in the ex parte proceeding on 21st March, 1895? We think it does, so far as plaintiffs and executor are concerned. By law the executor is required to call upon all creditors to present their claims against the estate for settlement. Whether he did so or not, and whether these plaintiffs presented to him their note or a copy of it duly verified within the year, does not appear. But it was afterwards presented by summons and complaint against the executor, and judgment rendered thereon in the court of common pleas. Thereafter the executor and plaintiffs were estopped from disputing the debt or the amount of it as ascertained by that judgment. When, therefore, the executor applied for his discharge, he was bound to render an account, and on such accounting to include this judgment as a liability of the estate, established by the judgment of the court of common pleas—a claim, the amount of which these plaintiffs were estopped from disputing. In passing upon the account so admitted it was the duty of the probate court, under its constitutional "jurisdiction in all matters

testamentary and of administration," to allow it as a valid indebtedness, and to so adjudicate, and this was done. Such adjudication in this case was not invalid for insufficiency of form and statement. *Bankhead v. Good*, 56 S. C. 393, 34 S. E. 689. This statement of indebtedness, however, was of no effect as against the devisees of Jane Taylor, who were not parties to the proceeding. But it was an ascertainment and allowance of a debt against the executor, and through him against the estate which he represented, because an adjudication that the estate of testatrix was indebted to plaintiffs on the debt presented by him to the extent that they made claim thereon, and the benefit of which they could therefore assert and enforce.

We find no decision in the courts of this state which has precisely ruled upon this question, and in its consideration we have limited ourselves to the facts of this case—a claim due by testatrix in her lifetime, established against her estate by judgment duly obtained against her executor, presented by the executor to the probate judge on statement made by executor of assets and liabilities on his ex parte application for final discharge, and the allowance by the probate judge in specific amount of judgment as a debt due by the estate, followed by formal judgment of the probate court in favor of plaintiffs and execution thereon. We do not consider the claim of any other creditor, because no other creditor has properly made himself a party to this action. The duties of an executor are to collect personal assets, pay debts and their legacies. He is required to publish a notice to creditors to present their claims to him duly verified. The probate court has "jurisdiction in all matters testamentary and of administration." The executor is authorized to apply to the probate court for a final discharge, but must then account for all his receipts and disbursements, and, if legatees are to be affected, must make a statement of all outstanding debts which have been presented to him and unpaid. The judge of the probate court must pass upon the correctness of every item of this return. And, as against debts due by his testatrix in her lifetime, the executor represents the estate and occupies an adversary position towards the creditors. And the claim in this case against the deceased having been already reduced to judgment at the instance of the plaintiffs and by the default of the executor, and such judgment then allowed as a debt due by the estate, and enrolled as a judgment, it became a judgment of the probate court against the personal estate of testatrix, of which the plaintiffs, who presented the claim, could avail themselves, the sufficiency of which in amount they were estopped from denying. *O'Brien v. Heeney*, 2 Edw. Ch. 245. To the facts of this case the principle decided in *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667,

should be extended. This ruling is in accordance with the decision made in some other courts, where the constitutional and statutory provisions are substantially the same as those of this state. *Carter v. Engles*, 35 Ark. 205; *Tate v. Norton*, 94 U. S. 746, 24 L. Ed. 222; *Mason v. Bair*, 33 Ill. 206; *Mitchell v. Mayo*, 16 Ill. 84; *Ford v. Newcomer*, 14 La. Ann. 707; *Johnson v. Waters*, 111 U. S. 671, 4 Sup. Ct. 619, 28 L. Ed. 547; *Thayer v. Clark*, 48 Barb. 245; *Lewis v. Welch*, 47 Minn. 197, 48 N. W. 608, 49 N. W. 665; *Bennett v. Camp*, 54 Vt. 36; *Freem. Judg.* § 319a, and note 3; 2 Black, Judg. §§ 641, 644.

We think there is error, also, in the circuit decree as to the sufficiency of the evidence offered to establish the existence of the debt against the testatrix. We agree with the circuit judge that "the alleged judgment against the executor certainly has no force or effect so far as the defendants are concerned, because they were neither parties nor privies to it." This is substantially the ruling of the court in *Wilson v. Kelly*, 19 S. C. 166, 167, and *Brock v. Kirkpatrick*, 60 S. C. 351, 38 S. E. 779, 85 Am. St. Rep. 847. To make the devised estate answerable for the debt of the devisor, there must be evidence offered to show that the devisor was indebted. If such indebtedness is shown by bond or note, the bond or note is prima facie evidence of the indebtedness. If judgment has been obtained against the executor on the bond or note, such judgment establishes the debt against the personal estate of the deceased debtor, and also against lands not taken possession of by the devisees, but is not binding upon the devisees, nor upon the devised lands in their exclusive possession. Nevertheless, such judgment is prima facie evidence of indebtedness by the devisor, and, if there be no evidence to the contrary, it is conclusive. "Between the real and personal representative of a deceased person there is no privity. Hence a judgment against an administrator or executor is never conclusive against the heirs or devisees, and a judgment for or against an heir or devisee has no effect upon an administrator or executor. * * * But a judgment against the personal representative is prima facie evidence against the realty." *Freeman on Judgments*, § 163. "The relationship of privity does not exist at common law between administrator or executor and heirs or devisee, though it is held that judgment against the executor is prima facie evidence of the testator's liability in a scire facias against the heirs to subject the lands in the hands of the heir." *Bigelow, Estoppel*, 78. As "the proceeding against the executor is in substance the foundation of the proceeding against the heir or devisee, the argument for considering it as prima facie evidence may be irresistible; but I cannot consider it as an estoppel." Chief Justice Marshall,

in *Garnett v. Macon*, 6 Call. 308, 10 Fed. Cas. p. 23, first column.

We have carefully examined all of the authorities cited by the circuit judge to sustain his decree, and by respondents' attorneys, but none of them go further than to hold that the judgment against the executor does not bind the heirs or prevent an inquiry into their original indebtedness. In *Wilson v. Kelly*, 19 S. C. 160, 167, the court says: "The judgment is at most only prima facie evidence of the validity of the claim, which is liable to be overcome by other evidence." Our judgment, therefore, is that the judgment of plaintiffs against the executor should have been received as prima facie evidence of the indebtedness by testatrix.

4. The only remaining point raised by the exceptions relates to defendants' plea of laches, which was sustained by the circuit decree. The judge below and the attorneys for respondents in their argument in this court concede that plaintiffs have shown no laches in prosecuting their claim against these defendants as devisees. Therefore the precise question before us is whether the plaintiffs have lost their right of action against the devisees by their laches in seeking to recover their claim from the executor. It has been held in this case, in 60 S. C. 322, 330, 38 S. E. 779, that the plaintiffs had the right to pursue either executor or devisees, but this does not dispose of the question now under consideration. In *Smith v. Collins, Bailey*, Eq. 74, 75, Judge Johnson says: "The right of a creditor to pursue the estate of his deceased debtor in the hands of legatees or distributees is unquestionable. * * * But in giving effect to this right, however just it might be in the abstract, the court is bound to take care that it is not abused, nor suffered to operate injuriously to others, and that the creditor has himself done all that reciprocal justice requires of him." In that case the debt was contracted in 1794, debtor died in 1801, estate distributed in 1805, without notice of this indebtedness, suit commenced in 1811, when executor was insolvent, and revived in 1822, and this action commenced against legatees in 1824. The court presumed a release of the legatees from the obligation to contribute. And in *Goodhue v. Barnwell, Rice*, Eq. 198, 240, Chancellor Dunkin says: "Certainly the personal estate is the primary fund for the payment of debts, and, if a creditor stands by and suffers the personal estate to be squandered, he will not be afterwards permitted to look to the heirs for the payment of his demand." This is quoted with approval in *Bird v. Houze, Speer*, Eq. 254. Chief Justice Simpson says, in *McGee v. Hall*, 26 S. C. 179, 186, 1 S. E. 711: "Laches may be regarded as an equitable statute or limitations, and is applied to equity cases in analogy to legal statutes applied to cases at law. And generally, when a party would not be barred at law, he would not be barred

in equity." In *Babb v. Sullivan*, 43 S. C. 436, 441, 21 S. E. 277, Judge Benet gives the following definition of laches: "Delay is not the sole factor that constitutes laches. If it were so, some period fixed by statute or by common law of the courts would afford a safe and unvarying rule. Laches connotes, not only undue lapse of time, but also negligence and opportunity to have acted sooner; and all three factors must be satisfactorily shown before the bar in equity is complete. Other factors of lesser importance sometimes demand consideration, such as the nature of the property involved, or the subject-matter of the suit, or the like. As a definition of laches, however, it is sufficiently correct to say that it is the neglecting or omitting to do what in law should have been done, and this for an unreasonable and unexplained length of time, and in circumstances which afforded opportunity for diligence." This definition was approved in *Wagner v. Sanders*, 62 S. C. 73, 89, 39 S. E. 950, in opinion delivered by Mr. Justice Gary. In the application of these principles the court sustained the plea of laches against a claim 19 years past due with the same lapse of time since the death of the debtor, and where the creditor, after the alleged indebtedness, permitted slaves of the debtor to be turned over to her husband; no effort being made in all these years to collect this claim. *Goodhue v. Barnwell*, Rice, Eq. 240. In *Bird v. Houze*, Speer, Eq. 250, intestate died in 1828, and his heirs took possession of his lands. On 31st December, 1830, the creditor presented to the administrator for payment a note of intestate past due since 5th January, 1826. In October, 1832, the ordinary declined to allow the note, "as it was out of date," whereupon the creditor sued the administrator in summary process, and obtained judgment by default in December of same year. Nothing more was done until 1841, when the judgment was revived against the administrator, execution lodged March, 1842, lands of intestate levied on and bid in by creditor for \$5 in April. Under bill for partition between the heirs this sale was set aside, and the creditor was held to have lost all rights against the heirs. Laches was likewise imputed to a creditor where intestate died in 1854, distribution was made in 1855, leaving a large quantity of personalty in the hands of the administrator to pay debts, suit was brought by creditor against administrator in 1860, and judgment by default then entered and execution issued, upon which a return of nulla bona was made in 1868, when bill was filed to reach lands of intestate in the possession of his heirs. Both of the administrators had died insolvent, one in 1866 and the other in 1868. *Mobley v. Cureton*, 2 S. C. 140. So, too, where no effort was made to collect the claim and, indeed, no claim made for nearly 17 years after the death of the debtor. *Gregory v. Rhoden*, 24 S. C. 90. So, too, the doctrine of laches applied in refusing relief

under a motion to amend a judgment after an unexplained delay of about 10 years (*Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277), and under action of account against the representatives of a surviving partner after 23 years, without reason for delay and the interests of other parties having intervened. *Wagner v. Sanders*, 62 S. C. 73, 39 S. E. 950. On the other hand, there was held to be no laches where debtor died in 1865, notes made by him purchased in 1875, which were sued to judgment against the executor in 1881, and presented as a claim in proceeding to sell land in aid of assets instituted by the executor in 1883, even though in 1880 the land had been mortgaged by one of the heirs. *Shaw v. Barksdale*, 25 S. C. 207. We have not considered cases of specific performance, as they are governed by principles peculiar to themselves.

Under the principles above announced and deducible from the rulings made on the facts of the several cases cited, we do not think the plaintiffs in this case are barred by laches, and we so hold. Testatrix died 15th December, 1888, less than eight months after she had given her one day note to plaintiffs. All of the property of testatrix which could be reached by execution against the executor (other than the lands devised to these defendants) was converted into money before the year expired, during which action on this note could not be brought. Within less than 12 months after that year expired, to wit, on 3d December, 1890, action was commenced, under which judgment by default was entered against the executor on 6th February, 1891, and execution issued same day. Nine months afterwards this execution was levied on the lands devised to Hannah Kirkpatrick. No sale was made or attempted to be made under this levy. No reason is given for this nonaction, but at that time there was pending, and had been pending in the probate court since August, 1890, a proceeding to which creditors were not parties, but which involved a construction of the will, a claim of \$500 presented by Annie Taylor for services rendered testatrix, the amount chargeable against the executor for the land purchased by him, the value of the tracts of land conveyed to the children by the deeds, made but not delivered, which were treated as advancements, on accounting by the executor and the payment into court of the amounts due the several legatees. These matters were considered by the probate judge in May, 1891, heard by the circuit court the following month, and on appeal to this court was heard April term, 1892, and decided by opinion filed September 20, 1892. See 37 S. C. 161, 15 S. E. 912. In that same case, on 28th February, 1893, the probate judge filed an order, wherein he recited that it had "been made to appear that the executor is insolvent and not able to pay in the funds belonging to the said estate which is in his hands," and directed all persons indebted to said estate

to pay all "said debts into this court." On September 10, 1893, a second levy was made under the execution of L. A. and T. H. Brock against Kirkpatrick, executor, on the same tract that had been levied in November, 1891.

We find no blamable delay on the part of plaintiffs in awaiting for nearly two years the result of the case of Hughes against Kirkpatrick, which, if the executor was solvent and honest, would require the payment of their claim before distribution was made. And we see in the case no evidence to show that the defendants here have been put in any worse position by plaintiffs' failure to proceed personally against the executor, declared to be insolvent in February, 1893, and there is no evidence that any creditor of the estate or any legatee has received one dollar since 1889. We think the conclusion is fully warranted that at no time would anything have been realized by action against the executor. Under the levy of September, 1893, no sale was made, because enjoined by suit commenced the same month by Hannah Kirkpatrick, which action was ended by perpetual injunction in October, 1898, without prejudice to plaintiffs' right to bring this action. Meantime, under petition by the executor for settlement and discharge, the probate judge made his statement on 21st March, 1895, of the executor's receipts and disbursements, and of the liabilities of the estate. Judgment was enrolled thereon, and execution issued, upon which was indorsed a return of nulla bona on 18th April, 1895. Thereafter, in April, 1899, four years after the right of action accrued, and six months after it was finally decided that the lands devised to Hannah Kirkpatrick could not be sold under judgment against the executor, this action was commenced against Hannah Kirkpatrick, and also against Annie Taylor, whose status was the same as that of her codefendant.

Nor do we regard the purchase by plaintiffs of the mortgage given by the Haddons to Kirkpatrick, the executor, a bar to this action. It is true that the executor bought this land in October, 1889, at his own sale, for \$300, and sold it soon thereafter to Haddon for \$1,200, taking bond and mortgage for \$800. This mortgage was purchased by plaintiffs from Kirkpatrick, probably in 1890. At the time, Kirkpatrick was claiming this mortgage as his own, for he so claimed in his answer in the Hughes Case in the latter part of 1890, and his liability to account for the \$1,200 was not passed upon in that case. It seems to have been first charged against him at \$1,200, in the statement made for settlement by the probate judge in March, 1895. We do not see how plaintiffs could have forced Kirkpatrick to receive their claim against the estate of Jane Taylor in part payment of their purchase of the Haddon mortgage.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for further

proceedings to carry into effect the views herein announced.

GARY, A. J., disqualified.

On Rehearing.

PER CURIAM. After carefully considering the petition for a rehearing in this case, and it appearing that this court has neither overlooked nor failed to consider any material issue of law or fact arising herein, it is ordered, that the order heretofore granted staying the remittitur herein be, and is hereby, vacated, and that the petition herein be, and is hereby, dismissed.

(124 Ga. 544)

CARSTARPHEN WAREHOUSE CO. v.

FRIED et al.

(Supreme Court of Georgia. Dec. 22, 1905.)

FRAUDULENT CONVEYANCES—SALE IN BULK—REMEDIES OF CREDITORS—ATTACHMENT—INJUNCTION—RECEIVER.

A sale of a stock of merchandise in bulk, not in compliance with the provisions of the act approved August 17, 1903 (Acts 1903, p. 92), is void as to creditors on the ground of fraud; and a creditor of the vendor may proceed by attachment against his fraudulent debtor. It appearing from the allegations of the petition that the plaintiff's statutory remedy by attachment against the fraudulent debtor was both available and complete, the prayer for the extraordinary remedies of injunction and receiver was properly denied.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 665, 681, 682; vol. 42, Cent. Dig. Receivers, § 12.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by T. J. Carstarphen, doing business as the T. J. Carstarphen Warehouse Company, against J. R. Fried and others. Judgment for defendants, and plaintiff brings error. Affirmed.

A petition for injunction and the appointment of a receiver was filed by T. J. Carstarphen, who conducted business under the name and style of the T. J. Carstarphen Warehouse Company, in which J. R. Fried, of Bibb county, and the firm of J. F. Williams & Son, of Wilkinson county, were named as defendants. The proceeding was brought in the superior court of Bibb county, and the facts alleged by the plaintiff as entitling him to the equitable relief sought were substantially as follows: The defendant firm is indebted to the plaintiff in the principal sum of \$119.22 upon a promissory note dated February 17, 1905, and due March 1st after date. He is engaged in the wholesale grocery business in the city of Macon, and this note was given to him by J. F. Williams & Son in liquidation of an account for merchandise sold to that firm, which at the time was engaged in conducting a general merchandise store at McIntyre, Ga. Some time in the month of February or

March, 1905, Fried purchased of J. F. Williams & Son the whole of the stock of goods, wares, and merchandise belonging to that firm, and is now in possession thereof, except so much of the same as he has disposed of since the date of his purchase. He did not, at least five days before the completion of the purchase or the payment for this stock of goods, notify personally or by registered mail the plaintiff and other creditors of the proposed sale, the price to be paid, and the terms and conditions thereof, nor furnish them with a statement of the assets and liabilities of the firm, as required by section 2 of the act approved August 17, 1903 (Acts 1903, p. 93). The sale to Fried is absolutely fraudulent and void as to the plaintiff and the other creditors of J. F. Williams & Son, and the stock of goods in the hands of Fried and the money derived from his sale of a portion of the goods constitute a trust fund which is subject to the payment of plaintiff's demand and the debts due to other creditors of the firm. It is insolvent, as also are its members, J. F. and W. L. Williams. Fried received a discharge in bankruptcy in August, 1904, and the plaintiff "believes that the said J. R. Fried is now insolvent." He is rapidly selling out and disposing of the stock of goods. The plaintiff alleged that unless Fried was restrained from disposing of the goods, and a receiver was appointed by the court to take charge of the same, plaintiff would be "remediless at and by the strict rules of the common law," and accordingly was entitled to the equitable relief for which he prayed. Fried and J. F. Williams, one of the members of the defendant firm, took issue with the plaintiff as to this allegation, by interposing separate demurrers, in which they assigned various reasons why the extraordinary relief prayed for should not be granted, and insisted that the plaintiff did have a complete and adequate remedy at law, especially as he did not in his petition affirmatively allege that Fried was insolvent. They also filed answers in which they set out the circumstances under which the sale of the stock of goods was made, and in which they denied the right of the plaintiff under such circumstances to attack the sale as invalid. At the interlocutory hearing the case was submitted to the presiding judge upon the pleadings, including the demurrers to the petition, together with certain documentary evidence presented for consideration by the respective parties in support of their contentions regarding the merits of the plaintiff's complaint. After hearing the argument of counsel, the judge passed an order denying the prayers of the petition and revoking an order previously granted which provided for the appointment of a temporary receiver. The plaintiff excepted.

J. C. Morcock, for plaintiff in error. Nottingham & Cabaniss, for defendants in error.

EVANS, J. (after stating the facts). Under Civ. Code 1895, § 4937, a creditor may in one suit proceed for judgment on his debt and to set aside a fraudulent sale made by his debtor. *De Lacy v. Hurst*, 83 Ga. 223, 9 S. E. 1052. But in such an action the plaintiff would not be entitled to the extraordinary remedies of injunction and receiver if it appeared that an attachment against the fraudulent debtor (Civ. Code 1895, §§ 4543-4547) would afford complete and adequate relief (*Booth v. Mohr*, 122 Ga. 333, 50 S. E. 173). The act of the General Assembly approved August 17, 1903, declares that a sale of a stock of goods, wares, and merchandise in bulk, not in compliance with the provisions of the act, shall as to any and all creditors of the vendor be conclusively presumed to be fraudulent. Acts 1903, p. 92. The petition in this case alleges that the sale of the stock of merchandise was in bulk, and there was a failure by the vendor to comply in essential particulars with the terms of this act of the General Assembly. The sale was therefore inoperative and void as to creditors upon the ground of fraud, and the plaintiff's remedy by attachment against a fraudulent debtor would have afforded him an adequate legal remedy. On the rule to show cause why a permanent receiver should not be appointed and the writ of injunction should not issue as prayed, the defendants urged by demurrer that this legal remedy was both available and adequate, and assigned other reasons for denying the extraordinary relief sought. The court refused to grant the prayers of the petition for such relief, and vacated the order, previously passed, which provided for the appointment of a temporary receiver. We think the plaintiff had a complete statutory remedy by attachment, and that the court properly declined to appoint a permanent receiver and grant the prayer for injunction. Having reached this conclusion, it is not necessary to discuss the other matters urged by the defendants upon the interlocutory hearing in opposition to the prayers of the plaintiff for injunction and receiver.

Judgment affirmed. All the Justices concurring.

(124 Ga. 190)

EQUITABLE LOAN & SECURITY CO. v. LEWMAN.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. NEW TRIAL—SECOND NEW TRIAL.

A second new trial should not be granted where the presiding judge approves the finding of the jury upon the issue of fact, unless some error of law has been committed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3952.]

2. ESTOPPEL—ATTESTING DEED—PARTIES AFFECTED.

The true owner of land, by attesting a deed the contents of which he knows, made by a person who has no title, will be estopped from asserting his title as against the grantee and his privies. This estoppel will not bind an ex-

isting creditor of the person estopped. Where such creditor subsequently reduces his debt to judgment, the lien thereof is superior to the equity of a third person who has neither title nor lien from the true owner, notwithstanding such owner is estopped from asserting his title because of having witnessed a deed to such third person, made by one without title to the premises therein described.

3. EXECUTION—SALE—SUBROGATION OF PURCHASER.

The purchaser at an execution sale is subrogated to all the rights of the execution creditor bringing about the sale, and before his title thus acquired can be defeated by an equity in a third person, the purchaser must not only have actual notice of the equity, but that equity must be superior to the lien of the judgment creditor bringing about the sale.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 783.]

4. ESTOPPEL—WHO MAY CLAIM.

That one claiming ownership of a tract of land upon which another asserts a lien may have agreed with the latter or with some one else to pay off his claims of indebtedness affords no reason for holding that the claimant of the land is estopped from setting up title thereto. If the agreement be made with the person asserting a lien, his remedy is upon the contract; if made with some other person, then the lienholder is a mere stranger to it, and is not in a position either to enforce the contract or to urge it by way of estoppel.

5. TRIAL — INSTRUCTIONS — TECHNICAL EXPRESSIONS.

Although the court may, in charging the jury, make use of a purely technical expression, which correctly presents the law governing the case on trial, yet this is not cause for a new trial when there is no reason to apprehend that the jury failed to grasp the meaning of the expression so used, and the complaining party made no request of the court to elucidate the instruction excepted to.

6. VENDOR AND PURCHASER—NOTICE—BONA FIDE PURCHASER.

Since the passage of the recording act of 1889 (Civ. Code 1895, § 2778), an unrecorded deed made by a testatrix is ordinarily to be regarded as inferior in dignity to a deed duly recorded subsequently made by her devisee to an innocent purchaser for value without notice of the prior conveyance. But this statute has no application to a case where the testatrix recognized in her will the title of her donee, and the purchaser from her devisee was thus put upon notice that the property conveyed to him formed no part of the estate of the testatrix, and could not be regarded as passing to the devisee under the residuary clause of the will.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Trial of claim between the Equitable Loan & Security Company and H. L. Lewman. From the judgment, both parties bring error. Judgment on main bills of exceptions reversed, and on cross-bill affirmed.

On December 18, 1865, Timothy Burke conveyed by deed to Mrs. Maria L. Harris a lot in the city of Atlanta 100 by 275 feet, having a frontage of 100 feet on the east side of what was then known as Collins street. She entered into possession, and for years occupied a house erected on the north half of this lot. Subsequently, in 1878 or 1879, her son-in-law, R. M. Farrar, built a house on the south half of the lot, with money which he

borrowed for that purpose, and he and his family lived there continuously from that time up to 1886. Mrs. Harris died on December 6, 1884, leaving a will which contained the following provisions: To two of her daughters, Josephine E. and Matilda F. Harris, she devised the house and lot which she had occupied as a home, the premises being described as No. 179 Collins street, having a frontage on that street of 50 feet, and running back 275 feet, bounded on the north by the house and lot of Mrs. C. P. Sams, and on the "south by house and lot of Robt. M. Farrar." The executor was directed to collect the proceeds of a policy of insurance on the life of Mrs. Harris, and divide the same among certain named beneficiaries, one of whom was her daughter Frances F. Farrar, the wife of R. M. Farrar. The residue of the estate, both real and personal property, was given to Josephine E. and Matilda F. Harris, share and share alike. The testatrix nominated as her executor Robert M. Farrar, and after her death he qualified as such, and procured her will to be probated at the January term, 1885, of the court of ordinary of Fulton county. On March 4, 1896, Matilda F. Harris executed her will. She died shortly thereafter, and Robert M. Farrar, who was nominated as executor, brought the will to probate at the August term, 1897, of the court of ordinary. The sole beneficiaries under this will were Josephine E. Harris and Frances F. Farrar, to whom was devised the half interest of the testatrix in the house and lot occupied by Mrs. Harris prior to her death, situated on Courtland (formerly Collins) street, and described in the will as being the same lot which was willed to testatrix by her mother. At the date of the death of Mrs. Harris, her sole heirs at law were the three daughters above mentioned. On April 2, 1898, the survivors of them, Josephine E. Harris and Frances F. Farrar, executed quitclaim deeds inter se, therein describing the premises purchased by their mother from Timothy Burke in 1865, and reciting that they each acquired an undivided half interest in the property by inheritance from their mother, being her sole heirs at law; that her estate had never been administered, there being no necessity for an administration, as she owed no debts; and that having inherited their respective interests in her estate free from incumbrance, and being her sole heirs at law and of lawful age, they had agreed between themselves upon a division of the property. The deed from Mrs. Farrar to Miss Harris purported to convey an undivided one-fourth interest in the north half of the lot, which was described as having 100 feet frontage on Courtland street; and the deed to Mrs. Farrar recited that the grantor conveyed an undivided one-half interest in the south half of that lot, and that in the division Mrs. Farrar reserved an undivided one-fourth interest in the north half. One of the subscribing witnesses to these deeds was Robert M. Farrar. On April 9,

1898, Mrs. Farrar procured a loan of \$1,000 from H. L. Lewman, and executed and delivered to him a security deed purporting to convey to him a three-fourths interest in the south half of the lot last above mentioned. Her husband also witnessed this deed. It was filed for record on April 30, 1898, and was duly recorded. On April 18, 1898, a *fi. fa.* in favor of D. W. Rountree and against R. M. Farrar and others issued from the city court of Atlanta. Mrs. Farrar died within a year or so afterwards, and Walter Tomlinson was appointed administrator upon her estate. As such he sold to the Equitable Loan & Security Company an undivided three-fourths interest in the entire tract which had been purchased by Mrs. Harris in 1865, and on the 22d of December, 1900, executed and delivered to that company a deed, in which the property was described as having a frontage of 100 feet on Courtland avenue. It immediately went into possession of the premises under this deed and one from Josephine E. Harris, whereby she undertook to convey an undivided one-fourth interest therein. In the latter part of that year, Miss Harris, who had been living with Farrar as a member of his family, went to Texas. Before leaving, she turned over to him a bundle of papers, which she said she had been keeping since the death of her sister Matilda, who had taken charge of her mother's papers upon her decease. Some months later, Farrar discovered among these papers one which appeared to be a deed to him, executed on the 27th of June, 1878, by Maria L. Harris, Josephine E. Harris, and Matilda F. Harris, and attested by two witnesses. It recited a consideration of \$2,000, and purported to convey a four-fifths undivided interest in the city lot hereinbefore referred to as the south half of the tract purchased by Mrs. Harris, the lot being that on which Farrar had built the house in which he lived from some time in 1878 or 1879 up to 1898. The deed was in the handwriting of Farrar. Indorsed thereon, also in the handwriting of Farrar, was the following affidavit, subscribed to by one of the attesting witnesses, E. M. M. Hooper, before William W. Grant, a notary public, on August 3, 1878: "State of Georgia, Fulton County. Personally appeared before me, the undersigned, a notary public in and for said state and county, E. M. M. Hooper, who, being duly sworn, on oath says that the said Maria L. Harris, Josephine E. Harris, and Matilda F. Harris signed, sealed, and delivered the within deed in his presence and in the presence of the other witness, L. J. Farrar." Shortly afterwards, Robert M. Farrar showed this deed to C. J. Simmons, an attorney, whom he thought was representing the administrator of the estate of Mrs. Farrar. Simmons subsequently caused two *fi. fas.* against Farrar, of which he was the transferee, to be levied on the south half of the lot on Courtland street, and the Equitable Loan & Security Company interposed its

claim to the land. The company effected a settlement with Simmons, and afterwards, under an agreement with the holder of the *fi. fa.* in favor of Rountree against Farrar et al., permitted the southern portion of the lot to be sold at sheriff's sale as the property of Farrar, itself becoming the purchaser at the sale under this *fi. fa.* Before the sale, a representative of the company announced that it had bought the property from the administrator of Mrs. Farrar. An attorney who represented Lewman also gave the following notice to prospective bidders: "Notice is hereby given that the property about to be sold as the property of R. M. Farrar, situated on Courtland street, in the city of Atlanta, is not the property of R. M. Farrar, but that the same was owned by Mrs. Fannie F. Farrar, who executed a loan deed upon the same to H. L. Lewman for the principal sum of \$1,000, which indebtedness has been reduced to judgment, together with the interest and cost, and that said judgment is a superior lien to any title that can be passed under a sale of that property as the property of R. M. Farrar, and that any person who buys said property as the property of R. M. Farrar gets a bad title." This sale took place on the first Tuesday in August, 1902, and on the 5th of that month the sheriff made a deed to the property to the Equitable Loan & Security Company. Subsequently Lewman caused the same land to be levied on as the property of the estate of Mrs. Farrar, under the judgment obtained against her administrator. The Equitable Loan & Security Company interposed a claim, and at the trial of the issue thus formed Lewman sought to resist its claim by setting up the following facts as an estoppel upon it to assert title to the property: Robert M. Farrar assisted in procuring to be executed the deed from Josephine E. Harris to Fannie F. Farrar, conveying a half interest in the property in controversy to Mrs. Farrar, and also assisted in procuring to be executed the deed from his wife to Josephine E. Harris, conveying an interest in the adjoining lot. He knew these deeds were made for the purpose of dividing the estate of Maria L. Harris, and also that they were for the purpose of inducing Lewman to make a loan of \$1,000 to Mrs. Farrar. He witnessed the deed from Mrs. Farrar to Lewman, and knew the purpose for which that deed was executed, and used the money loaned to his wife for the support of his family. This loan was made before the judgment in favor of Rountree and against Farrar was rendered, and the latter was estopped to claim title as against Mrs. Farrar or her grantee under the deed executed by Maria L. Harris in 1878, and at the time the judgment against him was rendered he had no interest in the property upon which the lien of that judgment could attach. Moreover, the claimant undertook and agreed to pay the indebtedness of Mrs. Farrar to Lewman, by a writing in the possession of claimant dated

December 28, 1900, and, on account of the assumption of this indebtedness and the claimant's agreement to pay the same the claimant cannot now dispute either the amount thereof, or its priority over any title the claimant may have. The court declined to allow Lewman to interpose this plea of equitable estoppel against the claimant, and the case was submitted to the jury upon the issue whether or not Mrs. Harris had ever delivered to Farrar the instrument in the form of a deed purporting to have been executed by her and her two daughters Josephine and Matilda Harris on the 27th day of June, 1878. Upon this issue, the jury found in favor of the Equitable Loan & Security Company, the claimant. Lewman thereupon made a motion for a new trial upon divers grounds, all save one of which the court overruled. The Equitable Loan & Security Company excepts to the granting of a new trial on the ground of the motion which the court sustained, and Lewman, by a cross-bill of exceptions, complains of the overruling of the other grounds of his motion, and also of the refusal of the court to allow his plea of equitable estoppel.

Candler & Thomson and W. D. Thomson, for plaintiff in error. Du Blon & Alston and Howard Van Epps, for defendant in error.

EVANS, J. (after stating the facts). 1. This not being the first grant of a new trial, and the presiding judge having expressed himself as satisfied with the finding of the jury upon the only issue submitted to them for their determination, their verdict should be allowed to stand if sufficiently supported by the evidence, unless the plaintiff in *fi. fa.*, Lewman, was unjustly prevented from presenting his contention that the Equitable Loan & Security Company was estopped from asserting title to the land levied on. There was, we think, ample evidence to sustain the conclusion that the deed from Mrs. Harris to Farrar, in the execution of which two of her daughters joined, was delivered to him in 1878. He testified on the trial that he could recollect nothing with regard to its execution and delivery to him, and would not have assisted his wife in procuring a loan on the land as her property in 1898 had he at that time known of its existence; and that he did not remember ever having seen the paper till, some months after he received the bundle of papers which Miss Josephine E. Harris stated had belonged to her mother, he discovered it among them. Miss Harris testified she had no remembrance of signing it, and could not identify as genuine the signature of herself or sister, though what purported to be the signature of her mother corresponded with her handwriting. On the other hand, there was testimony, which Farrar did not undertake to question, that the paper was drawn up in his handwriting, as was also the affidavit of one of the subscribing witnesses. This witness was sworn at

the trial, and testified that the document was genuine, and he had signed the probate indorsed thereon before W. W. Grant, a notary public, at the West Point freight depot, in the city of Atlanta. The notary public was shown to be no longer in life. The tax returns showed that Mrs. Harris did not, after the year 1878, return this south half of the land for taxes, but that the same was returned in the name of R. M. Farrar as owner from 1879 up to 1898. He stated he had, with money borrowed for the purpose, erected on the lot the house in which he lived up to 1888, but gave no satisfactory account of the circumstances under which he assumed to take possession of the premises, further than to say he had to live somewhere, and that he occupied the house without objection from Mrs. Harris. In her will Mrs. Harris recognized this lot as belonging to Farrar, by describing the premises she devised to her two daughters as being bounded on the "south by house and lot of Robt. M. Farrar." The deed was never recorded prior to the commencement of this litigation, but there was testimony from which the jury could infer that it was designedly kept from record because Farrar was financially embarrassed, and did not wish the fact of his ownership of the lot to become known to his creditors. In view of all the circumstances brought to light, we are of the opinion that the finding of the jury should not be disturbed; and in our further discussion of the case the fact will be assumed that in 1878 Mrs. Harris did execute and deliver to Farrar a deed covering an undivided four-fifths interest in the land in controversy.

2, 3. The true owner of property may estop himself by his conduct from asserting title to his own property, as when he stands by and allows property belonging to him to be sold to an innocent purchaser for value as the property of another. *American Mortgage Co. v. Walker*, 119 Ga. 341, 46 S. E. 426, and citations. Or he may so estop himself by attesting a deed, of the contents of which he knows, made by a person who has no title. *Georgia Pac. Ry. Co. v. Strickland*, 80 Ga. 776, 6 S. E. 27, 12 Am. St. Rep. 282. The negotiation of the loan from Lewman by Farrar in behalf of his wife, and his attestation of her deed given to secure the loan, would estop Farrar from asserting title in his own favor as against Lewman; assuming, of course, Lewman's ignorance of the true title. This estoppel in pais occurred pending the suit, but before the rendition of the judgment under which the land was sold. While the doctrine of *caveat emptor* applies to sheriff's sales, a bona fide purchaser at an execution sale, who has paid the purchase money without notice of an equity, will be protected against the same. *Johnson v. Equitable Co.*, 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933. The purchaser is subrogated to all the rights of the execution creditor bringing about the sale, and before the title or a

bona fide purchaser can be defeated by an equity in a third person, the purchaser must not only have actual notice of the equity, but that equity must be superior to the lien of the judgment creditor bringing about the sale. *Atkinson v. Beall*, 33 Ga. 153; *Humphrey v. Copeland*, 54 Ga. 543. "It is the right of the judgment creditor to sell whatever his judgment binds. This right would be impaired if purchasers were not allowed a corresponding right to buy. This corresponding right to buy purchasers would not have if they were liable to be affected by a notice of other liens or claims inferior to the judgment." *Smith v. Jordan*, 25 Ga. 689. From these observations it will appear that no proper solution of the rights of the purchaser at sheriff's sale can be arrived at without determining the relative superiority of the lien of the Rountree execution, which sold the land, and the lien of Lewman, acquired by virtue of Mrs. Farrar's security deed, aided by the estoppel of Farrar.

While great stress was laid in the argument upon the fact that the estoppel occurred a few days before the judgment was entered, we do not think this circumstance at all conclusive. The suit of Rountree, which eventuated in the judgment, was pending at the time the Lewman loan was effected. This particular creditor of Farrar had a right to reduce his debt to judgment, and the lien of his judgment ought not to be restricted because his judgment debtor had defrauded some one else. The general rule of estoppel is that only parties and their privies to the act or representation relied on to estop are affected by an estoppel in pais. 11 Am. & Eng. Enc. L. (2d Ed.) 489. It can hardly be contended that any privy could exist between two creditors of a common debtor, each contending for priority of lien and preference in payment of his debt, where neither conspired with the debtor to defraud the other. In *Shearer v. Woodburn*, 10 Pa. 511, the Supreme Court of Pennsylvania held that "declarations by one reputed to be the owner of lands that the title was in A., made to one who thereafter purchased A.'s title, will not estop a subsequent purchaser under a judgment recovered against such person, at or about the time of his making such declarations, from setting up his title against the purchaser from A. A similar ruling was made in *Lyon v. Morgan*, 64 Hun, 111, 19 N. Y. Supp. 201, by the Supreme Court of New York. *Bigelow*, in his work on Estoppel (5th Ed.) 609, says: "It would seem that a purchaser of goods is not a privy in estate or otherwise with his vendor, so as to be affected by an estoppel in pais resting on the vendor in respect of the goods. Thus, if a person stand by, and allow his goods to be sold as the goods of another to one who does not take possession, and the actual owner afterwards sells the same to another person for value and without notice of the previous transaction, the latter would be entitled to the goods

against the first purchaser. The owner would simply be precluded from setting up title against the purchaser. It is not the office of an estoppel to pass title. The title remains, but it cannot be asserted against the party who acted upon the false representation. With reference to others, it may be asserted or conveyed, and a purchaser, not being a privy, would not be estopped to assert title to the goods. This is certainly true of a purchaser under an execution against the real owner." The author cites *Richards v. Johnston*, 4 Hurl. & N. 660, in support of this last proposition. In that case it was said that "a sheriff who comes to seize the goods of a debtor under a writ of execution is not bound by an estoppel which might have prevented the debtor himself from claiming the goods." In a later English case, that of *Richards v. Jenkins*, 18 Q. B. D. 456, 56 L. J. Q. B. 293, Lord Esher said: "Such an estoppel merely prevents the party who is estopped from saying as against some other party that the goods do not belong to such other party, though in fact they do not belong to him, and it only takes effect as between parties and privies. If the execution creditor could for this purpose be said to claim through and under the execution debtor, so as to be in privy with him, he might be estopped. But I do not think he can be said to so claim. He claims through and by the law as against the execution debtor, and not through and under him." In a Nebraska case it appeared that the owner of a business, by representing that it belonged to his wife, induced persons to sell goods to her, and to take a mortgage as security. Other persons, who had no knowledge of this misrepresentation, sold goods to the husband, and afterwards issued attachments against him. The court held that the attaching creditors were not bound by the estoppel, and consequently took priority over the mortgage. *Oberfelder v. Kavanaugh*, 29 Neb. 428, 45 N. W. 471. See, also, *Bingham v. Kirkland*, 84 N. J. Eq. 229. In *Waters' Appeal*, 85 Pa. 526, 78 Am. Dec. 354, Woodward, J., said: "The truth is, the relation of judgment creditors to their debtor's real estate is anomalous. They have a lien upon it by virtue of statute law, but they have no interest in it such as makes them privies in estate with their debtor." A contrary view was expressed in *Parker v. Crittendon*, 37 Conn. 148, in which case it was held that attaching creditors of a debtor, who with intent to defraud his creditors had conveyed a hack to another, and then stood by and allowed him to sell to an innocent purchaser, were privies in estate with their debtor, and, as such, estopped to set up title in him. This was ruled, notwithstanding it appeared that the innocent purchaser had not paid for the property; the court saying he "had a right to the benefit of his purchase." In *Ewart on Estoppel*, 208 et seq., the author, in commenting on these two lines

of decisions, which differ as to whether an estoppel upon a debtor will bind his creditors, says (page 210): "Solution of the question in hand by a discussion of the existence of privity does not appear to promise great success." He expresses the opinion that, if privity in estate be the test, a purchaser at sheriff's sale gets only that which the debtor had, subject to all equities of every sort; but suggests (page 209) that the true test to be applied in determining whether or not a party other than the one who has estopped himself by his conduct can assert title in any given instance, is to "ascertain upon general principles who ought to have priority, and then, in accordance with the conclusion so arrived at, declare that the sheriff's purchaser was or was not in privity with the vendor, and so bound by the estoppel." This seems to be the proper test, looking to the origin and the purpose of the doctrine of equitable estoppel, and its application to a case where the owner of property stands by, and allows it to be purchased as the property of another. Those only who are chargeable with the fraud, actual or constructive, perpetrated upon the innocent purchaser, and those who seek to gain some benefit or advantage therefrom, or, as volunteers, succeed to the rights of the person who has estopped himself by his conduct, should be held bound by the estoppel. Creditors gain nothing by the commission of such a fraud upon an innocent purchaser, but, if held bound by the estoppel upon their debtor, must suffer the loss of their demands against him in whole or in part. They do not seek to ratify or confirm any act which he has done with respect to his property, but repudiate an act which was fraudulent, not only as against the innocent purchaser, but as against them as well; for by that act the debtor disclaims title to property which ought to go towards paying off his just debts, instead of being sold for the benefit of a person who has no title or interest in it nor lien upon the same. Certainly, as a general rule, "no privity exists between creditor and debtor; there is neither devolution nor subordination of rights in the relation." Bigelow on Estoppel (5th Ed.) 343. As between creditors of a common debtor, one is not entitled to prevail over another unless he has acquired a superior lien, such as is recognized by law in the way which the law prescribes. Thus, in *Waters' Appeal*, supra, an owner of land conveyed it to another with general warranty, acknowledging receipt of payment of the purchase price, and taking judgment for a portion of the purchase money, which had not in point of fact been paid. Subsequently, other creditors of the vendee obtained judgments against him, which were levied on the land, and the proceeds of the sale were paid into court. These creditors then sought to exclude the vendor from participation in the distribution, because of the recitals in his deed to their debtor; but the

court held there was no estoppel of which they could take advantage. So it will be seen that the rule of estoppel, based upon the theory of privity in estate, works both ways, and cannot be relied on as bringing about equitable results, as was recognized in the case just cited. "Estoppel arising in virtue of a misrepresentation is the converse of an action of deceit. The property or interest claimed by reason of the estoppel corresponds to the damages sought in the action of deceit; and in order to make good the claim of estoppel, the same things, it should seem, are requisite that are necessary to the maintenance of the action mentioned." Bigelow on Estoppel (5th Ed.) 609, 610. The wrong committed upon an innocent purchaser from one other than the true owner, who stands by and allows a fraud to be committed upon the party misled, gives to him a cause of action. As against the true owner, he has two remedies—one an action for damages for the deceit practiced upon him, and the other a plea of equitable estoppel against asserting title to the property so bought. If the former remedy were pursued, no one could contend that, by reason of the purchase under such circumstances, the purchaser acquired any estate or interest in the property, or lien thereon. Only by proving his cause of action, and procuring judgment upon his demand against the true owner, could the purchaser obtain any lien upon the property, and the judgment lien would rank in dignity, as against other liens on the property, only in the order of its date. He would not, until he in this way established a lien, stand in any better position, relatively to other judgment creditors of the owner, than any one who had a demand against him not reduced to a judgment. The law gives priority among creditors to those who first avail themselves of the remedies whereby they can establish and enforce their rights against the common debtor. The innocent purchaser who is the victim of the fraud cannot, by way of equitable estoppel, gain an advantage over others having claims against the owner of the property, since he has no lien thereon, nor legal nor equitable estate therein. He is simply the victim of a tort, and has no greater interest in the property of the tortfeasor than would a person who was injured by its owner's carelessness or wilfulness in running over him in the street with a carriage or automobile.

As we have endeavored to show, the purchaser of the land under the *Rountree* *fi. fa.* is remitted to all the rights of the plaintiff in *fi. fa.*; and as the record suggests nothing even tending to estop the original execution plaintiff, it is immaterial what notice may have been given on the day of the sale, or what was the arrangement between the purchaser and the transferee of the execution looking to the bringing of the land to sale. The purchaser's title was altogether unaffected by the estoppel of *Farrar*, and if

the legal title was in Farrar at the date of the judgment under which the sale was made, then it passed by virtue of the sale to the purchaser. The finding of the jury that the deed from the Harrises to Farrar had been delivered settled the issue of the fact as to title.

4. It was further urged in the amendment offered, and which was disallowed, that the claimant undertook and agreed to pay the indebtedness to the plaintiff in writing, and that, on account of this assumption of the indebtedness and agreement to pay the same, the claimant cannot now dispute either the amount thereof, or the priority of the same over any title it may have. It does not appear from the allegations of the equitable amendment with whom the claimant entered into this agreement. If the agreement was made with the plaintiff in *fi. fa.*, his remedy is upon the contract; if made with some other person, he is a mere stranger to it, and it cannot be urged as an estoppel against the claimant in asserting its title to the premises.

5. Criticism is made on the instruction of the court on the subject of delivery of a deed, the plaintiff insisting that one of the phrases used by the court was technical, and should have been explained to the jury. The court instructed the jury that delivery was sufficient if the deed went out of the hands or control of the grantor, "with her intent that it [should] operate and inure as a muniment of title to the grantee." This expression is characterized as so technical that its meaning should have been explained to the jury. Considered in connection with the context, we cannot think that an intelligent jury could have failed to apprehend the meaning of the court. Besides, if the plaintiff had desired any further elucidation of the instruction, he should have made a timely request of the court. *Holmes v. Clisby*, 121 Ga. 248, 48 S. E. 934, 104 Am. St. Rep. 103. In these modern times, where there is such a general diffusion of education among the masses, and our juries are made up of intelligent and upright citizens, it would seem that they should be given some credit for intelligence and comprehension, even though the idea be expressed in other than colloquial speech.

6. In the third, fourth, and fifth grounds of the motion for a new trial complaint is made that the court submitted to the jury the single issue whether or not the deed from Mrs. Maria L. Harris and Josephine E. and Matilda F. Harris to Robert M. Farrar had ever been delivered, and failed to instruct the jury that, inasmuch as this deed was not recorded, it was junior to the deed held by Lewman from Frances F. Farrar, for the reason that the title held by her and conveyed to Lewman was derived through the will of her mother and her sister Matilda, and by a deed from Josephine E. Harris, which was duly recorded, provided Frances F. Farrar took this deed from Josephine E.

Harris without notice of the prior conveyance made to Robert M. Farrar. Prior to the recording act of 1889 (Civ. Code 1895, § 2778), a recorded deed from an heir or devisee was inferior in dignity to an unrecorded deed of the ancestor. *Webb v. Wilcher*, 33 Ga. 565; *McCandles v. Inland Acid Co.*, 108 Ga. 618, 34 S. E. 142. This rule was changed by the act of 1889, and that statute applies where the senior deed was made by a testatrix and the junior by her devisee. *Holder v. American Investment Co.*, 94 Ga. 641, 21 S. E. 897. But the court properly omitted to submit to the jury any issue as to the relative priority of the unrecorded deed to Robert M. Farrar, for the reason that, under the undisputed facts, the junior deeds relied on by Lewman should not have been given priority, inasmuch as the record of the title of Frances F. Farrar to the lot in controversy was sufficient to put Lewman on notice that Mrs. Maria L. Harris had, prior to the execution of her will, disposed of this lot to Robert M. Farrar, and that it therefore constituted no part of the residuum of her estate. It will be remembered that in the will of Maria L. Harris the lot on Collins street, which was specifically devised to two of her daughters, was described as being bounded on the "south by house and lot of Robt. M. Farrar," who was then in possession of the premises. This lot is the one now in controversy. In the will of Matilda F. Harris she undertook to devise only her half interest in the house and lot which had been occupied by Mrs. Maria L. Harris prior to her death, and reference was made to her will for a more particular description of this lot. An investigation of Mrs. Farrar's claim of title would have disclosed to Lewman that she got no estate by inheritance from her mother, but derived such title as she had under the will of her mother and the subsequent will of her sister, Matilda. The recitals to the contrary in the deed from Josephine E. Harris to Mrs. Farrar were untrue, as an examination of the records by Lewman at the time of making the loan to Mrs. Farrar would have demonstrated. The records disclosed, not only that Mrs. Harris died testate, but that in her will she recognized that the house and lot fronting the southern boundary of her home place, and then being occupied by Farrar, belonged to him, and formed no part of her estate. In view of this unequivocal disclaimer of ownership on the part of Mrs. Harris, no one would be warranted in assuming that the lot in controversy passed under her will as a part of the residuum of her estate. Lewman thus had constructive notice that Mrs. Harris recognized the title to this lot to be in Robert M. Farrar, and therefore is not in a position to assert that he stands in the attitude of an innocent purchaser without notice of the unrecorded deed from her to Farrar.

The foregoing discussion disposes of all the questions presented with which it is necessary

to deal. The court below very fully and fairly submitted to the jury the only issue which was really involved in the controversy, and their finding upon this issue should, we think, be allowed to stand.

Judgment on main bills of exceptions reversed; on cross-bill affirmed.

All the Justices concurring, except LUMPKIN, J., disqualified, and BECK, J., not presiding.

(124 Ga. 204)

TYLER v. THEILIG et al.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. WILL—CONSTRUCTION—NATURE OF ESTATE.

A testator devised described real estate to his wife, "free from all charge or limitation, to her own proper use, benefit, and behoof," but added in immediate connection therewith the following provision: "In the event that I and my said wife should die without children, then I give, bequeath, and devise the said above-described real estate to my wife's sister [F.], to have and to hold the same in fee simple, to her and her heirs forever; nevertheless this bequest and devise shall in no wise interfere or limit my wife's interest in said real estate. Should said [F.] die before my said wife leaving no child or children, then this devise shall revert and become a part and parcel of my general estate, subject to any disposition that my wife may make of the same." *Held*:

(1) The widow took a fee-simple estate, determinable upon her death without issue, in which event F., if living, or her issue, if she had previously died leaving children, would take a fee-simple estate.

(2) In the event of the death of F. without issue prior to the death of the testator's widow, the property would revert to the testator's general estate, subject to the control of the widow and to her disposition by deed or will.

2. SAME—DEVISE OF REMAINDER—DESCRIPTION OF TESTATOR—CONDITIONAL PROVISION.

A devise of the residue of the estate to the testator's widow for life or during widowhood, with remainder after her death or remarriage to "the lawful heirs of Charles F. Tyler in the United States of America, or the lawful heirs of Carl F. Theilig, formerly of Noulitz, Saxon Altenburg," according to the Georgia statute of distributions, conveyed to the widow an estate for life or widowhood, with remainder to the heirs of the testator other than the widow.

(a) It appearing that the testator, a native of the German Empire, was known in Germany as Carl F. Theilig and in the United States as Charles F. Tyler, and that the will was signed with both names, the alternative expression was merely a means of identification, and did not render the devise in remainder void.

(b) A subsequent clause in the will, which provided for children which might be born after its execution, was not in conflict with the devise last mentioned, but was merely an alternative or conditional provision.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by Maggie Tyler against Franz Theilig and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Carl F. Theilig, a German subject, moved to this country, became naturalized, and changed his name to Charles F. Tyler. In

1903 he died, a citizen of Georgia, leaving a will in which he sought to dispose of an estate valued at something more than \$50,000. His wife, Maggie Tyler, was made executrix of the will. The present suit is upon her petition, which alleges that the will is ambiguous, and prays that the court construe it. The first item of the will is as follows: "I give, bequeath, and devise to my wife, Maggie Tyler, the following property, to wit: All that tract or parcel of land in the city of Atlanta, known as No. 157 Walton street, situated on the north side of said street and fronting on the same fifty (50) feet, more or less, and extending back from said street one hundred and sixty (160) feet, more or less, free from all charge or limitation, to her own proper use, benefit and behoof. In the event that I and my said wife should die without children, then I give, bequeath, and devise the said above-described real estate to my wife's sister, Froney Flowers, to have and to hold the same in fee simple, to her and her heirs forever—nevertheless this bequest and devise shall in no wise interfere or limit my wife's interest in said real estate. Should said Froney Flowers die before my said wife, leaving no child or children, then this devise shall revert and become a part and parcel of my general estate, subject to any disposition that my wife may make of the same." The petition alleges that Froney Flowers was in life at the date of the death of the testator; that the testator died without leaving any child or children, or the descendants of a child or children, being survived only by his wife, the petitioner, who, as before stated, was named as his executrix; and that petitioner is unable to determine what estate, if any, passes to Froney Flowers under the last-named clause of the item quoted, "whether the attempted bequest to said Froney Flowers is wholly void because repugnant to the devise to Maggie Tyler made in the first clause of said first item, or whether the same, if in any event valid, lapsed by reason of the fact that Maggie Tyler did not die prior to the will's taking effect." The second item of the will was as follows: "I give, bequeath, and devise to my wife, Maggie Tyler, all the rest, residue, and remainder of my real and personal estate, of every name, description and nature whatever, to be used and enjoyed by her during her natural life, or so long as my wife shall be and remain a widow; and from and immediately after her decease, or in the event of her marrying again, from and immediately after her remarriage, then the rest, residue, and remainder of my real estate shall be distributed to and descend according to the laws of inheritance in force in the state of Georgia, to my lawful heirs in the United States of America, or the lawful heirs of Carl F. Theilig, formerly of Noulitz, Saxon Altenburg." It was alleged that at the time of his death the testator was survived by his

widow, the petitioner, a resident of Fulton county, Ga., a niece residing in Pasadena, Los Angeles county, Cal., and brothers and sisters and children of a deceased brother and a deceased sister living in the German Empire, and that petitioner is unable to determine the legal effect of the second item of the will; four questions arising in its construction, to wit: (1) Does Maggie Tyler take an absolute title in the personal property of the estate under this item, or only an estate therein for life or widowhood? (2) Is the remainder estate attempted to be created under this item for the heirs of the testator void for uncertainty? (3) If not void for uncertainty, is the devise of the remainder of the estate, created under item 2, limited to the heirs residing in the United States of America, or to the German Empire alone, or does it include both? (4) If not void for uncertainty, would Maggie Tyler, the widow of the testator, in the event of her remarriage, take as sole heir under the Georgia statute of distributions? The third item of the will undertakes to create in the testator's wife a trust for the benefit of any child or children begotten by him which might be born of her before or subsequent to his death; but the petition, as amended, shows that no such child was born, and that the possibility of issue has become extinct. It was prayed that the court construe the will, and enter a decree by which the various doubts suggested should be resolved, and that certain named parties at interest, residing in this country and in the German Empire, be served and made parties to the suit. As no question of fact was involved, the case was submitted on its purely legal aspects to the judge for determination, and a decree was entered in accordance with an opinion which his honor filed and had sent up with the record. To this decree the executrix excepted.

Montz & Austin, for plaintiff in error.
David Eichberg, for defendants in error.

FISH, O. J. (after making the foregoing statement). Since this case was tried, the learned jurist who rendered the judgment has, as was said of his lamented kinsman by Chief Justice Bleckley on a similar occasion, been translated to a seat on this bench, and the possibility of an error on his part, like that of issue on the part of the plaintiff below, has become extinct. Not that there has been any error committed by him in the judgment now under review, for the clear and lucid opinion in which he sets forth his reasons for that judgment so thoroughly accords with our own view of the case that we have decided to adopt the opinion, with some necessary modifications, as our own.

1. It is contended that the first item of the will gave a fee-simple absolute estate to Mrs. Tyler, and that Froney Flowers took no es-

tate thereunder. If this construction is correct, and there was no condition or limitation intended to be put upon the estate devised to Mrs. Tyler, then the second paragraph of this item is absolutely meaningless and mere surplusage. If effect is to be given to the first paragraph alone, then the second paragraph would be given no effect whatever. This will not be done unless absolutely necessary, but all the provisions will be construed in harmony when it can be done. The expression "free from all charge or limitation" in the first paragraph of this item may well be construed to mean that there shall be no incumbrance or charge fixed upon the estate, or limitation as to her use and enjoyment of the estate devised to her, or limitation upon the manner of her enjoyment of it. So, also, the words "to her own proper use, benefit, and behoof" are as applicable to a life estate or an estate for years as to an estate in fee simple, merely excluding any trust, use, or benefit for others. Immediately following this is the provision that, in the event the testator and his wife should die without children, then he devised the property to Froney Flowers, "to have and to hold the same in fee simple, to her and her heirs forever." While a devise or grant in this state does not require the use of the word "heirs" in order to convey a fee-simple estate, yet the fact that the devise to Mrs. Tyler does not expressly declare a fee-simple estate or use the word "heirs," and the devise to Froney Flowers does both of these things, indicates that the person who drew the will intended some difference in the estates to be granted. The words, "nevertheless this bequest and devise shall in no wise interfere or limit my wife's interest in said real estate," appear to have been added for fear that her use and enjoyment might be hampered or fettered by this additional devise to Froney Flowers. Sometimes a remainderman may proceed against a tenant in a particular estate because of waste, or the like. It would seem, by reason of this additional devise to her sister, that the husband did not desire any interference of this kind with his wife. It will be noticed that he does not say here that his wife has a fee-simple or absolute estate, but that this devise shall not interfere with her "interest in said real estate." The fact that the draftsman evidently understood the meaning of the expression "fee simple," and that it was nowhere used in connection with the devise to Mrs. Tyler, but was used in connection with the additional devise to her sister, and that in referring to what was devised to Mrs. Tyler it was not spoken of as a fee-simple estate, but as her "interest" in the property, indicates that the testator did not intend to devise to his wife an absolute fee-simple estate free from all conditions. The provision that "should said Froney Flowers die before my said wife, leaving no child or

children, then this devise shall revert and become a part and parcel of my general estate, subject to any disposition that my wife may make of the same," is not so repugnant to what precedes as to render it void. It provides for two things: First, that if Froney Flowers should die before his wife, without child or children, the devise to her should not inure to her collateral heirs, but the property should revert to the testator's general estate; and, secondly, he evidently desired that in that event his wife should have the right to make final disposition of it, and that it should not necessarily fall into the residue, and be governed by item second. Taking the entire item altogether, we think the proper construction is this: The testator devised to his wife the real estate described in this item in fee, but this fee was determinable upon the condition named, to wit, that the testator and his wife should die without children. In that event, upon her death the property should pass to Froney Flowers in fee simple. If Froney Flowers should die before the testator's wife, leaving no child or children, then the property should revert and become part of his general estate, but his wife should have the right to make disposition thereof, excepting it from the method of distribution provided for in item second, if she so desired. It is not absolutely clear whether the testator meant that this disposition should be by deed or will, or either, at the option of his wife, but most probably, as no limitation is put upon the word "disposition," he intended to confer the power of disposition upon her as she might choose, in case of a reversion upon the death of Froney Flowers without child or children. It cannot be said that this added provision for the benefit of the wife is inconsistent with the grant to her of a fee determinable upon condition. If the devisee in remainder under such condition should die without child or children, the wife would have the added right of disposition.

2. It is contended that under item second Mrs. Tyler took an absolute fee-simple estate in the realty; that she took an estate for life or widowhood, with remainder to the testator's heirs at law, according to the laws of descent in this state; that she, as his widow, was the only heir at law; and that therefore the estate for life or widowhood united with the estate in remainder, and she thus acquired an absolute fee-simple estate. The brothers and sisters of the testator and the descendants of brothers and sisters deny this contention. They contend that the proper construction of item second as to the real estate is to give Mrs. Tyler a life estate or estate during widowhood, and after her death an estate in remainder to them; that having given her a life estate with remainder to his lawful heirs, he meant his lawful heirs other than her. As to the personality referred to in this item, it will be observed that the

first part of the item creates a life estate in Mrs. Tyler, while the second part, which refers to the remainder estate, does not include the personality, but only the real estate. Therefore, as to the personal property, an estate for life or widowhood is created in Mrs. Tyler, with no provision as to remainder.

It is contended that Mrs. Tyler takes a particular estate as devisee thereof, and also takes the remainder estate as sole heir, under the description of the person or persons to take in remainder. If this contention is correct, then item second of the will might be briefly stated thus: A testator devises to his wife an estate in the residue of his property, which he distinctly limits to an estate for life or during widowhood. He desires to make provision as to what shall become of the real estate upon her death or remarriage, and in order to do this he provides that it shall go to his wife. It is hardly likely that the testator intended to use so many words and so many provisions for the purpose of conveying a fee-simple absolute estate to his wife. It is as if he had said: "I create a life estate in favor of my wife, which I distinctly limit as being a life estate, and after her death I then create a remainder in her." It is quite true that there are a number of cases which hold that where a testator gives property to a tenant for life, and on the death of the life tenant to the testator's next of kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude, the natural meaning of the testator's words, the next of kin of the testator living at his death will take; and if the tenant for life be such next of kin, either solely or jointly with other persons, he will not on that account be excluded. There are other cases which hold to the contrary. Ordinarily in this state a limitation over to "heirs" means to children. But the testator did not mean this, because he had no child, and made a different provision if one should be born. So that we must look from the ordinary signification to the meaning of the testator. In the present case Carl F. Theilig formerly lived in Noulitz, Saxon Altenburg. He came to America many years ago, leaving brothers and sisters in Germany. He married in this country, but never had any children. None of his family are in America, except one niece in California. After he came to this country, he adopted the name of Charles F. Tyler, instead of the German name of Carl F. Theilig. He has brothers and sisters, and descendants of brothers and sisters, in Germany. In the light of these facts, we must look for his intent in the use of the expression in item second of the will. If the testator has used clear and unambiguous words, and there is nothing in the context to qualify the meaning of such words as "heirs" and "next of kin," they will take effect according to their ordinary signification, although the result may be somewhat

anomalous. Did the testator mean that after his wife's death the residue, in which she had a life estate, should then descend to her in fee simple? The words "shall be distributed to" also throw some light upon the intention of the testator. It is true that, if there is only one person entitled to an estate, such expressions as "distribute" or "divide" would not create more devisees or distributees; but where the testator had brothers and sisters among whom an estate might be distributed or divided, and where the term is not as apt as when applied to a single individual, it may be considered as throwing some light upon the intention of the testator. Further, the testator was careful in this connection to note the fact that he was known as Charles F. Tyler in the United States and Carl F. Thellig in Germany, and that the heirs referred to were the heirs of Charles F. Tyler in the United States, or Carl F. Thellig, formerly of Noulitz, Saxon Altenburg. If the testator had intended that his wife alone should have the remainder in fee, what possible reason could there have been for him to refer to the fact of his former German name, and persons who might be his heirs under that name. Again, in item fourth, the testator's wife is nominated as his executrix, and it is provided that, in the event of her death before entering upon said trust, "or before the completion of said execution of this will," then Froney Flowers should become executrix. Now, if the testator intended merely to make his wife his sole devisee in fee simple and also his executrix, there could be no reason for providing for another executrix in case of her death before the completion of the execution of the will. It would seem that the testator contemplated something further to be done in the execution of this will besides merely turning over the property to his wife. He evidently did not mean to refer merely to the payment of debts, because the will nowhere refers to the existence of debts, nor does he make (what is quite a common provision with testators) a statement that debts shall be paid. Taking the entire will together, it is evident that the testator did not mean by the second item of the will simply to provide that his wife should have a life estate, and upon her death the remainder interest should descend to her; or that she should have an estate for widowhood, and that if she remarried the remainder should "descend" to her. The fact that the husband provided an estate during widowhood which was to terminate upon the remarriage of the widow evidently indicates that he intended to lessen her estate in case of remarriage, not to increase it. If the contention of the plaintiff is correct, the testator worked exactly the opposite result, because his wife clearly has an estate under the will so long as she remains a widow, but if she remarries she gets a fee-simple estate. It is hardly likely that the testator intended to accomplish this result. In the first item he had provided

a home for his wife, which she would not lose in case of remarriage. He also left her the personalty, which is not affected by the remainder. It appears most likely that his memory reverted to the home of his early days, and that he did not wish, in the event his wife died childless or remarried, that this other property should pass to strangers, but to his own blood kin.

It is suggested that the expression, "that is to say, the lawful heirs of Charles F. Tyler in the United States of America, or the lawful heirs of Carl F. Thellig, formerly of Noulitz, Saxon Altenburg," being in the alternative, renders the devise in remainder void. We do not think so. In view of the fact that Mr. Tyler's original name was Thellig, and that when he came to America he adopted the name of Tyler, and that in providing for this remainder he doubtless had in mind the fact that in Germany he might still be called Thellig, and that persons claiming as his heirs might know him under that name, and in view of the fact that there are no heirs in America except his wife, and that one niece had come to the United States who might possibly have answered to the description of an heir if her father died, and that others might come to this country as two of the family had done, it seems that the more natural construction to be put on the will is that the testator, in providing for the distribution to his heirs, merely wished to identify himself as Charles F. Tyler in America and Carl F. Thellig in Germany, and to direct that distribution should be made according to his will, whether the claim be made under the name of Tyler or Thellig. This idea is further borne out by the fact that he signed the will in both names, Tyler and Thellig. At all events, the construction indicated is certainly to be preferred to one which would render the devise void.

It is also suggested that item third is in direct conflict with item second, and therefore destroys its efficacy. We cannot concede the soundness of this contention. The will was executed in May, 1897, and the testator died in November, 1903. Item third was merely an alternative or conditional provision, made in case there should be a child born to himself and wife. No such child was born, either before his death or afterwards, and item third never took effect. Mere alternative provisions, one of which creates a trust if a child be born, and the other different distribution if there be no child born, are not in conflict, and one does not destroy the other.

A number of authorities have been cited by counsel for the plaintiff to sustain their position as to the words "heirs" and "next of kin" when used in wills, but we do not think they are in point. The only Georgia case cited is that of *Wiggins v. Blount*, 33 Ga. 409. That case, however, is very different from the one at bar. There an estate was created in the testator's wife for life or

during widowhood, for the benefit of herself and the testator's family, with the provision that, if any of the children should leave the family, by marriage or otherwise, they should cease to share in the benefits of the estate during the life of their mother. A daughter married, and subsequently dies without issue, and her husband, surviving her, remarried, and also died without issue. His widow sued the administrator d. b. n. of the original testator for a child's share of the estate, the testator's wife having died in the meantime, and it was held that she could recover. In the present case there is no provision for holding the estate together until a given time, and then dividing it among the widow and others; but according to the contention of the widow the property constitutes for her a life estate, with a remainder to her after her death or remarriage. It is not a case of division among a class of which she is a member, but it is claimed that she alone is meant by the description of who is to take in remainder, and that all the words about Theilig and Germany and distribution are surplusage. We do not hesitate to hold that this claim is without foundation.

Judgment affirmed. All the Justices concurring, except LUMPKIN, J., disqualified, and BECK, J., not presiding.

(124 Ga. 310)

HARRIS v. BROWN et al.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. TRUSTS — EDUCATIONAL AND RELIGIOUS PURPOSES.

Where the owners of a lot of land conveyed it to certain named persons, "and their successors, in trust for the purposes herein-after mentioned and declared," to have and to hold to them "and their successors in office, forever, in trust that they shall erect and build or cause to be built thereon two academies or seminaries, and also to build a house or place of worship for the use of the members of the Methodist Episcopal Church, and in further trust that in case of vacation, by death or otherwise, of a trustee or trustees, the vacancy shall be filled by the proper authority by another trustee or trustees as the case may be," such a conveyance created a continuing trust for educational and religious purposes.

2. SAME — TRUSTEES — DEATH — APPOINTMENT OF SUCCESSORS.

Such a trust is the subject of equitable jurisdiction; and, if the original trustees named in the deed are no longer in existence, the superior court, exercising equitable jurisdiction, will appoint successors upon application of any person authorized to bring the action.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, §§ 8, 42, 85; vol. 47, Cent. Dig. Trusts, §§ 207, 208.]

3. SAME — TITLE OF TRUSTEES.

Under the acts of this case, neither the trustees of the Methodist Episcopal Church nor the trustees of the Ft. Valley Male & Female Academy are shown to be the successors of the original trustees, lawfully appointed.

4. SAME — ENFORCEMENT OF TRUST — RIGHT TO SUE — BENEFICIAL INTEREST.

One who owns a residence lot abutting on the land covered by the trust is not for that reason a beneficiary of the trust or authorized

to file a proceeding to have trustees appointed and the trust protected.

5. SAME.

A woman who alleges that she is a citizen and taxpayer of the town and county in which the land covered by the original trust deed is located does not thereby show a sufficient interest in the trust to authorize her to file an equitable petition for the purposes stated in the last note.

6. SAME — PROTECTION OF TRUST PROPERTY.

A member of the Methodist Episcopal Church of the town in which the land was situated, and which occupied the church building erected on the lot, had such an interest in the trust as authorized her to file an equitable petition to have trustees appointed, and to enjoin an unauthorized sale of the property by the church authorities. Whether a sale by proper trustees will be authorized by the court is not decided.

7. SAME — SALE BY TRUSTEE — RIGHTS OF PURCHASER — NOTICE.

A purchaser from a trustee, with notice actual or constructive of the trust, holds as trustee for the beneficiaries.

8. SAME — DEED BY TRUSTEES TO OTHER TRUSTEES.

Where two sets of trustees claim to be acting under a deed which created the trust, a deed from one of them to the other will not operate either as title or color of title as against the common trust.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Judge.

Suit for injunction by A. W. Harris against S. B. Brown and others. There was a decree for defendants, and plaintiff brings error. Reversed.

On August 28, 1836, Mathew Dorsey and James A. Everett conveyed to Hardy Hunter and eight other persons named, "and their successors, in trust for the purposes hereinafter mentioned and declared," certain described lands in the county of Houston, containing six acres more or less, "to have and to hold the above-described lot or piece of land unto the said [persons named] and their successors in office, forever, in trust that they shall erect and build or cause to be built thereon two academies or seminaries, and also to build a house or place of worship for the use of the members of the Methodist Episcopal Church; and in further trust that in case of vacation, by death or otherwise, of a trustee or trustees, the vacancy shall be filled by the proper authority with another trustee or trustees as the case may be." The makers of the deed warranted the title to the persons named "and their successors in trust, forever, in fee simple." A schoolhouse was erected on the property, and also a church building for the use of the members of the Methodist Episcopal Church. Some of the trustees named in the deed were members of the Methodist Church and some were Baptists, and they had no official connection with the Methodist Episcopal Church. In some way, not very clearly indicated by the evidence, certain persons, styling themselves trustees for the Ft. Valley Male & Female Academy, were in possession of the school

building and managing it as if they were trustees for the educational use. The trustees appointed by the conference of the Methodist Church were managing the interest of the church. It is not clearly disclosed what became of the original trustees under the deed, but presumably, from the long lapse of time, they are all dead. No successors were ever appointed for them by the court, so far as the evidence shows. Prior to August, 1882, the school trustees removed the school to another location not on the land involved in the controversy, and the building was sold and torn down. At the date just mentioned a conveyance was made which purported to be from a number of persons as "trustees of the Ft. Valley Male & Female Academies, of said state and county," to certain other persons as "trustees of the Methodist Episcopal Church South at Ft. Valley." The consideration named was \$50, and it purported to quitclaim the land involved in this litigation. It was signed: "William I. Green, Pres. A. C. Riley, Sect." The trustees of the Methodist Church claim that since said deed they have held entire and exclusive possession of the property. About three years ago the Methodist Church was removed from its location on this property to another place in the town of Ft. Valley. Recently, under authority from the quarterly conference, and with the consent of the preacher, the trustees of the church have proceeded to divide up the property into lots for the purpose of offering them for sale. The plaintiff, alleging herself to be a citizen and taxpayer of the town of Ft. Valley, in which the property is located, and owner of a residence lot fronting on the property, which is referred to as a square, and also a member of the Methodist Episcopal Church South of Ft. Valley, filed her equitable petition for the purpose of enjoining the church trustees from dividing or selling the property in lots, from closing certain streets which she claimed existed on the property, from removing the trees upon it, and from interfering with the public use and enjoyment of the square as an open public square. She also prayed that the court would appoint trustees to hold the property and to conserve and carry out the uses and purposes of the trust, and for general relief. The defendants denied that the plaintiff was entitled to injunction, but contended that they had the title to the property and the right to bring it to sale. On hearing the application for injunction the presiding judge refused it, and plaintiff excepted.

N. E. & W. A. Harris, for plaintiff in error.
H. A. Mathews and Jos. H. Hall, for defendants in error.

LUMPKIN, J. (after stating the facts). 1-3. The deed of Dorsey and Everett created a trust of a dual character, educational and religious. Clearly it was not their intention for the trust to terminate upon the building

of the academies and the church. The conveyance was to the persons named as trustees and their successors, to have and to hold to them "and their successors in office forever in trust," and it was declared that, in case of a vacancy in any trusteeship, it should be filled by "the proper authority." These expressions in the deed, as well as the general character of the trust created, negative the idea that the grantors intended for it to terminate as soon as the houses were built. The deed created a continuing charitable trust, for the two purposes mentioned. *Beckwith v. St. Philip's Parish*, 69 Ga. 574; *Thompson v. Hale*, 123 Ga. 305, 51 S. E. 383. A consideration of \$10 is recited; but the evidence indicates that it was a deed of gift, and it has been so treated in the argument. Such a trust is peculiarly a subject of equitable jurisdiction. Civ. Code 1895, §§ 4006-4008. "A charity once inaugurated is always subject to the supervision and direction of a court of equity, to render effectual its purpose and object." Civ. Code 1895, § 4009. A trust will not be permitted to fail for want of a trustee. Civ. Code 1895, § 3197. While the courts are reluctant to interpose in questions affecting the management of the temporalities of a church, yet, if property is devoted to a specific doctrine or purpose, the courts will prevent it from being diverted from the trust. Civ. Code 1895, § 2362. Had this trust been for the church only, section 2353 of the Civil Code of 1895 (codified from the act of 1805, which was in force when the deed was made) would have been directly applicable. It declares that land conveyed to a church or its trustees, for the purpose of erecting a church or meetinghouse, "shall be fully and absolutely vested in such church or religious society, or in their respective trustees, for the uses and purposes in said deed expressed; to be holden to them, or their trustees, for their use by succession, according to the mode of church government, or rules of discipline exercised by such churches or religious societies respectively." If, therefore, the only use specified in the deed had been the erection of the church, the trustees of the Methodist Episcopal Church, chosen according to its method of church government, would be held to be the proper successors of the original trustees. But the trust was for an educational as well as a religious purpose; and therefore the act referred to did not control it. That act does not say that, where a trust is created for both a church and an academy, the trustees of the church alone shall take the entire title. The original trustees appear to have died. At some time in the past, certain persons styling themselves "trustees of the Ft. Valley Male & Female Academy" held possession of the academy on this property. Who elected or appointed them, or how they claimed to be successors of the original trustees under the deed, does not appear. The usual trustees chosen by the Metho

Church according to its form of government to hold and manage its property seem to have exercised control over what was considered the interest of the church. Thus the trust property was being held by two sets of trustees; neither being the original trustees, nor successors shown to have been legally appointed. The deed creating the trust declares that vacancies shall be filled by appointment "by the proper authority." In the absence of any other provision as to the mode of succession, a court of equity was the proper authority, or, under our system, the superior court exercising equitable power, on proper application therefor.

4. If the trust stands without lawful trustees to administer to it, the next question which presents itself is whether the plaintiff is authorized to apply to have trustees appointed, and to have the trust protected. She claims the right to do this on three grounds. The first is because she owns a lot abutting on the square or tract of land covered by the trust. In this capacity she has no-standing in court. The trust was not created for the benefit of adjacent lot owners, nor was the dedication by the grantors for a public park or playground. No such intention is expressed in the deed, nor is there any evidence that they sought at any time to impress such a use upon the land; nor could they have done so after having parted with the title to it and dedicated it to another use. Whether the town of Ft. Valley acquired any rights in regard to streets, or to maintain its water pipes on certain portions of the land, the evidence is conflicting, and the presiding judge did not abuse his discretion in dealing with it. There was much evidence introduced for the purpose of showing that certain streets claimed to exist were mere irregular and undefined pathways or roadways crossing a vacant lot, and not established or fixed roads or streets. Whether or not certain streets have been established, it seems quite clear that the property has not been divested of the educational and religious trust and become a public park.

5. The next ground on which the plaintiff contends that she is entitled in equity to the relief prayed by her is that she is a citizen and taxpayer of the town of Ft. Valley and of the county of Houston, in which it is located. In *Thompson v. Hale*, supra, the proceeding was brought by certain persons who were patrons of the academy for whom it was sought to appoint trustees, as well as residents and taxpayers of the town in which it was located. In the opinion, Mr. Justice Evans says: "The beneficiaries under the deed are not the trustees, but all the persons living in the locality of the school who might avail themselves of its educational advantages and opportunities." The right of the plaintiffs in that case did not depend alone upon their being citizens and taxpayers. While a tax-

payer may file a petition to enjoin public authorities, such as a municipal council or the fiscal agents of a county, from misapplying public funds held by them, this rests upon the basis that the public authorities hold such funds in trust, and that the taxpayers are in the nature of beneficiaries of the trust. But it does not follow that every taxpayer is such a beneficiary of a trust created by a deed to individual trustees for the purpose of founding a school as to authorize him to enforce such trust, to enjoin a diversion of it, to have trustees appointed for it, and to exercise supervisory acts in regard to it. In England, the King, as *parens patriæ*, protected public trusts; and, if the superintendence of such a trust was involved, it was necessary for the Attorney General to be made a party on behalf of the crown. *Adams, Eq. (8th Ed.)* §13. In *2 Perry on Trusts (5th Ed.)* §744, it is said that, if the trustees of a charity abuse the trust, the property does not revert to the heirs or legal representative of the donor, unless there is an express condition of the gift that it shall do so; "but the redress is by bill or information by the Attorney General or other person having the right to sue." The author does not, however, enter into a discussion as to what other person has such right. In *Chambers v. Baptist Educational Society*, 40 Ky. (1 B. Mon.) 215, 221, a bequest was made of a fund, the interest of which was to be used exclusively for the education of such Baptist preachers or candidates for the Baptist ministry as adhered to the articles of general union of Baptists in Kentucky. The college for this purpose was located in Georgetown. In the opinion of the court it was said, in reference to the status of the plaintiff (page 221): "The charge that he is a Baptist, belonging to the general union of Baptists in Kentucky, resident in Georgetown, and owning property there, will not suffice. The interest thus derived is too general, undefined, and remote to justify his interference." In *Hathaway v. New Baltimore*, etc., 48 Mich. 251, 12 N. W. 186, where money was bequeathed to a village to be employed in the erection of a school building to be used as a high school, and the building was erected, it was held that a suit in equity would not lie by a taxpayer to compel the village to maintain a high school in the building. In Michigan, however, *St. 43 Eliz.*, commonly known as the "statute of charitable uses," has never been adopted, as held by the Supreme Court of that state. How far this fact may affect the decision referred to need not be discussed. To authorize the plaintiff to enforce such a trust by proceedings in equity, she must have some pecuniary interest in it, or show that she is a beneficiary who may attend the school herself, or send members of her family to it, or in some way avail herself of its educational advantages; and the bare statement that she is a citizen and taxpayer is not sufficient.

6. One of the purposes of the trust de-

clared in the deed of Dorsey and Everett was to build a house or place of worship for the use of the members of the Methodist Episcopal Church. It is not denied that the plaintiff is such a member of the church which used the building on the lot; and in that capacity she is one of the beneficiaries of the trust. *Hullman v. Honcomp*, 5 Ohio St. 237; *Baptist Church of Lancaster v. Presbyterian Church*, 57 Ky. (18 B. Mon.) 635; *Brunnenmeyer v. Buhre*, 32 Ill. 183 (2); *Happy v. Morton*, 33 Ill. 398.

7, 8. It is contended by the defendants that, if the deed purporting to have been made by the academy trustees and signed by the secretary and president did not convey to the church trustees a perfect title, it at least operated as color of title, and that prescription had ripened under it. If the academy trustees had no title, they could not convey one. They do not appear to have been incorporated; and, if they had any title, it was not conveyed by a deed signed merely by one as their president and another as their secretary. Considered from the standpoint of color of title, it could not avail the defendants. Neither the academy trustees nor the church trustees claimed in opposition to the trust created by the deed of the donors, but both of them claimed under it. "The purchaser from a trustee, with notice actual or constructive of the trust, holds as trustee for the beneficiaries." Civ. Code 1895, § 8179; *Baptist Church of Lancaster v. Presbyterian Church*, supra. It appearing that there are no successors to the original trustees lawfully appointed, and that the plaintiff has a status in equity as a beneficiary, it follows that the trustees of the Methodist Church should be enjoined from making the sale, and that the court should appoint trustees to succeed those named in the deed. If the trustees appointed by the quarterly conference have not succeeded to the title of the original trustees appointed by the deed, a sale by them would not convey a perfect title, even if the injunctions were denied. They could not convey more than they have. The only way in which a complete title to this land can be made is through a court of equity. The complainant, being a beneficiary, may not be entitled to prevent a sale, if the court deems such a sale advantageous to the trust; but she is entitled to have it take place lawfully, so that a good title will be conveyed and a price be realized based upon such a valid conveyance. There is no indication in the evidence that the church trustees desire knowingly to act wrongfully. They doubtless would not wish to make a sale which would not convey a good title to the purchasers; and, having at heart the best interest of the church and trust, they will no doubt readily perceive the desirability of making a valid sale, if one is made at all. As to whether there shall be a sale or not, and if there shall be one, what

direction shall be given in regard to the fund arising, are questions not now for decision.

Judgment reversed. All the Justices concurring, except BECK, J., not presiding.

(124 Ga. 338)

ATLANTA BUGGY CO. v. HESS SPRING & AXLE CO.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. SALES—UNILATERAL CONTRACT.

Where a written contract was entered into between a purchaser of certain goods and a person who signed for the seller, which contained a provision that the contract "shall only be considered binding on the seller when signed by one or more of its officers," and it did not appear that it was ever so signed, or that there was any consideration for the promise of the purchaser, except the contemplated mutual obligations to be assumed by the seller, the contract was unilateral. The seller not being bound, neither was the purchaser; and the latter might withdraw from it before it became mutually binding by acceptance in the manner agreed on.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Sales, § 45.]

2. SAME—ACTION—DECLARATION—AUTHORITY OF AGENT—RATIFICATION.

Where the proposed vendor brought suit for breach of such contract against the vendee, and by amendment alleged that the person who signed the contract with the vendee was the agent of the plaintiff, with full power to represent it in making the contract for the articles specified in it, and binding it thereto, and that the contract he made was fully ratified by the plaintiff and accepted by it as binding on it, such amendment did not show that the contract was or ever became one whereby one became bound to sell and the other to buy the specified property. The allegation that the person signing the contract on behalf of the plaintiff was authorized so to do, and that the contract was ratified by the plaintiff, did not change its written terms, but left as one of them that it should not be binding on the seller until signed by one or more of its officers.

3. SAME.

Authority to make the contract had reference to it as made, and ratification confirmed it as made. Neither anterior authority nor subsequent ratification would operate to change the terms of the written contract without the knowledge or consent of the other party, and adversely to it.

4. SAME—PART PERFORMANCE—EFFECT.

Two written contracts of a similar character being involved, the fact that under one of them the vendee specified certain articles which he desired, and which were furnished, rendered it binding on the parties to the extent only of the accepted specification.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Hess Spring & Axle Company against the Atlanta Buggy Company. There was judgment for plaintiff, and defendant brings error. Reversed.

The Hess Spring & Axle Company brought suit against the Atlanta Buggy Company. The declaration contained three counts, but one of them was stricken on demurrer. Of the others, one was based on each of two contracts. They were similar in character,

except that one applied to vehicle axles, the other to vehicle springs. The first began thus: "Contract for axles. Made in duplicate at Atlanta, Ga., July 25th, 1902. The Hess Spring & Axle Co., of Carthage, Ohio, agrees to sell, and the Atlanta Buggy Co., of Atlanta, Ga., agrees to buy, upon the terms and conditions stated herein." Then followed a description of the quantity, prices, and terms, provisions in regard to making specifications by the buyer, a warranty by the seller, etc. The contract closed with these words: "No verbal agreement shall affect this contract, nor can it be changed in any manner, except in writing and noted hereon, and it shall only be considered binding on the seller when signed by one or more of its officers. [Signed] The Hess Spring & Axle Co., per C. W. Cathcart. Accepted: Atlanta Buggy Co., Clarence Houston, Secty. & Treas." As to the first contract, it was alleged that the defendant failed and refused to make specifications within the time named in it. As to the second, it was alleged that the defendant made specifications for a small amount of the springs, but failed and refused to make specifications for more. Defendant demurred to the declaration, and the plaintiff amended by adding the following allegations to each count: "Said contract was made by a duly authorized agent of the plaintiff, to wit, C. W. Cathcart, with full power to represent plaintiff in making the contract for the articles specified in said contract, and binding the company to make and deliver the same. Said contract, when made, was fully ratified by plaintiff, and accepted by it as binding upon it. Plaintiff stood ready to fully perform each and every obligation imposed upon it by said contract. Said plaintiff was a manufacturer, and was known by the defendant to be such, and said contract was made with the plaintiff with the intention that the articles therein specified should be manufactured by it and sold by it to the defendant." The demurrer was overruled, and the defendant excepted.

Smith, Hammond & Smith, for plaintiff in error. Slaton & Phillips, for defendant in error.

LUMPKIN, J. It is necessary to consider only one question raised by the demurrer, namely, that it appears that each of the contracts provided that it should "only become binding on the seller when signed by one or more of its officers," that it was without consideration, unless there were mutual promises, and that the seller never made a promise or became bound, and therefore the defendant was not bound. No other consideration moving to the defendant is alleged or insisted on, except that there were mutual promises, and that each contract was binding on both parties. If this were not so, then there was no mutuality, and neither would be bound. Under the allegations of the original declaration it is clear that no

contract binding on both parties was set forth. Each of the contracts contained the provision above quoted as to when it should become binding on the seller. It is not alleged that it was ever signed by an officer of the seller, nor is there any allegation that Cathcart was such an officer. Was this cured by the amendment? It still did not allege that Cathcart was an officer of the seller, but that he was a duly authorized agent of the plaintiff, with full power to represent it in making the contract for the articles specified therein, and binding the company to make and deliver them. Concede that he had authority to make the contract, and also to bind the plaintiff to make and deliver the articles; did he exercise it so as to thus bind the plaintiff? Evidently not. The written contract which he actually made contained as one of its terms that it did not become immediately binding. If Cathcart was an agent, and had authority to contract absolutely for the making and delivery of the articles, he did not exercise it, but in fact contracted that his principal should not become then presently bound. The cases in which it has been held that, when there are provisions in an insurance policy declaring that none of its terms can be waived except in writing, there may, nevertheless, be a waiver by an agent, shown to be in fact authorized by the company to make it, in some other manner. *Western Assurance Co. v. Williams*, 94 Ga. 128, 21 S. E. 370, and like decisions, do not affect this case. That a party may, by himself or his agent duly authorized to do so, waive a provision of a contract in his favor, and that the other party may take advantage of such waiver, is quite different from an effort on the part of one party to a contract to waive one of its terms providing for a certain signature as precedent to its becoming binding on him, and thus, without notice to or the assent of the other party, to establish a right in his own favor which would not otherwise exist. This case is more like that of *Reese v. Fidelity Mutual Life Ass'n*, 111 Ga. 482, 36 S. E. 637, in which it was held that when the application for a policy of insurance and the policy itself stipulated that it should not become binding on the company issuing it until the first premium had been actually received, during the good health of the applicant, this payment of the premium during his good health was a condition precedent to fixing liability on the company. See, also, *Mutual Reserve Fund Life Ass'n v. Stephens*, 115 Ga. 192, 41 S. E. 679. In *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, there was a consideration for the contract signed by the party sought to be bound, and the fact that both parties did not sign the agreement in regard to land was not fatal to a recovery, where the party not signing brought an equitable proceeding for specific performance. So in *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67, the contract was based on a consideration, or at least the seal

attached imported a consideration. It was held that "a unilateral contract, although required by the statute to be in writing, may be made mutual by the other party doing some act which would take the case out of the statute, so far as he is concerned." But a tender of the purchase price, made after the time specified for delivery (if a tender would otherwise be sufficient), was held not to have that effect. For mutual obligation to furnish a consideration, they must be mutually binding.

It is further contended by plaintiff, that, if the allegation was not otherwise sufficient, the statement that it ratified the action of Cathcart showed the contract to be binding. If the act of Cathcart originally bound the plaintiff, ratification could give it no greater force. Pleading ratification of the act of one acting as agent implies that he originally was wanting in authority, or exceeded his authority. Otherwise, ratification would be unnecessary. As to whether, if one party to a contract is not bound by reason of want of authority in a person signing as his agent, he can afterward ratify such act and claim that the other party became bound, although the contract was not originally binding on both, the authorities are in conflict. In Wisconsin it has been held that "ratification of contract, entered into by person acting as agent, but without authority so to do, made by the person for whom he assumed to act as principal, cannot validate the contract so as to bind the other contracting party without his assent." *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 109. Speaking of a vendee in a contract for the purchase of land, who has not signed the written contract, the same court says: "He ought not to be in a position where he can hold the other party to the contract, and compel its performance if advantageous to him, and at the same time be at liberty to avoid the contract on his part if disadvantageous. Both parties ought to be bound by the contract, or neither should be bound." *Lowber v. Connit*, 36 Wis. 183; *Dodge v. Hopkins*, 14 Wis. 630, 637, 641; *Townsend v. Corning*, 23 Wend. 435, 444; *Governor v. Fox*, Eng. Law & Eq. R. 420; *Mechem on Agency*, § 179 (b). Judge Story thought the general rule to be that ratification related back to the act done, both for and against the principal, but with certain exceptions. *Story on Agency*, § 245 et seq. An elaborate discussion of the subject will be found in a note to *Atlee v. Bartholomew*, supra, in which the position of Mr. Mechem is criticised. See, also, *Lawson on Contracts*, § 177; *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596; *Hammond v. Hagnin*, 21 Mich. 374, 4 Am. Rep. 490; *Soanes v. Spencer*, 16 Eng. Com. L. 32 (*Sergeant & Lowber's Ed.* 14); *McLean v. Dunn*, 4 Bing. 722, 13 E. C. L. R. 710; *Rev. Rep.* 714; 1 Am. & Eng. Enc. L. (2d Ed.) 12, 13. The Georgia cases hold, as a general rule, that ratification relates back to

the act ratified, except where there is an intervening equity. *Howard v. Cassels*, 105 Ga. 412, 31 S. E. 562, 70 Am. St. Rep. 44 (2); *Singleton v. Bank*, 113 Ga. 527, 38 S. E. 947 (2); *Graham v. Williams*, 114 Ga. 716, 40 S. E. 790; *Civ. Code*, § 3019. As to the point made in the quotation from *Lowber v. Connit*, supra, compare decisions in *Perry v. Paschal*, 108 Ga. 137, 29 S. E. 703. We are not, however, required to decide whether in this case the seller could retain the right to ratify or reject until it developed which would be the more advantageous, and then ratify, if for its own interest, and thus by relation back make the contract mutual instead of unilateral. Suppose that the principal could ratify; what would it ratify? The exact contract which the person acting as agent made. What was that? It was that the written instrument should not become binding on the seller until signed by one or more of its officers. This agreement formed one of the terms of the written contract made by the person acting as agent. When his acts were ratified, it simply confirmed the contract which he made. It did not operate to make another contract, or to change the terms of the one made. Ratification confirms. It neither changes the contract nor makes a new one with different terms. The contract made, therefore, not having been binding on the seller, and there being no consideration, the purchaser was not bound, and could retire from it before it became a complete and mutually binding contract. *Cooley v. Moss*, 123 Ga. 707, 51 S. E. 625.

The case of *George Delker Co. v. Hess Spring & Axle Co.* (C. C. A.) 138 Fed. 647, is relied on by the plaintiff. That decision dealt with three points: That the contract was not too uncertain to be enforced; that the purchaser was not put on his election as to his action in certain events provided for in the contract; and the determination that the contract contemplated manufacturing the articles, and that the measure of damages was one adapted to a manufacturing contract, and not to an ordinary contract of bargain and sale. The questions dealt with in this opinion were not involved. The specification of certain articles under one of the contracts did not go further than to render it binding to the extent of the accepted specification. *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 684.

Judgment reversed. All the Justices concurring, except BECK, J., not presiding.

(124 Ga. 521)

DOLLAR v. BUSHA.

(Supreme Court of Georgia. Dec. 21, 1905.)

HUSBAND AND WIFE — EXECUTION AGAINST HUSBAND—LIABILITY OF WIFE'S PROPERTY.

In a claim case, where it appeared from the uncontradicted evidence that the property levied on was produced on the land of the claimant, who was the wife of the defendant in *fi. fa.*,

mainly by the work of the claimant and her children, though assisted by the labor of the husband, and that he had no interest whatever in the property, a verdict finding it subject to the lien of an execution against the husband was wholly unwarranted.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 455, 457.]

(Syllabus by the Court.)

Error from Superior Court, Hall County;
J. J. Kimsey, Judge.

Action by S. J. Busha against E. B. Dollar. Judgment for plaintiff on levy of execution. L. J. Dollar interposed claim. From a judgment holding the property subject, she brings error. Reversed.

A *fi. fa.* in favor of S. J. Busha was levied on a bale of cotton as the property of E. B. Dollar, the defendant in *fi. fa.*, and a claim thereto was interposed by his wife, Mrs. L. J. Dollar. On the trial of the claim case in a justice's court, the claimant admitted possession of the cotton in the defendant in *fi. fa.* after the rendition of the judgment against him. She testified that the cotton belonged to her; that it had been raised on land of which she was in possession and which had been given her by her mother; that she and her children performed most of the labor in growing the cotton, though her husband worked some with them; that the plowing was done with a mule belonging to her, and she bought and paid for the guano to make the cotton; and that she did not rent the land to her husband, but he rented other land to make corn. The claimant's mother testified that she had given the land to her daughter, who had been in possession of it several years, but that no written deed to it had ever been delivered to her; that she owned the mule and ran the business, and her husband had no interest in the land or stock. Another witness swore that claimant owned the land and stock and that the cotton was hers, and that he had "traded for the mule for her." The defendant in *fi. fa.* testified: "I never had any interest in the land. It belongs to claimant. Her mother gave it to her. I never rented the land from claimant. I hauled the cotton to the gin for her." The plaintiff in *fi. fa.* introduced no evidence in rebuttal, nor did he make any effort to impeach any of the witnesses who had testified. The jury nevertheless found the property subject, and the claimant took the case by certiorari to the superior court, where the finding of the jury was upheld. Exception is taken to the judgment of that court overruling the certiorari.

W. B. Sloan, for plaintiff in error. Brook & Henderson, for defendant in error.

EVANS, J. (after stating the facts). The defendant in *fi. fa.* and the claimant sustained the relation of husband and wife. The cotton levied on was produced on the claimant's land. The chief part of the labor in making the crop, of which the property levied on was a

part, was performed by claimant and her children. The bare fact that the husband assisted in making the crop gave him no proprietary interest in it. If a husband debtor employs his labor on homestead land, or in connection with the exempt personalty, what his labor produces inures to the homestead beneficiaries. *Wade v. Weslow*, 62 Ga. 564; *Kupferman v. Buckholts*, 73 Ga. 778. A husband, acting bona fide, may become the creditor of his wife for services, by contract expressed or implied; and, if he be such a creditor, his creditors have their remedy against her by garnishment. *Keller v. Mayer*, 55 Ga. 409. But the debtor cannot be forced to apply his labor to the extinguishment of his creditor's claim. There is no way of reaching it. *King v. Skellie*, 79 Ga. 151, 3 S. E. 614; *Kiser v. Dozier*, 102 Ga. 434, 30 S. E. 967, 66 Am. St. Rep. 184. There is nothing in the record to even intimate that the wife rented the land to the husband, or that he was in any wise the owner of the crop produced on the land. We can see no objection in law or in morals to an insolvent husband contributing his labor, or that of his minor children, in assisting his wife to make her separate estate productive. The income would belong to the wife; and, at most, the husband's creditors would only be entitled to reach what, if anything, might be due the husband for his services, by process of garnishment. Certainly the crop grown on her land would not be subject to an execution against her husband. No fraud or collusion between the husband and the wife is even suggested, and the verdict was clearly contrary to the evidence, and should have been set aside in the certiorari proceeding. The jury was not at liberty to arbitrarily disregard the testimony of the claimant's witnesses, who stood unimpeached, upon the bare suspicion that they had testified falsely. *Seaboard Air Line Ry. Co. v. Walthour*, 117 Ga. 427, 43 S. E. 720; *M. & B. R. Co. v. Revis*, 119 Ga. 332, 46 S. E. 418. The facts of this case are altogether different from those appearing in *Crawford v. Kimbrough*, 76 Ga. 299, which is relied on by counsel for the defendant in error; the evidence in that case disclosing that there was collusion between the husband and wife to defraud his creditors, and that there was no merit in the claim interposed by her to the crops levied on. The decision in *Sams v. Thompson Hiles Co.*, 110 Ga. 648, 36 S. E. 104, directly supports the ruling now made. Judgment reversed. All the Justices concurring.

(124 Ga. 523)

PARKS v. SIMPSON.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. LANDLORD AND TENANT—LIEN ON CROPS—FORECLOSURE.

The special lien of a landlord for money or supplies furnished in making a crop exists, and can be foreclosed as a lien, only on the crops of the year in which the advances are made. A

balance of indebtedness for a prior year cannot be included in a foreclosure of such a lien, even by agreement of the parties at the beginning of the year that such balance shall be included with the advances of that year.

2. SAME—CREATION BY ESTOPPEL.

Estoppel cannot operate to create a special lien, with the right of summary foreclosure, where no such lien exists under the statute.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action by J. F. Simpson against Will Parks. Judgment for plaintiff, and defendant brings error. Affirmed.

Simpson instituted a proceeding in a justice's court against Parks to foreclose a landlord's lien on the crop of the defendant raised in the year 1904 for the sum of \$39.29. The defendant filed a counter affidavit. The case was appealed to a jury in the justice's court. The verdict was in favor of the plaintiff, and the defendant carried the case to the superior court by writ of certiorari. It appeared from the evidence that in the year 1903 the plaintiff had furnished to the defendant supplies, and that about \$52 was still due on that account. About the beginning of the year 1904, the landlord told Parks that he would have to foreclose the lien on the corn, fodder, and other products of the latter to realize the balance which he owed for the year 1903, if he did not make the landlord safe in some way, by giving a security or a mortgage. The tenant, Parks, proposed that he would let the balance due on his account for the year 1903 be made a new debt for the year 1904, and that his crop in the latter year should stand bound for such balance as though it had been furnished in the year 1904. During the year 1904 the landlord furnished \$27.50 to aid the tenant in making his crop. So that in the fall the entire debt due, including interest, was \$85.39. In December, 1904, the tenant paid \$50, without directing how the payment should be applied. The landlord thereupon applied it to the oldest or first part of the account, leaving the balance sued for. On the hearing of the certiorari the presiding judge overruled it, and refused a new trial. The defendant excepted.

Parks & Gaillard, for plaintiff in error. W. B. Sloan, for defendant in error.

LUMPKIN, J. (after stating the facts). The special lien which exists in favor of a landlord upon the crops of his tenant for money or supplies furnished in making such crops is a lien only on the crops of the year in which they are made. Civ. Code 1896, § 2800, subsec. 3. Statutes affording summary remedies must be strictly construed. *Porter v. Lively*, 45 Ga. 159; *Dart v. Mayhew*, 60 Ga. 104; *Mabry v. Jenkins*, 66 Ga. 732; *Hinton v. Goode*, 78 Ga. 233. As the statute creates this special lien, with the right of summary enforcement, only under certain circum-

stances, debts cannot be collected in the mode so provided, unless they fall within the terms of such statute. Parties cannot by agreement bring other debts than those which the law itself embraces within its scope. The landlord's special lien was only for money and supplies furnished to make the crops of the year 1904, and the parties could not include within it an indebtedness due for the year 1903. It is immaterial that the landlord might have foreclosed a lien for that debt at the proper time. He did not do so. It is urged that the tenant is estopped from denying the landlord's right to proceed summarily to foreclose a lien for the entire amount. A person may estop himself from asserting a lien, but estoppel cannot create a special lien, where by the terms of the statute none exists. The operation of an estoppel is negative, not creative. The judgment will be affirmed, with direction that the amount of the verdict in excess of the indebtedness for money furnished during the year 1904 be written off.

Judgment affirmed, with direction. All the Justices concurring.

(124 Ga. 501)

ROGERS v. BLUENSTEIN.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. SALES—CONTRACT—VALIDITY.

If one buys property of another, and agrees to resell it to such other at an advanced price payable in the future, such a transaction actually made is not illegal, but will be enforced.

2. SAME—USURY—QUESTION FOR JURY.

Whether the transaction was a sale with the right of repurchase, or whether it was a ruse devised to evade the usury laws and to take a security for the loan of money at a usurious rate, was a question of fact for the jury.

3. SAME—INSTRUCTIONS.

The charge of the court, if not entirely accurate, was not such as to require a new trial.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Laura B. Rogers against S. Bluenstein. Judgment for defendant, and plaintiff brings error. Affirmed.

Laura B. Rogers brought an action against S. Bluenstein to recover a diamond ring and setting and a diamond pendant and setting. The evidence showed that on June 18, 1902, the plaintiff executed an instrument in writing by which she conveyed the diamonds to one Carroll D. Judson for the sum of \$400. He executed to her on the same day a paper whereby he agreed to sell the diamonds to her on or before October 15th for the sum of \$408. The agreement contained the following: "It is expressly agreed and understood that this instrument constitutes an option for the purchase of said property described, at the price named and within the time specified, time being hereby made expressly of the essence of the contract; and,

upon the neglect or failure of the said Mrs. Laura B. Rogers to exercise the said option by paying the sum aforesaid within the time specified, the said option shall be null and void, and the said personality shall remain the sole and exclusive property of the said Carroll D. Judson, free and clear of any and all claims or demands of the said Mrs. Laura B. Rogers." The option was extended to November 15th. On November 14th she wrote Judson, saying: "You are hereby authorized and requested to sell and convey by bill of sale the diamond ring and pendant described in the within agreement to S. Bluenstein, and your doing so shall fully satisfy this contract." Judson then executed a written transfer of the property to Bluenstein, and he gave to her a writing stating that he agreed to sell and deliver the diamonds to her at any time on or before February 14, 1903, upon the payment in cash of \$425.64. This paper contained a clause similar to that above quoted from the agreement of Judson. Some time after the date specified in this agreement had passed a tender was made to Bluenstein, which he refused, and the present action was brought. The plaintiff contended that the transaction with the defendant was merely a loan of money at usurious interest; that the diamonds were first pledged to Judson; that the defendant advanced to take them up, charging interest at the rate of 12 per cent. per annum, and adding it to the amount of money advanced by him. The defendant contended that the transaction was not that of loaning money at usurious rates, but was as it purported to be. The jury found for the defendant. The plaintiff moved for a new trial. It was overruled, and she excepted.

Winter Wimberly, Jesse C. Harris, and Akerman & Akerman, for plaintiff in error. Jno. P. Ross and W. J. Grace, for defendant in error.

LUMPKIN, J. (after stating the facts). 1. It is legally possible for one person to buy property from another and agree to resell it to the vendor at a higher price payable in future. If such be the actual transaction, the law will enforce it. The difficulty frequently arising is to determine whether in a given instance the parties intended a sale or a mortgage. *Felton v. Grier*, 109 Ga. 320, 35 S. E. 175; *Spense v. Steadman*, 49 Ga. 183; *Monroe v. Foster*, Id. 514. If Bluenstein in fact bought the diamonds from Judson with the assent of Mrs. Rogers, and agreed to sell them to her at an advanced price payable in the future, there would be nothing unlawful about it. If in fact the transaction was one by which Bluenstein loaned Mrs. Rogers a sum of money at a usurious rate of interest, it was illegal, and the title so obtained was tainted with usury. The transaction, being on its face apparently lawful, might, nevertheless, be shown to be a device for concealing usury. But the

burden of proving this rested on the party asserting it. *Morrison v. Markham*, 78 Ga. 161, 1 S. E. 425; *Einstein v. Butler*, 65 Ga. 561; *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204 (5); *Civ. Code* 1895, § 2802. There was a considerable amount of evidence tending to show that in fact the title of the defendant was tainted with usury, but it was not free from conflict. In addition to what appeared on the face of the papers, when asked in regard to a loan to the plaintiff, defendant testified: "There was no loan with her. * * * As to how much money I let Mrs. Rogers have, I never had a contract with Mrs. Rogers. The bill of sale shows what I paid Judson. I don't remember exactly—\$413, or something. * * * And I gave an option to purchase back on the 14th of February, 1903." If the jury based their verdict on the belief that this was in fact a sale with an agreement to resell, we cannot say that they were without evidence authorizing them to do so.

2. The plaintiff in error alleges that the court erred in charging that if the diamonds were conveyed to the defendant as a security for a debt which was tainted with usury, and not in fact as a sale with the right to repurchase, and if she tendered the defendant the amount of money due upon her contract with him, and it was refused, she would be entitled to recover the difference between the amount of her debt at the time of the tender and the highest proved value of the property since the date of such payment. It is contended that, if the diamonds were pledged as a security for a loan, the pledgor would be entitled to redeem the property pledged, regardless of the question of usury. If this be conceded, there was, nevertheless, no harmful error in the charge. If what transpired between the parties amounted to a pledging of the diamonds to secure a debt, the amount fixed for their return or reconveyance was, without any controversy, greater than the amount advanced with legal interest. The plaintiff contended that there was usury, and in making the tender her attorney calculated the rate which he alleged had been previously charged. We think the charge of the court, if erroneous, could not have injured the plaintiff.

Judgment affirmed. All the Justices concurring.

(124 Ga. 393)

ISDALE v. HANSON et al.

(Supreme Court of Georgia. Nov. 20, 1905.)

INJUNCTION—FRAUD—SALE OF INTEREST IN BUSINESS.

Under the facts of this case, there was no abuse of discretion in refusing to grant an injunction and appoint a receiver as prayed. But the plaintiff having prayed that the defendant be enjoined from selling, hypothecating, or disposing of certain notes which he had given to the defendant for the purpose of obtaining an interest in the partnership, and the latter having expressed a willingness that such notes

should be impounded, direction is given that the judgment be modified, and a proper order impounding them be entered.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 95, 304, 307.]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by O. G. Isdale against F. Hanson and others. From an order refusing an injunction and the appointment of a receiver, plaintiff brings error. Affirmed.

Isdale filed an equitable petition against Hanson, alleging that he purchased from the latter an interest in the business conducted by him under the name of the Hanson Supply Company, for \$1,000, for which he gave his notes, and on which he had paid amounts aggregating \$180.49; that the defendant has refused to comply with his agreements or to permit plaintiff to have access to the books or records of the company or any voice in the management or control of the business, and has openly declared that plaintiff has no interest in the business, and has agreed upon a sale of it for the sum of \$10,000 to certain persons named; that defendant has converted into money the greater portion of his real estate, and plaintiff believes and is reliably informed that after receiving the purchase money for the sale of the business he will leave the state. Plaintiff has demanded of defendant a return of the money with interest on it, and that the unpaid notes be returned to him and canceled; but defendant has refused this demand. Plaintiff prayed that the purchasers of the business from the defendant be enjoined from selling or hypothecating any of the notes given to him by the plaintiff for the purchase of an interest in the business, and that a receiver be appointed, an accounting be had, and judgment be rendered in his favor. Defendant answered, in brief, as follows: The plaintiff sought and obtained employment with him, representing himself to be an experienced and competent steam and gas fitter. As additional compensation and for the purpose of insuring increased interest in the business, defendant entered into an agreement with plaintiff and one Gowan, by which each of them was to pay, from his compensation for work, for an interest in the business amounting to \$1,000. Stock was to be taken, and the proposed interest of the plaintiff was to be in the proportion which \$1,000 should bear to the entire valuation which should be shown by the inventory. Notes were given by the plaintiff, and a written contract entered into, one of the terms of which was that, "should said Isdale fail to pay said notes above mentioned, then this contract should be null and void." It soon developed that the plaintiff was incompetent to do work as a steam and gas fitter, and he neglected the business and failed to carry out his contract, causing loss and damage to the defendant. Finally the plaintiff severed his

connection with the defendant, and rescinded the contract and terminated all rights which he had to claim any interest as a partner. On an accounting the plaintiff would be indebted to the defendant. "Defendant deposits with the clerk thirty-three of said notes which have not been paid by petitioner, amounting to \$825 of principal, besides interest added in the face of each note, and prays that the sum be impounded to be disposed of by order of this court." The intention to sell all of his property and leave the state is denied. On the hearing the evidence was conflicting. The court denied the prayers of the plaintiff for injunction and receiver, and he excepted.

W. J. Nunnally, for plaintiff in error. Denny & Harris and Halsted Smith, for defendants in error.

LUMPKIN, J. Judgment affirmed, with direction. All the Justices concurring.

(124 Ga. 504)

RAYMOND v. STRICKLAND.

(Supreme Court of Georgia. Dec. 21, 1905.)

FIXTURES—LANDLORD AND TENANT—REMOVAL—EXPIRATION OF LEASE.

An electric chandelier, annunciator, and like contrivances or devices attached to the ceiling or walls of a house by a tenant, at his own expense and for his personal comfort and convenience, come within the legal definition of "domestic fixtures," when so placed that they can be readily detached without injury to the premises. In the absence of any understanding to the contrary, such fixtures may be removed by the tenant at any time during his term or occupancy, and even thereafter, if he be deprived of the opportunity to remove them by a wrongful retaking of possession of the premises by the landlord. Not being annexed to the rented structure with any view to their becoming permanently attached thereto as a part of the realty, they do not lose their identity as chattels, and a possessory warrant will lie to recover them from a landlord who wrongfully withholds possession thereof from the tenant.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Amie Raymond against Mabel Strickland. Judgment for defendant, and plaintiff brings error. Reversed.

This litigation originated in a justice's court, from which there issued a possessory warrant sued out by Amie Raymond against Mabel Strickland to recover an annunciator and a chandelier of which the former claimed to be the owner. The following facts appeared on the trial in that court: The plaintiff rented from the defendant a house in the city of Macon, agreeing to pay \$25 per week rent. After taking possession, the plaintiff took down an old chandelier, had the house "wired" for electric service, and put up a new four-light chandelier and also an annunciator at her own expense. A short time thereafter, she went on a visit to Jacksonville, Fla., and on her return, within a

few days, found that the defendant had taken possession of the house. Plaintiff asked the defendant for the chandelier and the annunciator, but the latter refused to give them up till the plaintiff paid \$50 back rent. The chandelier was fastened by screws to the ceiling, and the annunciator was fastened to one of the walls by a large screw. Both were connected with the "wiring" of the house, but could have been readily disconnected by merely cutting the wires, and could have been removed without injury either to the ceiling or wall. The contract of rent did not embrace any special stipulation with regard to the putting in of fixtures of this kind, though they are generally removed by the tenant on vacating a house. Plaintiff was to have the house as long as she paid the rent, and defendant was to retake possession if she did not pay the rent promptly. Before re-entry, the defendant had heard that the plaintiff had left the house and the state with the intention of never returning, and the defendant went to the house and found the same occupied by the servants only, and that nothing was there belonging to the plaintiff except the fixtures referred to above. The plaintiff, on her return, made demand for them, but made of the defendant no demand to be put back into possession of the house. The defendant declined to surrender these fixtures unless the plaintiff paid the \$50 rent then past due, which the latter promised to do, but has never done; and the defendant held the fixtures as collateral for the back rent. Later, plaintiff sold them to the party from whom she purchased the same, and this party sent a man to the house to remove them, but the defendant declined to deliver them to him, though he produced a written order therefor. The plaintiff then agreed to rescind the sale, restored to the party who bought the fixtures the money paid her for them, and instituted the present action to recover possession of the same from the defendant. A judgment in favor of the plaintiff was rendered in the justice's court, and the defendant took the case by certiorari to the superior court. There an order was passed sustaining the certiorari, and the judge entered a final judgment in favor of the plaintiff in certiorari, holding that neither the chandelier nor the annunciator was a chattel, and therefore a possessory warrant would not lie for a recovery of the possession of either. To this judgment exception is taken by the defendant in certiorari, who was the plaintiff in the suit brought in the justice's court.

Glawson & Fowler, for plaintiff in error.
Herman Brasch, for defendant in error.

EVANS, J. (after stating the facts). The bill of exceptions recites that the court sustained the certiorari because the articles described in the possessory warrant were not chattels, and possession thereof could not be

recovered by possessory warrant; so that the correctness of the judgment excepted to depends upon the classification of the articles as personality or as fixtures attaching to the realty so as to become part thereof.

Our Code provides that "anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it. Machinery, not actually attached but movable at pleasure, is not a part of the realty." Civ. Code 1895, § 3049. Anything detached from realty instantly becomes personality. Id. § 3050. Section 3049 is peculiarly applicable to cases where the fixtures are erected by the owner of the realty, who subsequently sells or mortgages the premises. "When land is conveyed, whatever fixtures are annexed to the realty at the time of the conveyance pass with the estate to the vendee, unless there be some express provision to the contrary; and fixtures pass to a bona fide purchaser of the real estate, notwithstanding an agreement between the owner of the land and the vendor of the fixtures that they should remain personal property. The same rules as to fixtures which apply as between vendor and vendee apply also as between mortgagor and mortgagee." *Cunningham v. Cureton*, 96 Ga. 492, 23 S. E. 420. See, also, *Waycross Opera Co. v. Sossman*, 94 Ga. 100, 20 S. E. 252, 47 Am. St. Rep. 144. Where the fixtures are placed on the premises, not by the owner or in pursuance of a contract with him, but by a tenant for his personal use or convenience, a much more liberal rule as to their severance obtains. The tenant cannot cut or destroy growing trees, remove permanent fixtures, or otherwise injure the property. Civ. Code 1895, § 3119. "A tenant, during the term or a continuation of his tenancy, or while he is in possession under the landlord, may remove fixtures erected by him. After the term and possession are ended, they are regarded as abandoned to the use of the landlord, and become the latter's property." Civ. Code 1895, § 3120. This section of the Code is to be construed to refer only to trade fixtures, and when so interpreted, it is in entire harmony with all the cognate sections of the Code. *Wright v. Du Bignon*, 114 Ga. 770, 40 S. E. 747, 57 L. R. A. 669. A further indulgence is allowed the tenant in removing such ornamental and domestic fixtures as may be annexed to the premises by the tenant for the more advantageous use thereof, provided no material injury results to the realty or to the substantial characteristics of the articles themselves. Domestic fixtures have been held to include ranges and stoves fixed in brickwork, furnaces, gas fixtures, pumps, clocks, window blinds, bath tubs, and other chattels annexed for convenience. The following articles have been considered ornamental fixtures: hangings, tapestry, and pier glasses nailed to the walls or panels of a house; marble chimney-pieces, cornices,

etc. *Bronson on Fixtures*, §§ 34, 35, and cases cited in note. With regard to domestic and ornamental fixtures, it is very generally held that they may be removed by the tenant, and are to be considered personalty even though annexed; and that any wrongful act or refusal on the part of the landlord with respect to the removal of the tenant's fixtures amounts to a conversion for which an action will lie. *Bronson on Fixtures*, § 109c; *Wright v. Du Bignon*, *supra*; *Richards v. Gilbert*, 116 Ga. 382, 42 S. E. 715. An action will not lie for domestic fixtures left annexed after the right of removal has expired.

In the case in hand, the annunciator and chandelier are easily classified as domestic fixtures; the evidence shows that both could be removed without injury to the ceiling or walls of the house. They were the personal chattels of the tenant, and she had the right of removal during her tenancy and possession. A wrongful entry by the landlord could not deprive the tenant of this right. Indeed, the landlord did not controvert the tenant's title to the articles, but held them as collateral for past due rent. Presumably the landlord, by declining to return the fixtures to the tenant on demand therefor, did not question the tenant's right of removal if the rent arrears should be paid. It appears that the tenant, while absent on a visit, left her servants in charge of the house, and before her return the landlord took possession of the house and assumed dominion over the fixtures. On the tenant's return, demand was made for the fixtures, but compliance with this demand was refused. The landlord had no right to summarily, without any legal process, eject the servants of the tenant and in that way retake possession of the premises. *Entelman v. Hagood*, 95 Ga. 390, 22 S. E. 545. Nor would possession obtained by the unauthorized consent of the tenant's servant defeat her right to entry before the termination of the tenancy to remove the fixtures. The landlord's conduct amounted to a conversion of the fixtures, and the tenant had her remedy by possessory warrant to recover possession of them. The court erred in sustaining the certiorari.

Judgment reversed. All the Justices concurring.

(124 Ga. 506)

SHANK et al. v. WASHINGTON EXCHANGE BANK.

(Supreme Court of Georgia. Dec. 21, 1905.)

PRINCIPAL AND SURETY—ACTION ON NOTE—JUDGMENT.

If a certain person bought property and gave promissory notes therefor payable to the vendor or order, two of them signing as principals and one as surety for them, and such notes were transferred to a bona fide purchaser for value before due and without notice, in a suit by the holder against the makers, the surety, and the payee as indorser, the makers and the surety for them could not, by alleging that the

property was of no value and that there was a total failure of consideration, claim to occupy the position of sureties for the original payee, and to have the judgment in favor of the plaintiff so molded as to declare that they were such, and that they should have the privilege of paying the judgment and being subrogated to the rights of the plaintiff.

(Syllabus by the Court.)

Error from City Court of Washington; W. H. Toombs, Judge.

Action by the Washington Exchange Bank against George S. Shank and others. Verdict for plaintiff, and defendants bring error. Affirmed.

The Washington Exchange Bank brought suit against George S. Shank and T. S. Paschal as makers, Louisa J. Shank as surety, and E. L. Holland as indorser on two promissory notes. The defendants, George S. Shank, T. S. Paschal, and Louisa J. Shank, security, filed a plea alleging that the notes were given to Holland for the purchase of a certain boiler and engine; that they were both totally worthless and not suited for the purpose for which they were sold; that this was known to Holland before the sale, and that his conduct was a fraud upon them; that Holland indorsed the notes and was sued in this action as such indorser; and that there was no consideration for the notes sued on. But they admitted that they would have to submit to a judgment in favor of the bank, if it was a bona fide holder for value. They contended that the judgment in favor of the bank should be so framed as to allow it to be controlled by them as mere sureties or guarantors for Holland, with permission to them to pay it and be subrogated to the rights of the bank against him. It was agreed that the bank was a bona fide purchaser of the notes for value and without notice. On motion the court struck the plea, and, after verdict against the defendants filing the plea and Holland, the former excepted.

F. H. Colley, for plaintiffs in error. J. M. Pitner, for defendant in error.

LUMPKIN, J. (after stating the facts). Where a suit is brought against several defendants, some of whom are in fact sureties for another, if this does not appear on the face of the contract, it may be proved by parol either before or after judgment; the creditor not being delayed in his remedy by such collateral issue between the principal and the surety. Civ. Code 1895, § 2984; *Whitley v. Hudson*, 114 Ga. 668, 40 S. E. 838; *Camp v. Simmons*, 62 Ga. 85, *Cauthen v. Central Georgia Bank*, 69 Ga. 733. This rule applies where the relation of principal and surety in reality exists, although it does not appear on the face of the contract. In the case now under consideration the defendants who filed this plea did not allege that they were in fact sureties for Holland or signed as such, or that the relation of principal

and sureties was ever contemplated between them. They were debtors of Holland, not sureties for him. Louisa J. Shank signed as surety for the other two, not for Holland. If they have any claim against Holland, it is not because they are sureties for him, but because they gave him a note for certain worthless machinery and are subject to judgment because the note was transferred to an innocent purchaser for value without notice. Want of consideration or failure of consideration for a promissory note does not create the relation of principal and surety between the makers of the note and the payee, although it may have been indorsed to an innocent purchaser, and the makers may be unable to assert their defense against the holder. The plea was properly stricken. Judgment affirmed. All the Justices concurring.

(124 Ga. 510)

**AMERICAN BONDING & SURETY CO.
OF BALTIMORE CITY, MD., v.
ADAMS et al.**

(Supreme Court of Georgia. Dec. 21, 1905.)

1. JUSTICES OF THE PEACE—CERTIORARI—NOTICE OF HEARING—SUFFICIENCY.

A plaintiff in certiorari notified the defendant of the sanction of the writ, stating the name of the case and designating it as one which had been "tried in the justice's court of the 187th district, G. M., said county, on the 8th day of October, 1904." The notice recited that the writ would be heard "at the courthouse in said county at the next term of the superior court, to be held on the second Monday in March, 1904." The notice was dated November 25, 1904, and nowhere stated the name of the county in which the certiorari was to be heard. The notice served on the defendant was not an exact copy of the one attached to the petition for certiorari, which the sheriff certified to having served on the defendant's attorney, though the two were substantially identical.

Held: (a) The designation of the district in which was situated the justice's court in which the case was tried, together with the recital that the writ of certiorari was to be heard at the courthouse "in said county," was sufficient notice to the defendant as to the county in which the writ would be heard. (b) The defendant was bound to know when the "next term" of the superior court of his county would be held; and the fact that the notice incorrectly named the date of the term did not render it invalid. (c) If the defendant desired to take advantage of the discrepancy between the copy of the notice attached to the petition and the notice served upon his attorney, he should have traversed the return of the sheriff. This was not a ground to dismiss the certiorari.

2. CERTIORARI—PETITION—VERIFICATION.

A petition for certiorari filed by two plaintiffs, one of whom is an attorney at law, is properly verified by an affidavit of the attorney made individually as an attorney for his co-plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action between the American Bonding & Surety Company of Baltimore City, Md., and S. L. Adams. From a judgment on a writ

of certiorari, the surety company brings error. Affirmed.

Z. B. Rogers, for plaintiff in error. T. L. Adams, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 510)

NEAL v. GRAY.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. INSURANCE—PREMIUM NOTE—RENEWAL—ACTION—DEFENSES.

Where a policy of insurance contained a provision that "the failure to pay any of the first three years' premiums, or any notes or interest upon notes given to the company for any premium or part of a premium, on or before the days upon which such premiums, notes, or interest shall become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary, and all payments made upon this policy shall be deemed earned as premiums during its currency," and where a note was given for the first years' premium, and when it became due it was not promptly paid, but was afterwards, during the year, renewed, and the renewal note was accepted by the company and suit brought on it by an indorsee of the company, this operated as a waiver of forfeiture of the policy for nonpayment at maturity of the note first given for the annual premium, and it furnished no defense to a suit on the note that the renewal took place some time after such maturity.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1067-1069.]

2. SAME—DEFAULT IN PREMIUMS—WAIVER.

Whether or not the agent of the company, who represented to the defendant that the policy would not be void, but would remain in force upon giving the renewal note, had authority to waive the forfeiture, the acquiescence in the renewal of the company, and its receipt of the second note and claiming the right to transfer it by indorsement, operated as such waiver.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1061-1069.]

3. BILL AND NOTES—INDORSEMENT—ACTION BY INDORSEE.

Where a promissory note was indorsed by the payee or by an indorsee from the payee to another "for collection only," the indorsee had such a legal title as would authorize him to bring suit upon the paper in his own name.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1383, 1406.]

4. SAME—EVIDENCE.

Unless denied on oath, an indorsement need not be proved, although the name of the indorser purports to have been signed by an agent, and the action is against the maker.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1552.]

5. APPEAL—REVIEW—HARMLESS ERROR.

It being doubtful under the evidence whether the verdict was for 18 cents more interest than it should have been, this will not necessitate a reversal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4547, 4548.]

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

Action by M. B. Gray against Henrietta Neal. Judgment for plaintiff. Defendant brings error. Affirmed.

Suit was brought in a justice's court and carried by appeal to the superior court. It was based on a promissory note dated December 15, 1904, due December 30th, payable to the order of the Union Central Life Insurance Company, and signed by Henrietta Neal. It had on it the following indorsements: "The Union Central Life Insurance Co., by T. S. Lowry & Son, Mgrs." "Pay to the order of M. B. Gray, Agt., for collection only. T. S. Lowry & Son, Managers." The suit was brought by M. B. Gray, "Agt.," against the maker. The defendant filed a plea, admitting a prima facie case and assuming the burden of proof. She pleaded that the note sued on was without consideration, having been given for the premium of a policy of insurance which had already lapsed and become void when the note was made; and that Gray falsely and fraudulently represented to her that the insurance policy would be good if the note was given, notwithstanding it had become void before that time, which representation deceived her and induced her to make the note, and that such representation was untrue, though this fact was unknown to her. On the trial the evidence showed that the defendant had obtained a policy of life insurance from the company, dated April 1, 1904. Instead of paying the first annual premium in cash, she gave her promissory note for the amount. It does not appear from the evidence what was the date of this note, or when it fell due, but it was renewed once or twice, and the suit was based on the note thus given in renewal. One of the conditions stated in the policy was as follows: "Payment of premium. The failure to pay any of the first three years' premiums, or any notes or interest upon notes given to the company for any premium or part of a premium, on or before the days upon which such premiums, notes, or interest become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary, and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy are hereby made a part of this contract of insurance." The husband of the defendant testified as follows: "When the note sued on was given, the premium was long past due, and I told Mr. Gray that the policy was already void, because the policy said so, and the first note said the policy would be void if the note was not paid at maturity. Mr. Gray, the agent for the company, said that made no difference, that if my wife would give the note the policy would be good. No money has ever been paid. * * * She gave this note because Mr. Gray, the agent, told her the policy was good

and had not lapsed at the time she gave this note. I did pay the interest on the note when this last note was given. Mr. Gray told me my wife would have to pay the interest. Defendant has had policy ever since it was issued, and had policy, application and receipt when note sued on was given. * * * My wife gave the note sued on only because Mr. Gray, the agent, told her if she would give the note the policy would be good. She would not have given the note if he had not told her the policy would be good. She thought Mr. Gray, the agent, was telling the truth." The application for insurance contained the following provision: "It is hereby agreed and warranted that, should the company issue a policy upon the application, its interest shall not be affected by verbal statements made to its agents or others, or by the knowledge of such agent, but that it shall be affected only by the statements herein made, including that made to the medical examiner, which are hereby warranted to be true, full, and correct as facts, and they shall constitute the basis of any policy which may be issued hereon." The note sued on contained the following: "Such policy, including all conditions therein for surrender or continuance, as a paid-up term policy, shall without notice to any party or parties interested therein be null and void on the failure to pay this note at maturity, with interest from date at 8 per cent. per annum." On the margin of it was printed the following statement: "Agents are not authorized to make any contract verbal or written differing from that written or printed on face of this note, nor are they permitted to collect any part of the same unless indorsed to them for that purpose." At the close of the evidence the court directed a verdict for the plaintiff, and the defendant excepted.

B. F. Walker, for plaintiff in error. Isaac S. Peebles, Jr., for defendant in error.

LUMPKIN, J. (after stating the facts). 1. A policy of insurance may provide that the failure to pay any premium or any notes or interest upon notes given to the company for any premium, on or before the dates upon which such premiums, notes, or interest shall become due, shall void and nullify the policy without action on the part of the company or notice to the insured or beneficiary; and such a provision is valid and binding. 2 Joyce on Insurance, § 1205. A condition of this character may be waived, or the company may be estopped from asserting it. Thus, prompt payment may be waived by a course of dealings calculated to cause the insured to think that the exact time specified would not be insisted upon, and which would operate as a fraud upon one relying on such custom or usage in dealing with him, if suddenly changed without notice. Grant v. Alabama Gold Life Ins. Co., 76 Ga. 575; Cotton States Life Ins. Co. v. Lester, 62 Ga. 247, 35 Am. Rep. 122;

Alabama Gold Life Ins. Co. v. Garmany, 74 Ga. 51. If the insurance company, with knowledge of the facts, receives and retains past due premiums, after the day specified in the contract for payment, it renews the contract and waives forfeiture for nonpayment, where such acceptance is unconditional. 2 Joyce on Ins. § 1364; Wyman v. Phoenix Mutual Life Ins. Co., 45 Hun (N. Y.) 184; Rice v. New England Mutual Aid Society, 146 Mass. 248, 15 N. E. 624; Mobile Life Ins. Co. v. Pruett, 74 Ala. 488 (8); Piedmont & Arlington Ins. Co. v. Lester, 59 Ga. 812; Clark v. Minor, 73 Ga. 590. If the note given for the premium had not been paid at maturity according to the terms of the contract, a forfeiture would have resulted. But if, after its maturity, the company had received payment of it, the forfeiture would have been waived, and the policy renewed. Instead of payment being made in money, the agent represented that the policy would be continued in force upon the giving of a renewal note. This was done, and the note was received by the company and indorsed by it for collection. It had notice of the terms of its own policy, and that the note given for the premium for the current year had not been promptly paid. It saw fit to deliver up the original note and accept in lieu thereof another due at a future date. It could not receive payment of a premium due for the year and at the same time insist on a forfeiture for nonpayment. So likewise, when it accepted a renewal of the note due for the current premium, treated such note as valid, and indorsed it to another, who is seeking to collect it by suit, the company cannot assert that the policy was void because the renewal was made after the former note became due. Mere demand for a past due premium has been held not to constitute a waiver of forfeiture, where such payment was refused by the insurer. Sullivan v. Conn. Indemnity Ass'n, 101 Ga. 809, 29 S. E. 41; McCroskey v. Hamilton, 108 Ga. 640, 646, 34 S. E. 111, 75 Am. St. Rep. 79; National Life Ass'n v. Brown, 103 Ga. 382, 29 S. E. 927. If payment had been made when demanded, a waiver would have resulted. Here surrender of the old note, and the acceptance of the note payable in the future for the premium of the then current year, made after the failure to pay the first note promptly, and with full knowledge of the facts on the part of the company, operated as a waiver of forfeiture as completely as if payment had

been made in cash. Gray, the agent, said that the policy would remain of force; and, in view of the facts, as indicated in the foregoing opinion, he was right. It is said that under the terms of the contract the agent was without authority to waive a forfeiture. But after he had taken the renewal note, the company received, held, and indorsed it; and one of its agents, as indorsee, is suing upon it. The forfeiture was therefore waived, and the renewal note given by the insured was collectible, and the defense set up was without merit. The defendant also knew all the facts when she gave the second note. Atlanta Consolidated Bottling Company v. Hutchinson, 109 Ga. 550, 35 S. E. 124; Hogan v. Brown, 112 Ga. 662, 37 S. E. 880; Mutual Reserve Fund Life Ass'n v. Stephens, 115 Ga. 192, 41 S. E. 679.

2, 3. In this state an indorsee for collection has such a title as to enable him to bring and maintain a suit in his own name. Wilson v. Tolson, 79 Ga. 137, 8 S. E. 900; Freeman v. Exchange Bank, 87 Ga. 45, 47, 13 S. E. 160.

The authority of Lowry & Son to indorse the note for the company was not denied under oath; but, on the contrary, the defendant admitted a prima facie case in favor of the plaintiff. Civ. Code 1895, § 3705; Habersham v. Lehman, 63 Ga. 380; Tyson v. Bray, 117 Ga. 689, 45 S. E. 74.

4. It is contended by defendant that her husband paid the interest on the note to its maturity, and that the verdict directed included \$1.80 interest, when it should have been only \$1.62, thus making 18 cents in excess of the correct amount of interest. This would seem to furnish a proper case for the application of the maxim, "*De minimis non curat lex.*" Neal v. Brockhan, 87 Ga. 130, 13 S. E. 283. Certainly the evidence is not sufficiently clear to require a reversal or a correction of this slight error, if indeed it be one. The entire testimony on this subject is contained in the following statement of the defendant's husband: "I did pay the interest on the note when this last note was given. Mr. Gray told me my wife would have to pay the interest." This does not show how much interest was paid, or to what time.

The defendant having admitted a prima facie case against her, and having failed to establish any lawful defense, there was no error in directing a verdict.

Judgment affirmed. All the Justices concurring.

(104 Va. 331)

JOHNSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 25, 1906.)

1. CRIMINAL LAW — APPEAL — REVIEW OF FACTS—RULE OF DECISION.

Under the express provisions of Code 1904, § 3484, where the evidence and not the facts are certified, the rule of decision in the appellate court in considering the evidence is the same as on a demurrer to the evidence.

2. SAME—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

In order to entitle accused to a new trial on the ground of newly discovered evidence, the evidence must have been discovered since the trial. It must have been such that it could not have been discovered before the trial by the exercise of reasonable diligence. It must be material, and such as should produce an opposite result on the merits, and it must not be merely cumulative, corroborative, or collateral.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2306-2336.]

3. SAME.

In a prosecution for rape, the evidence of identification was conflicting and unsatisfactory, and it was testified on the trial that detectives, while watching defendant in his house, saw him go to the fireplace and burn some clothes which looked like soiled underwear, and there was further evidence of experts that burnt pieces of cloth, exhibited on the trial as taken from the fireplace, were the ribs of a pair of drawers or of an undershirt. After conviction an affidavit, made by a credible person of high integrity, was filed, stating that affiant went with the detectives to defendant's house, that there was no fire of any kind in the house or signs of any fire having been there, and that the only piece of burnt cloth taken from the fireplace was a piece of burnt ribbon resembling a necktie. *Held*, that a new trial should have been granted for newly discovered evidence.

Error to Circuit Court, Henrico County.

Austin Johnson was convicted of rape, and brings error. Reversed.

Edgar B. English, for plaintiff in error.
Wm. A. Anderson, Atty. Gen., for the Commonwealth.

WHITTLE, J. At the June term, 1905, of the circuit court of Henrico county, the plaintiff in error, Austin Johnson, was indicted, tried, and convicted of the crime of rape, alleged to have been committed by him upon the person of a female child of the age of 10 years, and his punishment was fixed by the jury at death.

The prisoner moved the court to set aside the verdict and grant him a new trial on two grounds: (1) Because the verdict was contrary to the law and the evidence; and (2) for after-discovered evidence. But the court overruled the motion, and pronounced judgment upon the verdict, to which judgment a writ of error was awarded by this court.

The evidence in the case (not the facts) having been certified in accordance with the injunction of section 3484, p. 1862, Va. Code 1904, the rule of decision in this court in considering the evidence must be as on a demurrer to the evidence. The effect of that rule is too familiar to demand repetition,

and conformably to its requirement we feel constrained to sustain the action of the trial court in overruling the motion of the prisoner to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence.

But in that connection it is proper to observe that, while in obedience to the explicit mandate of the statute we have been obliged to uphold the ruling of the court upon the first assignment of error, nevertheless we are painfully conscious of the unsatisfactory state of the proof with regard to the identification of the prisoner as the perpetrator of the atrocious crime of which he stands convicted. This allusion to the inconclusive character of the evidence on behalf of the commonwealth upon that subject is rendered pertinent by reason of the correlation of the two assignments of error.

In considering the last assignment it will not be necessary to examine all the evidence in the case, but only such parts of it as tend to make clear our reasons for the conclusion which we have reached.

It appears that the crime was committed about dusk on May 6, 1905, and upon a general description, given by the child, of her assailant, that he was a dark man with thick lips, and wore a black slouch hat, a dark blue shirt with black pearl buttons, a dark coat, and shoes with large holes in the tips, the accused was arrested that night and taken into the presence of the child for identification. She was twice asked if he was the guilty party, and each time indicated by a shake of her head that he was not. Thereupon the officers, having learned that a small negro girl, Cornelia Horsley, was in company with the child at the time she was enticed into an alleyway by her assailant (upon the pretext that his sister wanted to buy some of the cologne that she was peddling), took the prisoner to her home, and, on being interrogated as to whether he was the man who lured the child off, she replied: "No; that is not the man. That is Austin Johnson. The man who met us this evening was a tall, black man, who had on a black slouch hat and gray coat and blue shirt, dark pants, and tan shoes." It was also in evidence that Austin Johnson was well known to Cornelia Horsley, having formerly been in her father's employment—a circumstance which adds to the probative value of her testimony on the question of identification, and renders improbable the theory that the prisoner would have enticed his victim from the presence of a person to whom he was thoroughly known, and whose testimony he might reasonably have anticipated would lead to his detection and conviction. After hearing the statement of Cornelia Horsley the officers naturally concluded that a mistake had been made, and released the prisoner. Subsequently, however, on the same night, one of the officers received information that the child had said

that she was frightened when Johnson was brought in her presence, and wanted to see him again, and believed that he was the man who assaulted her. On the following morning two detectives went to the child's home, and, learning that she believed Johnson to be the guilty party, they set out to arrest him. They discovered the accused in a shanty at a brickyard in the vicinity, where he was accustomed to stay at night with a friend, lying, as they say, in a bunk, and feigning to be asleep. Continuing, one of these detectives testified that, while his companion had gone to the house of the owner of the brickyard to telephone for the patrol wagon, he observed the accused get up from the bunk where he was lying and go to the fireplace and kindle a fire; that he then went to the corner of the room, pulled down some cloth from the loft above, which looked like a garment of some kind, made a bundle of it, put it in the fire, and burned it up. "He burned two pieces, dirty looking—looked like a shirt or two shirts. It might have been two pairs of drawers." The witness exhibited to the jury two pieces of burnt cloth—one piece about the size of a quarter of a dollar; and the other some two inches square, which he testified that he had extracted from the ashes of the fire made by the prisoner. Another witness for the prosecution, who claimed to be an expert on the subject, stated that, in his opinion, the burnt pieces of cloth were "either the ribs of a pair of balbriggan drawers or the ribs of an underwear shirt." Soon after the alleged burning of these articles the officers appeared on the scene and arrested the accused and handcuffed him, and he was again taken into the child's presence and identified by her as her assailant. He was indicted June 8, 1905, and a week later put upon trial.

After his conviction the prisoner made affidavit that since the trial he had discovered material evidence affecting the merits of the case, which he could not have obtained by due diligence before or during the trial, and also filed affidavits of a number of persons setting forth the after-discovered evidence upon which he relied. We shall only notice the affidavits of two of these witnesses, J. T. Herrin and W. J. Ready.

The affidavit of Mr. Herrin is to the effect that he is the managing overseer of the "West End, Brickyard," located near the "New Reservoir"; that a private detective came to his residence on Sunday afternoon, May 7, 1905, and requested affiant to accompany him to a shanty some 30 or 40 yards distant, where he desired him to see a negro, who was there asleep, and ascertain if he belonged in the yard; that he (the detective) thought he was the same negro who was suspected of having perpetrated a rape upon a little white girl the day before; that affiant found the accused lying on a bunk asleep, and awoke him and asked what he was do-

ing there. The affidavit proceeds: "I will state most positively that there was no fire of any kind in the shanty house, and that there were no signs of any fire having been there, and that nothing was said by Johnson (the detective who testified about the accused burning the bundle of underwear) or any one else about there having been any fire there. I remember distinctly that the prisoner accompanied the officers very willingly, making the remark: 'Yes; I will go anywhere with you'—addressing the officers. * * * That on the next day, Monday, Duke and Johnson (the detectives) came to the yard and requested permission to go into said shanty house. The key was in my possession, and I accompanied them to the said house, and into the same. That they examined into a small accumulation of old ashes in the fireplace, a large open fireplace, and took therefrom a piece of burnt cloth, which resembled a piece of burnt ribbon, and which they said was a piece of necktie. That is all they took from the fireplace. I know nothing of any burned pieces of underwear found there that day and taken from the fireplace. There were certainly no burnt pieces of underwear found that day, and none to my knowledge in the fireplace."

Affiant W. J. Ready, the proprietor of the brickyard, deposed that he had known J. T. Herrin for 10 years, that he had been in his employment as managing overseer of his brickyard and plant for 15 months, and that he is a man of "the highest integrity of character."

The rule governing the granting of new trials for after-discovered evidence is well settled by the authorities in this jurisdiction, and is succinctly stated in the case of *Nicholas v. Commonwealth*, 91 Va. 741, at page 753, 21 S. E. 364, at page 368, as follows:

"(1) The evidence must have been discovered since the trial. (2) It must have been evidence that could not have been discovered before the trial by the exercise of reasonable diligence. (3) It must be material in its object, and such as ought, on another trial, to produce an opposite result on the merits. (4) It must not be merely cumulative, corroborative, or collateral." 4 Min. Inst. pt. 1, 758, 759; *Wynne v. Newman's Adm'r*, 75 Va. 817; *Whitehurst v. Com.*, 79 Va. 558. See to the same effect the cases collected in a note to *St. John's Ex'r v. Alderson*, 32 Grat. (Va. Rep. Ann.) 140.

Applying these principles to the case in judgment, we are of opinion that the accused is entitled to a new trial.

The injurious impression that must have been wrought upon the minds of the jury, in their effort to reconcile the conflicting evidence in respect to the identification of the prisoner as the guilty party, by the uncontradicted testimony of the detective, that the day after the crime was committed the accused was discovered in the act of burning

his underclothing, the condition of which it was believed would incriminate him, can hardly be overstated. And, conversely, the testimony of an intelligent, disinterested witness of high character, which, if true, indicates a purpose on the part of the detective to compass the conviction of the accused upon fabricated evidence, would reasonably have exerted a favorable influence with the jury in his behalf.

Inexpressibly horrible as was the crime perpetrated upon this unfortunate child, it would be still more baleful to endeavor to expiate it either by taking the life of an innocent man, or of one whose guilt had not been established with that degree of certainty which the law in its wisdom has ordained. For these reasons, the verdict of the jury must be set aside, the judgment of the circuit court reversed, and the case remanded for a new trial.

(104 Va. 744)

NEWPORT NEWS PUB. CO. v. BEAUMEISTER.

(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. MASTER AND SERVANT—ACTION FOR INJURIES—ALLEGATION AS TO DUTIES.

A declaration alleged that in operating the printing press of defendant it became necessary for plaintiff to occasionally enter a pit under the press to adjust the machinery, and that on the day of the accident it became necessary for him to go down in said pit to set tapes on the machine, and that after adjusting the same and while still in the pit, though plaintiff was exercising due care, his hair caught in the machine, resulting in the injury. Subsequently the declaration was amended by inserting after the words "adjusting the same" the words "plaintiff recognized that there was a defect somewhere in the rollers, and in trying to locate the trouble, which was a necessary duty of the plaintiff." *Held*, that it sufficiently appeared that it was part of plaintiff's duty to be under the press in his endeavor to locate the defect.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 851.]

2. SAME—DUE CARE ON PART OF PLAINTIFF.

In an action for injuries to plaintiff while in defendant's service, it is not incumbent upon plaintiff to aver that he has not been guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 849.]

3. PLEADING — DECLARATION—ANTICIPATING DEFENSES.

It is not incumbent on plaintiff to negative defenses that may possibly be interposed.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 139.]

4. DAMAGES — INSTRUCTIONS — MEASURE OF DAMAGES FOR PERSONAL INJURIES.

In an action for personal injuries, where there could be no recovery of exemplary or punitive damages, but only a suitable recompense for the injury sustained, an instruction that "there is no legal limit to the damages the jury may award, * * * and they are the judges of the extent of the damages which, from the evidence, plaintiff may be entitled to recover," was misleading.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 548.]

5. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE—DUTY OF SERVANT TO REMEDY DEFECTS.

The rule that it is the master's duty to exercise ordinary care in seeing that the place assigned to his servant to work is kept in a reasonably safe condition does not control where the person injured is himself to perform the duty of keeping the place in a safe condition.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 704, 711, 714.]

6. SAME—INSTRUCTIONS—DUTY OF SERVANT.

Where the evidence showed that at the time a servant was injured the duty rested upon him to prevent the accumulation of paper which tended to make the place dangerous and which contributed to the jury complained of, an instruction that it was the master's duty to exercise ordinary care in seeing that the place assigned to plaintiff was kept in a reasonably safe condition was erroneous, in failing to make reference to the duties that rested on plaintiff.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1188, 1187.]

7. TRIAL—INSTRUCTIONS—REPETITION.

There is no error in refusing an instruction which is fully covered by an instruction already given by the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651, 657.]

8. MASTER AND SERVANT—ACTION FOR INJURIES—INSTRUCTIONS.

In an action for injuries to a servant, the original declaration alleged that plaintiff went down into a pit under defendant's printing press to adjust some tapes, and after adjusting the same and while still in the pit his hair was caught in the machinery. The amended declaration, upon which trial was had, alleged that after adjusting the tapes plaintiff recognized that there was a defect somewhere in the rollers, and in trying to locate this trouble, which was a necessary duty of plaintiff, his hair caught, etc.; the issue being, not whether it was necessary for plaintiff to go into the pit while the machine was in operation, but whether, being already in the pit and having accomplished in safety the purpose for which he went in, it was necessary that he remain and keep the machine in operation while making the investigation in the other end of the pit from where he adjusted the tapes. *Held*, that an instruction ignoring this issue, and requiring the jury to find, as a condition precedent to a verdict for defendant, that it was not necessary that plaintiff should go into the pit while the machine was running, was erroneous.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 587.]

9. SAME—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

In an action by a servant for injuries, it appeared that plaintiff entered a pit under defendant's printing press for the purpose of examining the machinery; that defendant had failed to perform its duty in providing an electric light in such pit, but plaintiff was a man of experience, and had entire control of the printing press, and was well acquainted with all the conditions surrounding the dangers confronting him when he attempted in the dark to locate the trouble; that plaintiff knew that he could not stand erect in the pit, and by stooping he had accomplished part of the objects for which he entered, and then, by raising his head too high, his hair caught in the machinery and the injury complained of resulted. *Held*, that plaintiff's negligence was the proximate cause of his injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 795-797.]

Error to Circuit Court of City of Newport News.

Action by W. H. Beaumeister against the Newport News Publishing Company. From a judgment for plaintiff, defendant brings error. Reversed.

R. M. Lett and O. D. Batchelor, for plaintiff in error. Bickford & Stuart and Ashby & Read, for defendant in error.

CARDWELL, J. This is the sequel to the case of Newport News Publishing Co. v. Beaumeister, reported in 102 Va. 677, 47 S. E. 821. At the first trial there was a verdict and judgment for \$2,000 in favor of the plaintiff, which judgment, on a writ of error to this court, was reversed, and the case remanded for a new trial. At the second trial the plaintiff again prevailed, and recovered the judgment for \$4,500 now under review.

The declaration on which the first trial was had alleged that in operating the printing press of the defendant company it became necessary for the plaintiff to occasionally enter the pit under the press, in order to adjust certain parts of the machine; that it was the duty of the defendant company, in the exercise of reasonable care, to properly light the pit, so that the plaintiff might, with due caution on his part, perform his duties therein; that the defendant company failed to provide sufficient light in the pit for his safety, though it had promised to do so, and that in reliance on such promise plaintiff had continued in the defendant company's employment; that on the day of the accident it became necessary for him to go down in the said pit to set some tapes on the said machine; and that after adjusting the same, and while still in the pit, though the plaintiff was exercising due and proper care, his hair caught in the said machine, etc.

Recognizing that the evidence on the former trial showed that the plaintiff had accomplished with safety the purpose for which he went into the pit, when the case went back for a new trial, his declaration was amended by inserting after "adjusting the same" (the tapes) the words "plaintiff recognized that there was a defect somewhere in the rollers, and in trying to locate the trouble, which was a necessary duty of the plaintiff." So that, by the first declaration, the duty which plaintiff claimed he was performing when injured was setting "some tapes," while by the amended declaration it was in trying to locate a trouble in the rollers.

To the amended declaration the defendant company demurred, which demurrer was overruled, and this ruling of the trial court is assigned as error.

The ground of the demurrer relied on is, that the declaration, as amended, contains no allegation of necessity or duty on the part of the plaintiff to be under the press,

while it was in operation, in his endeavor to locate a defect in the rollers.

We are of opinion that there is no merit in this contention. Enough has been said of the declaration to show that it does allege the duty on the part of the plaintiff to be under the press in his endeavor to locate the defect in the rollers, and, when this allegation was read by the defendant company along with the other facts alleged, it could not fail to understand that the allegation meant that it was necessary for the plaintiff to be under the press, while it was in motion, in his endeavor to locate the defect in the rollers. It is not incumbent upon a plaintiff to aver that he has not been guilty of contributory negligence, nor is it necessary to negative defenses that may possibly be interposed. All that is required is that the declaration state the facts constituting the alleged cause of action with sufficient certainty to be understood by the defendant, who has to answer them; by the jury, who are to inquire into their truth; and by the court, which is to render judgment. In other words, if the declaration is sufficient to inform the defendant of the nature of the demand made against him, and states such facts as will enable the court to say that, if the facts are proved as alleged, they establish a good cause of action, it is sufficient. Va., etc., *Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991, and authorities cited.

We think the amended declaration measures up to the requirement of the rule adverted to, and that the demurrer thereto was properly overruled.

The next error assigned is the action of the court in giving the following instruction for the plaintiff:

"The jury are instructed that there is no legal limit to the damages they may award for personal injuries, and that they are the judges of the extent of the damages which, from the evidence, the plaintiff may be entitled to recover, and, in estimating such damages, they may take into consideration his age, his station in life, his injury, his physical and mental suffering arising from said injury, his loss of wages for the time he has been prevented by said injuries from working, and a proper compensation for his being deprived by said injuries from following such calling or business as he could have followed, but for said injuries, but the damages may not exceed \$10,000, the amount claimed in the declaration."

This is practically the same instruction on the measure of damages that came under review in *Norfolk, etc., Ry. Co. v. Marpole*, 97 Va. 599, 34 S. E. 462, where the objections made to the instruction were (1) that it allowed the jury, without special proof, in fixing the plaintiff's damages, to take into consideration his mental suffering; and (2) that it intimated to the jury that they might award the sum of \$10,000, in the way of damages, without qualifying the statement

by saying that this sum was only mentioned because it was the maximum amount claimed by the plaintiff.

This court was of opinion then, as it is now, that, in so far as it relates to the amount of damages that the jury might allow, the instruction is erroneous, and calculated to mislead the jury; but as we could not see that it had probably done so in that case, and the judgment of the circuit court having to be reversed on other grounds, we only took occasion in the opinion to comment on the instruction as follows: "We do not think that the instruction, as a whole, misled or could have misled the jury in estimating plaintiff's damages, although it would have been better had the instruction simply told the jury that the plaintiff claimed \$10,000, and they were authorized to award such sum as the evidence justified, not exceeding that amount."

The vital difference between that case and the case under consideration is in the first named there was nothing to indicate that the jury might have been misled by the instruction, while here the significant fact appears that at the first trial of the case, when the instruction in question was not given, the jury awarded the plaintiff \$2,000 damages, and at the second trial, with this instruction before the jury, he was awarded \$4,500.

It is not complained that the instruction specified in detail the possible injuries suffered by the plaintiff, to be considered in estimating his damages, but that it was misleading to tell them, in that connection, that there is no legal limit to the damages they might award; in other words, that the instruction is misleading, and calculated to misinform the jury that the law does not intend that a fair compensation for the injuries alone shall be given under the evidence, but that any amount named by the jury within the limit of damages claimed is the proper measure under the law. Counsel for the plaintiff cite a number of cases in support of their contention that this court has repeatedly sanctioned the expression in an instruction, "that there is no legal limit to the damages that the jury may award for personal injuries"; but upon reference to those cases it will be seen that the question under consideration was whether or not the damages awarded were excessive, and not the question here under consideration. The expression is used in those cases, "there is no legal measure of damages," but in its use is to be found no sanction of an instruction in an action for personal injuries that admits of the interpretation that there is no legal limit fixed by law to guide the jury in awarding damages other than the amount claimed in the declaration.

As was well said by Riely, J., in *Richmond Ry., etc., Co. v. Garthright*, 92 Va. 635, 24 S. E. 269, 32 L. R. A. 220, 53 Am. St. Rep. 839: "No method has yet been devised, nor scales adjusted, by which to measure or

weigh and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be." But it was not meant there, or by what has been said by this court in any other case, so far as we have been able to find, that juries are not to be, in cases like this, guided in arriving at the amount of damages by a due and proper consideration of what would be a fair compensation for the injury suffered, and that fair compensation is not the legal limit to the damages which they may award.

As was said in the opinion by Joynes, J., in *Peshine v. Shepperson*, 17 Grat. 484, 94 Am. Dec. 468: "When the trespass is committed without fraud, oppression, or other special aggravation, the object of the law, it is generally said, is to give compensation for injury suffered, and damages are restricted to that object."

In this case there could be no recovery of exemplary or punitive damages as a protection to the public, but only a suitable recompense for the injury sustained, and we are of opinion that the instruction under consideration was, in the form in which it was given, clearly misleading, and should not have been given.

Instruction T, given for the plaintiff, is also erroneous, in view of the evidence in this case. The established rule is that it is the master's duty to exercise ordinary care in seeing that the place assigned to his servant to work is kept in a reasonably safe and suitable condition, for in most cases the master cannot delegate that duty so as to relieve himself from liability. *N. & W. Ry. Co. v. Phillips' Adm'x*, 100 Va. 362, 41 S. E. 726. But that rule does not control where the person injured is himself to perform the duty of keeping the place where he is at work in a safe condition. *R. Or. Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

In this case it clearly appeared in the plaintiff's evidence, and in fact is admitted, that it was the duty of the plaintiff to keep the pit clear of the accumulation of paper that rendered his movements under the press more dangerous; while the instruction is not applied to the light alone, which it is alleged the defendant company had failed to furnish. It makes no reference whatever to this admitted fact that the duty rested upon the plaintiff to prevent the accumulation of paper in the pit making his movements under the press more dangerous; and therefore the jury might have believed that the neglect of this duty on the part of the plaintiff contributed to his injury, and yet understood from the instruction that they should find in his favor because of the neglect of the defendant company to furnish a sufficient light at the pit.

But it is contended that the evidence does not show that the accumulated paper increased the plaintiff's danger in the pit, or that there was enough in there to warrant its removal; and therefore, the instruction could not have prejudiced the defendant com-

pany. This, however, it not borne out by the record. There was evidence that, with no accumulation of the paper in the pit, the plaintiff could have stood erect therein and under the press with a clear space of at least half an inch between the top of his head and the tapes in which his hair was caught; while, with the accumulated paper under his feet, he had to go to find out the trouble in the ink rollers, stooping so low that he could see neither the tapes that caught his hair nor the ink rollers, and, while in that position, he happened to raise his head too high, resulting in his hair at the back part of his head being caught, causing him to throw up his hand to extricate himself, when it was caught in the machine and mashed. Under these circumstances, the instruction, in telling the jury the duty rested upon the defendant company to see that the place assigned to the plaintiff to work was kept in a safe and suitable condition, without any reference to the evidence tending to prove that it was his duty to keep the pit in which he received his injuries free from accumulated paper, or to the evidence tending to prove that this neglect of duty on his part contributed to the injury, was erroneous, and well calculated to mislead the jury, and was not cured by any other instruction given.

The next assignment of error is to the refusal of the court to give instruction No. 2 asked for by the defendant company. Its purpose was to tell the jury, that if the point where the accident happened was so dark that plaintiff could not see the tape which caught his hair, or the cylinder which crushed his hand, even if he had been looking for them, he could not recover.

Instruction No. 7 contains the same proposition of law more clearly and fully expressed. Therefore the defendant company was not prejudiced by the refusal to give its instruction No. 2.

As has been stated, the former declaration alleged that plaintiff went down into the pit to adjust some tapes, and after adjusting the same, and while still in the pit, his hair was caught, etc., but did not say where he then was, or what he was doing. The amended declaration, upon which the last trial was had, alleges that after adjusting the tapes "plaintiff recognized that there was a defect somewhere in the rollers, and in trying to locate this trouble, which was a necessary duty of the plaintiff, his hair caught, etc. The issue under the declaration, as amended, was, therefore, not whether it was necessary for plaintiff to go into the pit while the machine was in operation, but whether, he being already in the pit and having accomplished in safety the purpose for which he went in, it was necessary that he remain in there and keep the machine in operation while making the investigation of the rollers situated in the other end of the pit from where he adjusted the tapes, which he says he was making at the time of the accident.

To meet these new conditions, and in accordance with the views of this court when the case was here on the former writ of error, the evidence being directed mainly to this phase of the case, the defendant company asked for the following instruction, numbered 8: "An employé unnecessarily undertaking work in such a position that its performance is obviously dangerous, or known by him to be dangerous, when it could have been otherwise performed without danger in a way well known to the employé, cannot recover for injuries occasioned thereby; and if the jury believe from the evidence that the investigation of the trouble with the ink rollers, which the plaintiff says he was making at the time of the injury, could have been made after first stopping the machine, or could have been made on the outside of the pit, then the jury must find for the defendant." This instruction was refused; the court giving in lieu thereof, with certain changes, instruction No. 6 refused at the last trial, and ruled by this court to be correct as the case stood at the former trial.

Instruction No. 8 contains a concise statement of the law of the case entirely applicable to the issue under the amended declaration and to the evidence bearing on that issue, while No. 6, given in its place, required the jury to find, as a condition precedent to a verdict for the defendant company, that it was not necessary that the plaintiff should go into the pit while the machine was running, which was not in issue, the issue made under the amended declaration relating solely to the conduct of the plaintiff after going into the pit, wholly uninfluenced by anything that transpired prior thereto; for when plaintiff went in, and until he had finished adjusting the tapes which caused him to go in, he was ignorant of the trouble which he was endeavoring to remedy at the time of his injury. As was said by counsel for the defendant company, the necessary effect of directing the consideration of the jury to the necessity of going into the pit and the danger attendant thereon was to divert their minds from the real issue—the prudence of plaintiff's conduct with relation to what transpired in the pit after adjusting the folding tapes—and to fix their attention on the prudence of the conduct of plaintiff in relation to the adjustment of the tapes, which was the real issue at the former trial before the declaration was amended, but which, under the amended declaration, has become a mere matter of inducement.

It was sought by instruction No. 8 to submit plainly and fairly to the jury the question whether or not it was necessary to locate the defect in the ink rollers without first stopping the machine, unhampered and unincumbered by any issue concerning the tapes, such issue not being pertinent at this trial; and we are of opinion that it was error to refuse it and to give in its place instruction No. 6.

Instruction No. 3 having been refused, the defendant company's instruction No. 4, which stated in different form the proposition enunciated in No. 3, should have been given; but at another trial of the case it will not be necessary to give both.

We do not consider it necessary to pass upon the question presented in bill of exceptions No. 4, as it is not likely to arise at the next trial.

The remaining assignment of error is the refusal of the court to set aside the verdict of the jury and grant a new trial, on the ground that the verdict is contrary to the law and the evidence.

The plaintiff has established the duty of the defendant company to provide the electric light alleged to have been necessary for use in examining and adjusting the machinery of the printing press in the pit, and its failure to do so, whereby the plaintiff would be entitled to recover damages in this action for the injuries he sustained, unless it appears from the evidence, viewed under the familiar rule governing its consideration, that his own negligence was the proximate cause of the injury, or contributed thereto.

The plaintiff was a man of experience, and had entire control of the printing press when he received the injuries for which he sues; and no one knew better than he the conditions surrounding and the dangers confronting him when he attempted in the dark to locate the trouble in the ink rollers. As said in the opinion of this court (*Newport News, etc., Co. v. Beaumeister, supra*), the absence of the light increased the danger, and imposed upon the plaintiff enlarged obligations to exercise due care and caution in the performance of his duty. Notwithstanding the darkness and the promise of the master to repair the light, there was the absolutely safe way of repairing the defect in the machine, and the question arises whether the plaintiff did not owe to his master, as well as to himself, the duty of adopting the method of doing the work with respect to which there was no danger.

To meet the contention of the defendant company that the defect or trouble in the ink rollers, which the plaintiff says he was trying to detect when he was injured, could have been detected after the machine had been stopped, or from the outside of the pit, we have only his statement that it could not be done; but he states no facts to show this, and therefore what he says on that point is but an expression of an opinion. But, were it conceded that he was right in the statement he makes, the question remains: Was it necessary or his duty to expose himself to the known danger of going under the press in the dark to find the cause of the defect in the work it was doing, and which appears from his evidence to have been trivial?

It would serve no good purpose to review the evidence in detail. Leaving wholly out

of view that part of it tending to prove that his neglect of duty in allowing the paper to accumulate in the bottom of the pit, in consequence of which he could not walk under the machine without stooping, and could not tell how near to the machine his head was when in that position, contributed to his injury, there is no getting away from the admissions he makes in giving his own evidence that it was not safe in the pit under the machine at the west end, where he was, without a light; that he could not see the ink rollers he went to inspect and had to walk under, and would not say that he could have seen his hand two inches before his face; that the trouble, when located, could not be remedied with the machine in motion; that he had to go in a stooping position when looking for it; and that in raising his head in passing under the ink rollers he was liable to come in contact with them. When asked: "Well, how could you calculate in the dark just how far you could raise your head without striking them [the rollers]?" he answered: "I didn't know. I just stooped way low." His witness Vaiden also states that it was dangerous under the machine where the plaintiff was hurt without a light. The following questions and answers appear in plaintiff's own evidence: "Q. Could you see the ink rollers at all? A. No, sir. Q. Was there light enough there, if you had looked, for you to have seen the tape which caught your hair? A. When? Q. At the time your hair was caught, or just prior thereto, if you had looked for the tape, would you have seen it? A. No, sir." If the contention of his counsel that he was speaking of not being able to see the tapes and ink rollers because of his stooping position could be accepted, it would all the more show his recklessness in putting himself in that position.

There are times when an employé may incur extraordinary risks and not relieve his employer from liability for an injury he thereby sustains, as when it is necessary in order to save the lives of others, or to prevent injury to them or to the employer's property, and perhaps other instances might be given; but that was not the situation when the plaintiff exposed himself on the occasion of his injury. No consequences of importance—certainly none serious—would have resulted if he had refused, as he should have done, to go to the dangerous place under the printing press, or had he pursued the absolutely safe course of stopping the machinery before attempting to detect and adjust the trouble in the ink rollers. It is true that he claims that he could not have detected the trouble in the ink rollers, which caused the defect in the paper being printed, with the machine stopped, or from the outside of the pit; but it is also true, as shown by his own admissions, that he could not have discovered the trouble in the ink rollers in the darkness there, and therefore he needlessly and recklessly went into a place of danger to accom-

plish what, as he well knew, he could not accomplish without sufficient light. He undertook to enter a place where he had to go in a stooping position with his eyes down. If there had been a blaze of light, he could not have seen the ink rollers in that position. In undertaking to raise his eyes to look, he made the mistake of raising his head too high, resulting in the injury to him, for which, under the circumstances, his employer is not responsible.

It was said by Judge Cooley, in *Sjogren v. Hall*, 53 Mich. 274, 278, 18 N. W. 812, 814, quoted by Buchanan, J., with approval in *Persinger's Adm'r v. A. Ore, etc., Co.*, 102 Va. 354, 46 S. E. 326: "So far as there is a duty resting upon the proprietor in such cases, it is a duty to guard against probable danger; and it does not go to the extent of requiring him to render accidental injury impossible. * * * If the fact that prevention was possible is to render the employer liable, then he may as well be made an insurer of the safety of those in his service in express terms, for to all intents and purposes he would in law be insurer, whether nominally so or not."

The opinion in *Persinger's Adm'r v. A. Ore, etc., Co.*, supra, says: "It is right that the master should be required to anticipate and guard against consequences that may reasonably be expected to occur, but it would violate every principle of justice or law if he should be compelled to foresee and provide against that which reasonable and prudent men would not expect to happen." *Terminal Co. v. McCormick*, 104 Va. —, 51 S. E. 731.

In *Ohes. & O. Ry. Co. v. Hafner's Adm'r*, 90 Va. 621, 19 S. E. 166, it was held that the railroad company was not liable for the death of Hafner, who was struck by the fourth sill of a dangerously low bridge after he had passed in safety under the three first sills by stooping and lowering his head, when he had full knowledge of the dangerous character of the bridge, and the accident was due to his negligently raising his head too soon; his own negligence being the proximate cause of the injury. Discussing the evidence as to Hafner's conduct at the time of the accident, the opinion by Lacy, J., says: "He did not stoop low enough all the way under the bridge, but negligently raised his head too soon, and was struck; while others situated precisely as he was did stoop low enough, and were unharmed. This was clearly contributory negligence on his part, which was the proximate cause of his injury, and he cannot recover. * * * There the negligence charged was the keeping and maintaining a dangerously low bridge, under which the employees of the company had to pass in the discharge of their duties; but it was considered that, while the company was in this respect negligent, the accident to Hafner was due to his want of proper care for his own safety in passing under the bridge.

While it was negligence on the part of the defendant company not to restore the electric light for use under its printing press, clearly the injury to plaintiff was not due to that negligence, but to his negligence in not exercising due care for his own safety when in a place of known danger, to the mistake of raising his head too high when he knew he was liable to come in contact with the machinery above him—an accident which the defendant company could not have foreseen as liable to happen, and provided against by the exercise of any sort of care on its part.

We are of opinion that the plaintiff's own palpable negligence was the proximate cause of his injury, and that the circuit court erred in not setting aside the verdict of the jury as contrary to the law and the evidence. Therefore its judgment must be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial.

(104 Va. 532)

SELDEN v. BROOKE, Collector.

(Supreme Court of Appeals of Virginia. Jan. 25, 1906.)

1. TAXATION — SITUS OF PROPERTY — TRUST FUNDS.

Under Code 1887, § 492, as amended by Acts 1897-98, p. 519, c. 490 (Code 1904, p. 252), providing that the separate property of a person over 21 years of age, or a married woman, shall be taxed "to the trustee, if any they have, and if they have no trustee, it shall be listed by and taxed to themselves; in either case it shall be listed and taxed in the county or corporation where they reside," a trust fund, the income of which is payable to a resident of the state over 21 years of age, during her lifetime, is taxable in the city in which the cestui que trust resides, although the trustee is a nonresident of the state.

2. SAME—CONSTITUTIONALITY OF STATUTE.

Code 1887, § 492, as amended by Acts 1897-98, p. 519, c. 490 (Code 1904, p. 252), although so construed as to authorize the taxation in this state of a trust fund, held by a nonresident trustee, the income of which is payable to a resident beneficiary, is not unconstitutional.

Appeal from Law and Chancery Court of City of Norfolk.

Suit to settle the estate of Arthur Taylor, deceased, in which Arthur T. Selden was appointed substituted trustee for Elizabeth T. Selden. The case was referred to a commissioner, who held the trustee liable to R. T. Brooke, collector, for certain taxes on the trust estate. From a decree overruling exceptions to the commissioner's report, the trustee appeals. Affirmed.

Hughes & Little, for appellant. Tazewell Taylor, for appellee.

WHITTLE, J. This case involves the validity of certain taxes assessed by the city of Norfolk for the years 1898, 1899, and 1900, upon a trust fund consisting of intangible personal property in the hands of a nonresident trustee, in the income of which

the cestui que trust, Elizabeth T. Selden, a citizen of the state domiciled in that city, has a life estate.

The trustee was appointed and bonded by a decree of the corporation court of the city of Norfolk, which had jurisdiction of the fund, and directed to pay the income and revenue accruing therefrom to the cestui que trust "during her entire life." The cause was subsequently transferred, by force of the statute in such case made and provided, to the court of law and chancery of the city of Norfolk, where it is now pending; and this appeal is from a decree of that court, which confirmed the report of a commissioner sustaining the validity of the assessment, and ordered the trustee to pay the taxes out of the income.

It is the policy of this commonwealth to impose taxes upon all intangible property of its citizens in the county or corporation of their residence, without regard to the situs of the physical symbols by which such property is evidenced. *Commonwealth v. Williams' Ex'r*, 102 Va. 778, 47 S. E. 867. But the specific enactment by authority of which these assessments were made is as follows: "If the property is the separate property of a person over 21 years of age or a married woman, it shall be listed and taxed to the trustee, if any they have, and if they have no trustee it shall be listed by and taxed to themselves; in either case it shall be listed and taxed in the county or corporation where they reside. * * * If the property is held for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence [except as hereinbefore provided]." Acts 1897-98, p. 519, c. 490, amending section 492 of the Code of 1887 [Va. Code 1904, p. 252].

While the statute may be unskillfully drawn, we are of opinion that by fair construction the case in judgment is obviously within its provisions. The income from the trust fund upon which the tax is imposed constitutes, in a certain sense, the separate property of Elizabeth T. Selden, a person over 21 years of age, who has a trustee, and resides in the city of Norfolk. The language, "If the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence (except as hereinbefore provided), is controlled by the antecedent provision, that whether the person whose property is amenable to tax has or has not a trustee, the property shall, "In either case be listed and taxed in the county or corporation where they reside." Though the tax is assessed in the name of the trustee, the burden is, in reality, imposed upon the beneficial owner, a resident of the commonwealth, who enjoys the protection of its laws along with other citizens, and ought in fairness to contribute her due proportion of revenue for the support of the government.

The term "separate estate," in the connec-

tion in which it occurs, imports separate ownership by the persons designated, in contradistinction to an equitable separate estate, or the legal separate estate of a married woman, under our statute. 2 Bouv. L. Dict. (Rawle's Rev.) 981.

If the construction, contended for on behalf of the appellant, that the domicile of a nonresident trustee fixes the situs of intangible personal property for purposes of taxation, were to prevail, it would afford ready means of escape from taxation and divert from the treasury of the state a very large amount of revenue to which, in our judgment, it is justly entitled. The contention that the construction indicated would render the statute unconstitutional, proceeds upon the hypothesis that the tax is against the nonresident trustee, whereas he is personally unaffected by the imposition, and is but the conduit through the medium of which the tax upon the property of a citizen passes into the state treasury. *Hunt v. Perry* (Mass.) 48 N. E. 103; *Lewis v. County of Chester*, 60 Pa. 325.

It was suggested that there are other statutes which authorize the assessment of the tax, but the view already taken disposes of the question and renders further consideration of the case unnecessary.

The decree is plainly right, and is affirmed.

(106 Va. 444)

SANDS et al. v. STAGG et al.

(Supreme Court of Appeals of Virginia. Jan. 25, 1906.)

1. MECHANICS' LIENS — ENFORCEMENT — PLEADING.

A bill to enforce a mechanic's lien need not allege that suit was brought, as required by Code 1887, § 2481 [Va. Code 1904, p. 1243], within six months from the time that the whole amount covered by the lien became payable, where it does allege the dates on which the amounts asserted as liens became due and payable, and it appears from the date of the process that suit was brought within the time required by the statute.

2. SAME—GENERAL OR SUB CONTRACTORS.

Where a building contract required the first party to erect buildings on a lot owned by the second party, in consideration of a conveyance of part of the lot with certain of the newly erected buildings, and the payment of a sum of money by the second party to the first party, persons who contracted with the first party to furnish material and labor were general contractors, and entitled to perfect a lien for their materials and work in the manner prescribed by Code 1887, §§ 2475, 2476 [Va. Code 1904, pp. 1236, 1238], and not subcontractors within the meaning of section 2477 [Va. Code 1904, p. 1240], such as to be required to give notice of their claims to the second party in order to fix his interest in the premises with liability for their claims.

3. VENDOR AND PURCHASER—RIGHTS OF VENDOR—CONFLICTING EQUITIES.

Where a vendee, who was erecting buildings on the premises to be conveyed, borrowed money to complete the buildings on an indorsement of his vendor, with the understanding that the loan should be repaid before the execution of a deed, and the vendee failed to make such repayment, and the loan was repaid by the ven-

dor, the latter's right to reimbursement for the sum paid by him had priority over a claim of a grantee of the vendee to a conveyance of the legal title.

Appeal from Chancery Court of Richmond.

Separate suits by Thomas B. Stagg, by William H. Lumber & Son, and by W. R. Mason, surviving partner, against G. G. Ryan and others. The causes were heard together. A decree was rendered in favor of complainants, and Conway R. Sands, trustee, and certain other defendants appeal. Affirmed.

C. R. Sands, A. W. Patterson, and Geo. Bryan, for appellants. Harvey Willson, Sol. Cutchins and Leake & Carter, for appellees.

BUCHANAN, J. This is an appeal from a decree rendered in three chancery causes heard together; the object of all of them being to subject a lot and five houses thereon to the payment of mechanics' and builders' liens asserted by the complainants for materials furnished and work done in the erection of the houses.

The first error assigned is to the action of the court in overruling the demurrer to the bills filed in the several causes.

Two grounds of demurrer are relied on here: The first is that the bills fail to allege that the suits were brought within six months from the time the whole amount covered by the liens became payable. Code 1887, § 2481 [Va. Code 1904, p. 1243].

The bills do not allege when the suits were instituted, but they do allege when the amounts asserted as liens upon the property became due and payable, and the date of the process shows that the suits were brought within the time required by the statute. Where the record shows at the time the bill is demurred to that the suit was instituted within the period fixed by the statute, there is no good reason for requiring the bill to allege that fact, since the court will take judicial notice of when the suit was instituted, as well as of all other proceedings in the cause. 1 Elliot on Ev. § 57; Boisot on Mechanics' Liens, § 554.

The other ground of demurrer is that the bills fail to allege that the complainants gave notice of the amount and character of their claims to Mahony, the owner of the land, as required by section 2477 of the Code of 1887 [Va. Code 1904, p. 1240].

The bills do not allege such notice; but the contention of the complainants, appellees here, is that they were not subcontractors, and therefore no such notice was necessary. The decision of this question depends upon the construction of the contract between Mahony and Ryan, under which the buildings on the lot were erected. That contract is as follows:

"This contract, made this 23d day of August, 1894, by and between G. G. Ryan, of the city of Richmond, and state of Virginia, party of the first part, and Daniel H. Ma-

hony, of the second part, and of Philadelphia, Pa.

"To wit: That for and in consideration of the sum of \$4,860.00 (four thousand three hundred and sixty dollars) each, the said party of the first part agrees to furnish all material, labor and erect and complete for the said party of the second part (2) two of the (2) two story and mansard brick tenements, according to plans and specifications made by the said party of the first part and approved and accepted by the said party of the second part. And to be built on Floyd avenue near Morris St.

"The said party of the first part agrees to allow the said party of the second part \$100.00 per front for 68' 0" adjacent to the houses already described and upon which the said party of the first part proposes to build (3) three houses, duplicating those aforesaid described, making a row of (5) five tenements.

Cost of bld. the above (2) two tenements.....	\$8,720 00
Cost of 68' 00" of land at \$100.00 per ft.....	6,300 00

To balance in favor of the said party of the first part.....	\$2,420 00
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"First Part: G. G. Ryan, [Seal.]

"Second Part: Danl. H. Mahony. [Seal.]"

The agreement between the parties contemplated the erection of a row of five houses, duplicates of each other, on the lot of Mahony, built according to plans and specifications furnished by Ryan and approved by Mahony. Two of the houses (which two the contract does not designate) were to be built for Mahony. For furnishing the material and doing the work in erecting and completing these two houses, Mahony was to convey to Ryan the residue of the lot on which the other three houses were erected, at the price of \$6,800, and in addition pay him \$2,420.

While it may be difficult to define the precise legal relation between Mahony and Ryan, it is clear, we think, that Ryan was authorized and empowered to erect the row of five houses on Mahony's lot. Mahony having authorized that work to be done by Ryan on his lot, the men who furnished the material and did the work in carrying out the scheme agreed to and authorized by Mahony, ought not to be compelled to look alone to Ryan's interest in the property for the payment of their claims. The fact that their contracts for material and labor were made alone with Ryan ought to make no difference when he was in fact carrying out the scheme entered into between him and Mahony, and Mahony's interest in the property, as well as Ryan's, ought to be liable for their claims. See Boisot on Mechanics' Liens, §§ 300-305; Phillips on Mechanics' Liens, §§ 69-72a; 2 Jones on Liens (3d Ed.) § 1487; Paulsen v. Manske (Ill.) 18 N. E. 275, 9 Am. St. Rep. 532; Henderson v. Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490; Hill v. Gill, 40 Minn. 441, 42 N. W.

294; *O'Leary v. Roe*, 45 Mo. App. 567; *Hilton v. Merrill*, 106 Mass. 528.

We are of opinion, therefore, though the question is not entirely free from difficulty, that the complainants should be held to be general contractors within the meaning of sections 2475 and 2476 of the Code of 1887 [Va. Code 1904, pp. 1236, 1238], and that it was not necessary for them to give Mahony notice of their claims, as provided by section 2477 of the Code.

The commissioner who was directed to ascertain and report the liens on the property sought to be subjected, and their priorities, reported, among other things, that there were no liens upon the two houses which Mahony had selected and retained under his agreement with Ryan; that the first lien upon the three houses which Mahony had conveyed to Ryan by deed delivered in escrow was a debt due Mahony from Ryan for money which Mahony had, in effect, furnished to enable Ryan to complete the erection of the houses; that the second liens were the claims of the complainants and another mechanic's lien claimant who had come into the cause by petition to assert his claim; and that Anderson, one of the appellants, to whom Ryan had conveyed one of the three houses, took it subject to those liens.

The mechanic's lien claimants did not except to the commissioner's report. The appellants excepted to it, but their exceptions were overruled by the court.

One of their exceptions was that the commissioner erred in reporting in favor of complainant Stagg's claim, instead of rejecting it entirely. The action of the court in overruling that exception is assigned as error.

Without discussing the facts upon which the commissioner based his finding and the depositions taken subsequent to the filing of the report, we are of opinion that Stagg's claim is a valid one, and that his lien had been perfected in the manner required by the statute.

The appellants also excepted to the report of the commissioner because he reported the claim of Daniel H. Mahony for \$3,000 as the first lien upon the three houses of Ryan. The action of the court in overruling that exception is assigned as error.

While Ryan was engaged in building the five houses, it became necessary for him to borrow money to complete them. To enable him to do this, John Mahony, who lived in Richmond, at the request and as the agent of Daniel Mahony, who lived in Philadelphia, indorsed Ryan's note for \$3,000 upon which he borrowed that sum, which was used in completing the houses, with the understanding that it was to be paid by Ryan before he would become entitled to a deed from Daniel Mahony, his vendor. Ryan having failed to pay it, and becoming insolvent, John Mahony paid it as the agent of his brother, Daniel Mahony, and the commissioner reported it as a debt due the latter.

Under the agreement between Daniel Mahony and himself, Ryan had no right to a conveyance of the legal title to that portion of the lot on which his three houses were built, until he had complied with the terms of the agreement of August 23, 1894, and to secure the performance of which Mahony had retained such title. Anderson, to whom Ryan had conveyed one of his three houses, only acquired such interest in the property conveyed as Ryan had; and, not having acquired by his deed the legal title, Anderson took the property subject to all the equities between Ryan and Mahony growing out of the agreement between them, one of which was the right of Mahony to have the \$3,000 furnished to complete the houses repaid before he could be required to part with the legal title. The commissioner was, therefore, clearly right in reporting Mahony's claim of \$3,000 as having priority over Anderson's purchase from Ryan. *Lewis v. Caperton's Ex'r*, 8 Grat. 148, 163, 164; *Yancey v. Mauck*, 15 Grat. 300, 306, 308; 2 Min. Inst. (4th Ed.) 220; 8 Pom. Eq. Jur. § 1260.

The remaining assignment of error is to the action of the court in overruling the exception of Sands, trustee, to the commissioner's report, because he did not report that the deed of trust of May 9, 1895, was a prior lien on all the property embraced in that deed.

The grounds upon which it is claimed that the deed of trust ought to have been reported as the first lien upon the property embraced in it are that the bills of the complainants are demurrable, that the liens asserted by those doing work and furnishing material were invalid, and that Mahony had no lien for the \$3,000 debt asserted by him.

As each of these grounds of objection to the court's action has been considered in discussing the other assignments of error, and decided against the contention of the appellants, it follows that this assignment of error must also be overruled.

We are of opinion, therefore, that there is no error in the decree appealed from to the prejudice of the appellants, and that it should be affirmed.

(104 Va. 826)

SELDEN'S EX'R v. KENNEDY.*

(Supreme Court of Appeals of Virginia. Jan. 25, 1906.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW — DEPRIVATION OF PROPERTY — ABSENTEES.

Code 1887, § 3373 [Va. Code 1904, p. 1786], providing that if a resident absents himself from the state for seven years successively he shall be presumed to be dead in any case where his death shall come in question, unless proof be made that he was alive within that time, if construed, in connection with section 2639 of the Code [Va. Code 1904, p. 1352], which provides for the granting of letters of administration on a decedent's estate, so as to authorize the administration of an absentee's property during his lifetime, without his knowledge or consent,

*Rehearing denied March 9, 1906.

and in a proceeding to which he is not a party and of which he has no notice, is repugnant to to Const. U. S. Amend. 14, declaring that no state shall deprive any person of property without due process of law.

2. EQUITY—LACHES—GROUNDS OF BAR.

Whether lapse of time is sufficient to bar a recovery depends upon the particular circumstances of the case, and in order to work such result the delay must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim, or such as to prevent a proper defense by reason of death of parties, loss of papers, or death of witnesses.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 204-209.]

3. EXECUTORS — RECOVERY OF LEGACY — LACHES.

Fifteen years' delay of an absentee in suing for a legacy which had been paid to an administrator for him was not such laches as to bar his right of action, where the executor, whose duty it was to pay the legacy, was still living, and no evidence had been lost by death, no records had been destroyed, and there was no uncertainty in the amount due, nor any presumption of payment.

Appeal from Law and Chancery Court of City of Norfolk.

Suit by C. E. Kennedy against C. W. Grandy, executor of William Selden, deceased. From a decree for complainant, defendant appeals. Affirmed.

Loyall & Taylor, for appellant. Burroughs & Bro., for appellee.

BUCHANAN, J. This suit was instituted by C. E. Kennedy against C. W. Grandy, surviving executor of Dr. William Selden, deceased, to recover a legacy.

It appears that Dr. Selden, by his last will and testament, which was probated in November, 1887, bequeathed to Charles E. Kennedy the sum of \$1,000. Kennedy died before the testator, leaving three children, who, under section 2523 of the Code of 1887 [Va. Code 1904, p. 1290], were entitled to the legacy. The executors paid to two of the children their portion of the legacy. Upon the 7th day of January, 1896, the corporation court of the city of Norfolk, upon proof that C. E. Kennedy, the other child, had been a resident of this state, and had since gone from and had not returned to the state, more than seven years prior to that date, adjudged, ordered, and decreed that he was and should be presumed to be dead, as declared by section 3373 of the Code of 1887 [Va. Code 1904, p. 1736], and appointed T. D. Kennedy, his brother, administrator of his estate. A few days after his appointment he collected his brother's share of the legacy from the appellant as surviving executor of Dr. Selden.

In 1904 C. E. Kennedy, who had been absent from the state for many years, made a demand upon the surviving executor for his share of the legacy; and upon his refusal to pay the same this suit was instituted, and upon a hearing of the cause, a decree was rendered against him for the sum de-

manded. From that decree this appeal was taken.

The first assignment of error is that the payment made by the appellant to T. D. Kennedy, as administrator of the estate of the appellee, was a valid payment, and that the trial court erred in not so deciding.

In order to sustain this contention, it will be necessary to hold that section 3373 of the Code, when considered in connection with section 2669 of the Code [Va. Code 1904, p. 1352], which provides for the granting of letters of administration when a person is dead, authorizes the appointment of an administrator of the estate of the appellee, under the facts disclosed by the record; and, if it does, that it is not in conflict with that portion of the fourteenth amendment to the Constitution of the United States, which ordains that no state shall "deprive any person of life, liberty, or property without due process of the law."

Section 3373 [page 1736] is as follows: "If any person, who shall have resided in this state, go from and do not return to the state for seven years successively, he shall be presumed to be dead in any case where in his death shall come in question, unless proof be made that he was alive within that time."

It may well be doubted whether the Legislature intended by that section to authorize the courts to grant letters of administration upon the estate of a person who was once a resident of the state, and had been absent therefrom for more than seven years, irrespective of death. But if it be conceded that such was its intention, is not the statute in plain violation of the due process of law clause of the fourteenth amendment?

It is conceded, and if it were not it is well settled, that the grant of letters of administration on the estate of a live man, as if he were dead, is absolutely void.

In the case of *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896, the question of the validity of such letters of administration was fully discussed, the authorities, English and American, cited, and the conclusion reached that a court of probate, in the exercise of its jurisdiction over the probate of wills and the administration of estates of deceased persons, had no jurisdiction to appoint an administrator of a living person, and that the appointment of an administrator, after public notice to the next of kin, creditors and the like of the estate of a living person, who had been absent from the state more than seven years, was in violation of the due process of law clause of the fourteenth amendment to the Constitution of the United States. And there are general expressions in that opinion which would seem to indicate that a state was absolutely without power to provide by special proceeding for the administration and care of the property of an absentee, and

to confer jurisdiction on its courts to do so, irrespective of the fact of death.

But in the recent case of *Cunnius, etc., v. Reading School Dist.*, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1126, that court, in considering the validity of certain statutes of the state of Pennsylvania "relating to the grant of letters of administration upon the estates of persons presumed to be dead by reason of long absence from their domicile," held that the due process of law clause of the fourteenth amendment to the Constitution of the United States does not wholly deprive a state of the power to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by special and appropriate proceedings distinct from the general law for the settlement of the estates of decedents. It further held, that fixing the period of a person's absence from his last domicile within the state at seven years, or more, before his estate could be administered under the special proceedings, was not so unreasonable as to render the statute repugnant to the due process of law clause of the fourteenth amendment; and that the notice required to be given by order of publication before an administrator could be appointed, and the safeguards provided for the protection of the property of the absentee in case of his return, satisfied the requirements of the fourteenth amendment. But the court expressed the opinion in that case, that a state law which did not provide, among other things, for adequate notice as a prerequisite to the proceedings for the administration of the estate of an absentee would be repugnant to the fourteenth amendment.

It is said that the expression of the court in that case, that the appointment of an administrator of the estate of an absentee while he is still living, without adequate notice as a prerequisite to such appointment would be void, was unnecessary to a decision of that case, and therefore a mere dictum. Even if this were so, the principle there announced is in accord with the repeated declarations of that court, as to what is required by the due process of law clause of the fourteenth amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Scott v. McNeal*, supra.

Tested by that rule, a statute which provides for the taking of an absentee's property and administering it when he is alive, without his knowledge or consent and in a proceeding to which he is not a party, and of which he has no notice, is clearly in violation of his rights under the fourteenth amendment.

The other assignment of error is that the trial court ought to have denied the relief sought, because of the long delay of the appellee in asserting his claim.

It has always been a principle of equity to discourage stale demands, and laches is often

a defense wholly independent of the statute of limitations. But the rule is adopted because after great lapse of time, from death of parties, loss of papers, or death of witnesses, there is danger of doing injustice, and there can be no longer a safe determination of the controversy. *Tazewell's Ex'r v. Sanders' Ex'r*, 13 Grat. 354; *Bargamin v. Clarke*, 20 Grat. 544, 553; *Rowe v. Bentley*, 29 Grat. 756, 763; *Jameson v. Rixey*, 94 Va. 342, 346, 26 S. E. 861, 64 Am. St. Rep. 726.

Mere delay is not always laches, and laches in the assertion of a right is not always sufficient to defeat it. The laches must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise. *Tazewell's Ex'r v. Sanders' Ex'r*, supra. 362; *Jameson v. Rixey*, 94 Va. 346, 26 S. E. 861, 64 Am. St. Rep. 726, and cases cited. Whether the lapse of time is sufficient to bar a recovery must of necessity depend upon the particular circumstances of each case. *Aylett's Ex'r v. King*, 11 Leigh, 486; *Rowe v. Bentley*, 29 Grat. 763; *Bell v. Wood*, 94 Va. 677, 683, 27 S. E. 504. Tested by these general principles, the facts of this case do not make out such a case of laches as ought to bar the appellee of his right to recover. The time between the accruing of his right to collect the legacy and the institution of his suit is about 15 years—a long time to delay the assertion of his right if he had knowledge of it. It is not shown when he first learned of it, but it does appear that he had been absent from the state for more than 7 years before letters of administration on his estate were granted, that during that period he had not been heard from by his nearest relatives, and that he was still a nonresident at the time of the institution of his suit. We think it may be fairly inferred from the record that he had no knowledge of his rights until after his legacy had been paid to his administrator, and probably not until shortly before he made his demand upon the appellant and instituted his suit. But if it be conceded that he knew that the legacy had been left him, the only thing other than mere lapse of time that could stand in the way of his right to recover is that the appellant voluntarily paid it to another, who had apparent, but no real, authority to receive it, and who gave a refunding bond for appellant's protection. The appellant whose duty it was to pay, and the appellee, who was entitled to receive the legacy, are both living; no evidence has been lost by death, no records have been destroyed or papers lost, there is no uncertainty as to the amount that is due, and no presumption of payment. In the absence of all of these, the equitable circumstances which generally constitute the grounds for the application of the doctrine of laches, we do not think that

the appellee can be said to be guilty of such laches as will bar his right to recover.

We are of opinion that there is no error in the decree appealed from, and that it should be affirmed.

(104 Va. 509)

CAMPBELL et al. v. BRYANT, Mayor,
et al.

(Supreme Court of Appeals of Virginia. Nov. 28, 1905.)

1. MUNICIPAL CORPORATIONS—TAXES—RESTRAINING COLLECTION.

Equity has jurisdiction to entertain a bill to enjoin the officers of a town from undertaking to collect taxes on the ground that the act purporting to incorporate the town is unconstitutional and void.

2. SAME—PARTIES.

In a suit to enjoin the collection of taxes by the authorities of a town on the ground of the invalidity of the act incorporating the town, where the mayor and members of the council of the town are made parties defendant, and appear and answer the bill in their official capacity, as well as in their own right, it is not necessary that the town itself be made a party by name.

3. STATUTES—GENERAL AND SPECIAL LAWS—INCORPORATION OF MUNICIPALITIES.

Under Const. art. 8, § 117 [Va. Code 1904, p. cccxxviii], requiring the General Assembly to enact general laws for the organization and government of cities and towns, and providing that no special act shall be passed in relation thereto, except in the manner prescribed in article 4 of the Constitution, cities and towns not in existence when the Constitution went into effect can only be incorporated under general laws, regardless of what special acts may be passed in relation to cities and towns under article 4 [Va. Code 1904, p. ccxvii].

4. SAME—DEPARTURES FROM GENERAL LAW.

Acts 1904, p. 283, c. 167, purporting to incorporate a certain town, and which provides that the election of mayor and councilmen shall be held on the first Tuesday in June, 1904, and every two years thereafter, whereas, under the general law [Va. Code 1904, § 1021] town elections for mayor and councilmen must be held on the second Tuesday in June, and which further provides that the mayor shall be vested with the power and authority of a justice of the peace to a distance of $1\frac{1}{4}$ miles beyond the town limits, and gives the sergeant of the town the authority of a constable within the same territory, whereas the general law [Va. Code 1904, §§ 1082, 1083a] confines the criminal jurisdiction of town authorities to territory extending one mile beyond the corporate limits and confines their civil jurisdiction to these limits, and which contains other departures from the general law, is repugnant to Const. art. 8, § 117 [Va. Code 1904, p. cccxxviii], requiring the General Assembly to enact general laws for the organization and government of cities and towns.

5. CONSTITUTIONAL LAW—SELF-EXECUTING PROVISIONS.

Const. art. 8, § 117 [Va. Code 1904, p. cccxxviii], requiring the General Assembly to enact general laws for the organization and government of cities and towns, and prohibiting the enactment of special acts in relation thereto, except in the manner prescribed in article 4 of the Constitution, and amending the charters of towns and cities so as to make them conform to the provisions of the Constitution, is self-executing, in so far as it prohibits special legislation and amends existing municipal charters.

6. TAXATION—CONSTITUTIONAL REQUIREMENTS—UNIFORMITY.

Acts 1904, p. 283, c. 167 [Va. Code 1904, p. 484], purporting to incorporate a certain town and exempting the persons residing within the territorial limits of the proposed town from the payment of certain county taxes, is repugnant to Const. art. 18, § 168 [Va. Code 1904, p. cclxii], which provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

7. STATUTES—EFFECT OF PARTIAL INVALIDITY.

Acts 1904, p. 283, c. 167 [Va. Code 1904, p. 484], purporting to incorporate a certain town, is, in view of the provision exempting persons within the town from the payment of certain county taxes in violation of Const. art. 18, § 168 [Va. Code 1904, p. cclxii], requiring taxes to be uniform within the territorial limits of the levying authority, invalid as a whole, since the proffered exemption was one of the chief inducements held out to procure votes for the charter when it was submitted to the inhabitants of the proposed town, and it cannot be determined that they would have voted for the charter, had the exemption provision been omitted.

8. SAME—EFFECT OF TOTAL INVALIDITY.

An unconstitutional statute purporting to incorporate a town is absolutely inoperative, and does not empower the town authorities to levy or collect taxes.

9. MUNICIPAL CORPORATIONS—TAXATION—DECREES ENJOINING COLLECTION.

A decree enjoining the collection of a municipal tax on the ground of the unconstitutionality of the act purporting to incorporate the municipality is not subject to the objection of purporting to judicially dissolve a municipal charter.

Appeal from Circuit Court, Amherst County.

Bill by Duncan Campbell and others against A. J. Bryant and others, mayor and councilmen, etc., of the so-called town of Madison Heights. From a decree of dismissal, complainants appeal. Reversed.

Caskie & Coleman and W. K. Allen, for appellant. Whitehead & Whitehead and J. G. Haythe, for appellees.

HARRISON, J. By an act of the General Assembly, approved March 14, 1904, (Acts 1904, p. 283, c. 167 [Va. Code 1904, p. 484]), entitled "An act to incorporate the town of Madison Heights, in Amherst county," it was enacted that the territory in Amherst county contained within the limits set forth and described in section 2 of the act should be deemed and taken as the town of Madison Heights, and that the inhabitants thereof should be a body politic under that name for all purposes for which towns are incorporated in this commonwealth. By the terms of the act, the charter thereby created was not to become operative until it had been ratified by a majority of the registered voters within the limits of the proposed town and by a majority vote of the freeholders voting at the special election to be ordered by the judge of the circuit court of Amherst county for the purpose

of ascertaining the will of those entitled to vote on the question.

In pursuance of the terms of the act an election was held on the 10th day of May, 1904, at which a majority of the whole vote cast was for the ratification of the charter, and a majority of the freeholders voting were likewise in favor of such ratification. It further appears that on the 7th day of June, 1904, A. J. Bryant was elected mayor, and George A. Christian, C. P. Shener, J. N. Cooper, George T. Harris, Thomas H. Banton, and C. E. Bell, councilmen. At a meeting of these persons, claiming to be mayor and councilmen, respectively, of the town of Madison Heights, by virtue of the election of June 7, 1904, certain persons were appointed officers of the town, among others J. D. Mays as sergeant and collector, and on the same day the council proceeded to levy a tax for various town purposes for the year ending June 30, 1905, amounting in the aggregate to \$2,010, and to place the same in the hands of J. D. Mays, sergeant, for collection.

Shortly thereafter (the date does not appear) the bill in this case was filed by Duncan Campbell and 20 others, suing for themselves and on behalf of all other citizens of the territory embraced within the limits designated by the charter act, alleging that said act, purporting to incorporate the town of Madison Heights, was unconstitutional and void, and that the mayor and council of the so-called town were therefore without authority to levy or collect taxes, and praying that the taxes assessed by the council be declared to be nugatory, and that J. D. Mays, the pretended sergeant of such town, be perpetually enjoined from undertaking to collect the same. To this bill the persons already mentioned, styling themselves mayor and council of the town of Madison Heights, and J. D. Mays, styling himself collector of said town, were made parties defendant, and filed a joint demurrer and answer in their own right and in their several official capacities, in which answer they deny all of the material allegations of the bill, insisting upon the validity of the charter act of March 14, 1904, and of their proceedings thereunder.

Upon the hearing the circuit court of Amherst county, by decree of March 16, 1905, overruled the demurrer, but dismissed the bill upon the ground that the complainants were not entitled to the relief prayed for. This conclusion of the circuit court, which rests upon the view that the act of March 14, 1904, incorporating the town of Madison Heights, is constitutional, is called in question by the present appeal.

The demurrer was properly overruled. The jurisdiction of a court of equity in this class of cases is well established. *Bull v. Read*, 13 Grat. 78; *Eyre v. Jacob*, 14 Grat. 422, 73 Am. Dec. 867; *Johnson v. Drummond*, 20 Grat. 419; *Redd v. Supervisors*, 31 Grat. 695;

Lynchburg v. Dameron, 95 Va. 546, 28 S. E. 951; *Cahoon v. Iron Gate*, 92 Va. 367, 28 S. E. 767; *Day v. Roberts*, 101 Va. 248, 43 S. E. 862.

The mayor and members of the council are parties defendant, and have appeared and answered the bill in their official capacity, as well as in their own right. It was, therefore, not necessary to make the town a party by name. It was present through its mayor and council, who were the only parties who could have represented it. To have, in addition, made it a party by name, would have been a vain act, serving no purpose, which is not required. This view is sustained by authorities already cited in support of the jurisdiction of the court.

Section 117, art. 8, of the Constitution [Va. Code 1904, p. cccxxxviii], provides that general laws for the organization and government of cities and towns shall be enacted by the General Assembly, and that no special act shall be passed in relation thereto, except in the manner prescribed in article 4 of the Constitution. What special acts may be passed in relation to cities and towns, under article 4 of the Constitution [Va. Code 1904, p. ccxviii], need not now be considered; for it is clear that cities and towns not in existence when the Constitution went into effect can only be organized and governed in accordance with the general laws. This provision of our present fundamental law prohibiting special legislation and providing that general laws for the organization of cities and towns shall be enacted, and that no special act shall be passed in relation thereto, is second to no other provision of the Constitution in value and importance, and cannot be too carefully observed or strictly enforced.

Of course the Legislature can, as formerly, grant charters creating cities and towns. But, when such charters are granted, the city or town so chartered must be organized and governed in accordance with the general laws; otherwise, the charter would be obnoxious to the constitutional provision forbidding special legislation.

The charter of the town of Madison Heights, as set forth in the act of March 14, 1904, is obnoxious in numerous particulars to the constitutional inhibition against special legislation. It is not necessary to point out in this opinion all of the material respects in which the powers sought to be conferred by the act in question differ from the powers conferred upon towns by the existing general law. One or two examples may be mentioned.

Clause 20 of the act provides that the election of mayor and councilmen of Madison Heights shall be on the first Tuesday in June, 1904, and every two years thereafter; whereas, under the general law, town elections for mayor and councilmen must be held on the second Tuesday in June. Va. Code 1904, § 1021.

It is provided that the mayor of Madison

Heights shall be invested with the power and authority of a justice of the peace, within the limits of the town and to a distance of $1\frac{1}{4}$ miles beyond in Amherst county, and shall exercise like jurisdiction in all cases originating within such limits that a justice of the peace may now or hereafter have and exercise. This provision gives to the mayor both civil and criminal jurisdiction within the corporate limits and for a distance of $1\frac{1}{4}$ miles beyond; whereas, the general law [Va. Code 1904, § 1032] provides that the jurisdiction of the corporate authorities of each town or city, in criminal matters and for imposing and collecting a license tax on all shows, performances, and exhibitions, shall extend 1 mile beyond the corporate limits of such town or city, and further provides [Va. Code 1904, § 1033a] that the civil jurisdiction of mayors of towns shall be confined to the corporate limits of the town and their criminal jurisdiction to such limits and 1 mile beyond.

The sergeant of the town is given all of the powers and authority of a constable and conservator of the peace within the corporate limits and for a distance of $1\frac{1}{4}$ miles beyond; whereas, as already pointed out, the jurisdiction of the corporate authorities of a town is limited by the general law to 1 mile beyond the corporate limits.

Without further detail it may be said that most of the important provisions of the act incorporating the town of Madison Heights are either in conflict with the existing general law or without any general law to support them. The fact, however, that no general law on the subject has been passed does not affect the question. Section 117 is self-executing, so far as it prohibits special legislation, and also to the extent that it amends the charters of towns and cities, so as to make them conform to the provisions of the Constitution. *Hicks v. City of Bristol*, 102 Va. 861, 47 S. E. 1001.

It would seem from clause 19 of the act that the draftsman of the charter intended to confer special authority and power; it being there provided that, "in addition to the special powers hereinbefore especially delegated to the town council, all general powers not in conflict with the laws of this state or of the United States, necessary for the proper government of said town, and which are by law allowed to municipal corporations, are hereby likewise delegated and vested in the said town council."

If, however, the Legislature had possessed the power to pass an act for the organization and government of a town, conferring special powers, the charter in the case at bar would still be invalid, because it exempts the persons residing within the territorial limits of the proposed town from the payment of certain taxes to the county of Amherst, in violation of section 168, art. 13, of the Constitution [Va. Code 1904, p. cccxli], which expressly provides

that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. This court has held that a town is a part of the county for all purposes of taxation, and that the Legislature has no power, by reason of the constitutional inhibition mentioned, to exempt the taxable persons and property in a town situated within the limits of a county and forming a part thereof from county levies; that a part of a county cannot be made to bear all the burden of taxation for county purposes; and that the uniformity required extends, not only to the rate and mode of assessment, but also to the territory to be assessed, and when a tax is levied by a county it must be uniform throughout the county. *Day v. Roberts*, 101 Va. 248, 43 S. E. 362.

In the case cited the court was construing a similar provision in the Constitution of 1869. The provision in the present Constitution is possibly more explicit in providing that taxation shall be uniform within the territorial limits of the authority levying the tax than that construed in *Day v. Roberts*. This being so, the county of Amherst can and must levy the same taxes upon the people and property of Madison Heights as upon the rest of the county. The provision of the charter exempting the people of that town from the taxes mentioned is therefore wholly nugatory.

This provision for exemption from taxes cannot be held invalid and the residue of the act be permitted to stand, unaffected by the illegal section, as was done in the case of *Cahoon v. Iron Gate*, supra, because to escape the payment of such taxes was one of the chief inducements held out by the charter to get the taxpayers of the proposed town to vote for the charter when it was submitted to them for their approval or rejection, and we cannot say that the people would have voted for the charter if that provision had been omitted. In such a case the whole charter must be held invalid. *Robertson v. Preston*, 97 Va. 296, 301, 33 S. E. 618.

It is not necessary to consider other features in which it is contended that the act of March 14, 1904, is invalid. It being unconstitutional in the particulars pointed out, the appellees had no power or authority to levy or collect the tax complained of. The act being unconstitutional, it is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.

The authorities relied on by the appellees (see *Agner's Case*, 103 Va. 811, 48 S. E. 493) in support of their argument that the courts have no power to dissolve a municipal charter, and that municipalities exist only by legislative sanction, and cannot be dissolved or cease to exist except pursuant to legislative provision, have no application to a case

like this. There is no undertaking to dissolve the charter of Madison Heights, and no such decree is asked for. It is a proceeding, sanctioned by a long line of Virginia decisions, asking for relief from an unconstitutional, and therefore illegal, tax. We are only holding that the act attempting to incorporate the town of Madison Heights and providing for its organization and government is invalid, because not passed in conformity with the Constitution of the state. In other words, we determine that the act, which it is claimed creates the town and gives its council the power to levy the tax complained of, is a nullity, because in violation of the Constitution. If it had ever been a valid act, then the court could not annul it or declare it forfeited. That would be a legislative power. But whether or not there is a valid act or charter authorizing the tax complained of is a judicial question, and the court not only has the right, but is bound, to pass upon such a question whenever it is properly presented.

For these reasons the decree appealed from must be reversed, and this court will enter here such decree as the lower court ought to have entered, declaring the tax complained of invalid and perpetually enjoining the appellees from all further attempt to collect the same.

(140 N. C. 233)

LEDFORD v. EMERSON.

(Supreme Court of North Carolina. Dec. 15, 1905.)

1. JOINT ADVENTURES—DISSOLUTION—ACTION BETWEEN PARTNERS.

Where a partnership was formed to engage in a single venture or purchase, which had been closed, and nothing remained but to pay over the claimant's share of the proceeds, the claimant was entitled to maintain an action at law against his partner for the amount due.

[Ed. Note. For cases in point, see vol. 29, Cent. Dig. Joint Adventures, § 7.]

2. ARREST—CIVIL ACTION—FRAUD.

Where, in an action by a partner in a joint adventure to recover the amount due from his copartner, plaintiff alleged and proved intentional fraud on the part of defendant throughout the entire transaction, and the trial judge found that defendant was guilty of fraud as alleged, plaintiff was entitled to a continuance of an order of arrest granted under Code, § 291, subsec. 4, providing that, when a defendant has been guilty of fraud in incurring the obligation for which the action is brought, an order of arrest may be issued.

Appeal from Superior Court, Cherokee County; Neal, Judge.

Action by John P. Ledford against A. S. Emerson. From an order discharging an order of arrest in a civil action, plaintiff appeals. Reversed.

See 51 S. E. 42.

The principal action was instituted in July, 1903, to recover plaintiff's share arising from a sale of certain options on land situated in north Georgia, same having been procured by plaintiff in the years 1900, 1901,

etc., and sold by defendant in April, 1903, at a price of \$10,000. The allegation and testimony of plaintiff tended to show that plaintiff procured a large number of options on land in north Georgia, and took same in the name of defendant, under an agreement that defendant was to advance the incidental expenses, sell said options, and divide the profits equally with the plaintiff; that defendant, having sold said options at the price of \$10,000, fraudulently concealed the facts from plaintiff and paid plaintiff \$250 which plaintiff took under false and fraudulent assurances as to the disposition of the options, giving defendant his receipt in full, and defendant had failed to make any other or further payments to plaintiff by reason of said deal, etc. As ancillary to the principal action, an order of arrest was issued in the cause on affidavits duly made on February 15, 1904, and defendant was arrested thereunder and held to bail. There was a motion to discharge the order of arrest, heard before Judge Neal, as stated. Motion allowed, and plaintiff excepted and appealed.

Axley & Axley, E. B. Norvell, and Busbee & Busbee, for appellant. Ben Posey and Dillard & Bell, for appellee.

HOKE, J. The judge below on the hearing found the facts contained in the plaintiff's affidavits to be true, and held, as a matter of law, that on these facts there was no right shown to arrest defendant. His honor thereupon discharged the order of arrest and entered judgment exonerating the bail from any and all liability by reason of his suretyship. This, as we understand, was on the idea that the facts disclosed a case of partnership, and in such case there was no legal right in one partner to cause the arrest of another. It is a well-recognized principle that, during the continuance of a partnership, one partner cannot sue another on any special transaction which may be made an item of charge or discharge in a general partnership account. This has sometimes been put on the ground that such a suit would necessitate that the party complained of should be both plaintiff and defendant. But I apprehend a reason of more moment is that as to such a transaction, till a full accounting is had, it cannot be ascertained or declared what portion of such claims belong to the one or the other; and so it is true that one partner, during the continuance of the partnership, cannot ordinarily bring trover or trespass against the other by reason of acts concerning partnership property, unless the same be destroyed or removed entirely beyond the reach or control of the complaining party, for one has no more right to deal with the property than the other. Where, however, the partnership has terminated, and, all the debts having been paid and the partnership affairs otherwise adjusted, nothing remains to be done but to

pay over an amount due from one to the other, to be ascertained by a reckoning as to one special item, or even several items, the matter presenting no complication of any kind, as in *Clarke v. Mills*, 36 Kan. 393, 13 Pac. 569; or where the partnership was for a single venture or special purpose, which has been closed, and nothing remains but to pay over the claimant's share of the proceeds, as in *Jacques v. Hult*, 16 N. J. Law, 38—in either case an action would lie in favor of one against the other. *George on Partnership*, 304; *Bales on Partnership*, 865, 866; *Clarke v. Mills*, and *Jacques v. Hult*, supra; *Musler v. Trumbour*, 5 Wend. 274; *Moran v. Le Blanc*, 6 La. Ann. 113; *Wheeler v. Arnold*, 30 Mich. 304. In *Clarke's Case*, supra, *Holt*, P. J., for the court, said: "There were no debts to be paid, no money to be collected, no property to be disposed of, and under the facts of the case it was purely a pecuniary demand, involving no complications that could not properly be determined in a justice's court." In *Wheeler v. Arnold*, supra, it is held: "The remedy at law for contribution between two partners after dissolution is admissible, and, when there have been no such dealings with assets and no such private relations with the firm as to make a settlement difficult, there would be no occasion, under our statutes making discovery obtainable at law by an examination of parties as witnesses, for an accounting in equity." In *Jacques v. Hult*, supra, it is held: "A mutual covenant to divide the proceeds of a certain crop, if it be a partnership, is so only for a special purpose and terminates as soon as the crop is sold; and an action lies by one of the parties against the other for any balance due thereon to the plaintiff from the defendant, without resorting to the action of account render."

This being the correct doctrine, and an action at law maintainable, the facts bring the claim within the provisions of our statutes on arrest and bail, no reason occurs to us why the plaintiff should be deprived of this ancillary remedy. The statute (Code, § 291, subsec. 4) provides that when a defendant has been guilty of fraud in contracting the debt or incurring the obligation for which action is brought, or for concealing or disposing of property, or to recover damages for fraud or deceit, an order for arrest may be issued; and it has been held in *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747, that such an order is proper when there has been fraud committed after contracting the debt, as by concealing property or other devices for defeating the creditor. Here is allegation, and ample evidence to sustain it, charging intentional fraud throughout the entire transaction on the part of the defendant, and the judge below has found that these charges are true: A fraudulent design in having the options drawn in the name of the defendant; a fraudulent effort and purpose in concealing the sale from the plain-

tiff; false and fraudulent statements in procuring from the plaintiff a receipt in full, etc. We must not be understood as holding that no right of arrest can ever exist where the partnership has terminated and the affairs are so complicated that, in order to a proper settlement, an action in the nature of a bill in equity for an account is required. We have only elaborated the position that the right of arrest may exist when an action at law would lie, with a view of confining the decision to the points required by the facts of the case before us.

The court is referred to the case of *Soule v. Hayward*, 1 Cal. 345, as authority supporting the defendant's position; but this was a case construing the California statutes that a partner was not included under the term "agent" in their statute on arrest, and the propositions here discussed do not seem to have been presented or considered by the court.

There was error in allowing the defendant's motion, and the order to that effect will be set aside.

Error.

(128 N. C. 750)

CARTER et al. v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Feb. Term, 1905.)

Appeal from Superior Court, Guilford County; Peebles, Judge.

Action by P. V. Carter and others against the North Carolina Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

J. A. Barringer and R. C. Strudwick, for appellants. King & Kimball, for appellees.

PER CURIAM. Affirmed.

(129 N. C. 490)

CARTER et al. v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Nov. 15, 1905.)

1. DEATH—ACTIONS FOR WRONGFUL DEATH—INSTRUCTIONS.

In an action for wrongful death, an instruction that it was "necessary for the administrator to show by affirmative evidence that the net earnings of the deceased exceeded his expenditures, and unless he has done that it is the duty of the jury to say that he is not entitled to recover anything," was erroneous, as confining the jury to the consideration of the testimony in regard to the net earnings of deceased at and prior to his death, and directing the jury to deduct from the gross earnings which the deceased would have made his expenditures.

2. SAME—DAMAGES—PROSPECTIVE PECUNIARY BENEFITS.

Under Code, § 1498, providing for actions for wrongful death, and section 1499, providing that the plaintiff in such action may recover such damages as are a fair and just compensa-

tion for the pecuniary injury resulting from such death, the jury, in determining the damages, must take into consideration the entire life, character, habits, health, and capacity of the deceased, regardless of whether he had accumulated property at the time of his death.

* [Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 103-119.]

3. SAME—EARNINGS AND EXPENSES OF DECEASED.

In determining the amount recoverable for wrongful death under Code, §§ 1498, 1499, after the gross income or earnings which the deceased would have made is determined, there should be deducted therefrom only his reasonably necessary personal expenses, taking into consideration his age, manner of living, and business, and not the total expenditures which the deceased might have made for family and other expenses.

4. SAME—INSTRUCTIONS—PROVINCE OF JURY.

It is not for the court to instruct the jury in any case, when death by wrongful act is shown or admitted, that upon any state of facts it is their duty to render a verdict against plaintiff; such matter being necessarily an inference of fact from all the evidence.

Petition for rehearing. Allowed.

For former decision, see 52 S. E. 642.

PER CURIAM. This is a petition to rehear this cause disposed of at the last term, 138 N. C. 750, 52 S. E. 642. His honor said to the jury, among other things: "The court charges you as a matter of law, and it is so plain that there can be no mistake about it, that in this case, whenever an adult has been killed—no matter whether he was killed by an individual or a corporation, it is all the same—and his administrator brings suit, it is necessary for the administrator to show by affirmative evidence that the net earnings of the deceased exceeded his expenditures, and unless he has done that it is the duty of the jury to say that he is not entitled to recover anything." To this instruction the plaintiff excepted.

There was error in two respects. The instruction, whether so intended or not, confined the jury to the consideration of testimony in regard to the net earnings of the deceased at the time of his death or prior thereto, or, in other words, whether he had accumulated anything at the time of his death. By a proper construction of the statute (Code, §§ 1498, 1499) the inquiry whether or not the relatives of the deceased have suffered any pecuniary loss by his death is not limited to the date of his death. It must necessarily extend beyond that period. The true question is, did the relatives really suffer any loss by reason of the fact that the deceased failed to live out his expectancy? In determining it, the jury must take into consideration the entire life, character, habits, health, capacity, etc., of the deceased, and, from the result of such consideration, estimate as near as may be, and ascertain according to the rule laid down by the court, what pecuniary advantage would have accrued to his relatives if he had lived out his expectancy, as the jury may find it to be, using the mortuary tables prescribed to aid

them. This question is within the peculiar province of the jury. The court may not take it from them and decide it as a question of law. He instructs the jury in regard to the rule for ascertaining the net income during the entire life of the deceased, and how to ascertain the present worth of the amount fixed by the jury as the total accumulation during his life, and their verdict in the light of all the evidence must be fixed by them. This court said, in *Benton v. Railroad*, 122 N. C. 1009, 30 S. E. 333, after stating the rule as laid down in *Pickett's Case*, 117 N. C. 638, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611: "In applying this rule, * * * and to enable the jury to properly estimate the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, they should consider his age, habits, industry, means, business qualifications, skill, and reasonable expectation of life." *Watson v. Railroad*, 133 N. C. 190, 45 S. E. 555. This court held, in *Russell v. Steamboat Co.*, 126 N. C. 961, 36 S. E. 191, and *Davis v. Railroad*, 136 N. C. 116, 48 S. E. 591, that substantial damage, ascertained in the manner pointed out, could be recovered for the wrongful killing of an infant. To confine the jury to the net income prior to and at the time of the death would exclude any recovery in such cases. The same result would follow in the case of a young man just entering upon active life, as well as many others which readily occur to the mind.

The charge was also erroneous, in that it directed the jury to deduct from such gross income or earnings, as they might find the deceased would have made, his "expenditures." The true rule requires the jury to deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of living, business calling, or profession, etc. If by "expenditures" is understood, and we think the jury, in the absence of any explanation, may have well so understood it, the amount spent for his family or those dependent upon him, the result would be to deprive the families of a very large majority of men from recovering damage for their death. But a small number of men accumulate estates. Their income or earning, after paying their actual personal expenses, are expended in the support and education of their children. Certainly it was not contemplated that for wrongfully causing the death of such a man no damage could be recovered, although his death deprived his family of their sole support, while for the death of one without any family, or who by miserly living and hoarding deprives his family of support and education, large damages should be awarded. It cannot, with any show of truth, be said that in the first case the family sustain no pecuniary loss by reason of the death of the husband and father. Such a construction of the statute would place be-

yond the protection of law nine-tenths of the people. His honor, of course, did not intend to so construe the law; but it is the logical result, if the absence of accumulation by the deceased or the lack of an excess of earnings over all expenditures is to be laid down as the rule of law. It is not for the court to instruct the jury in any case, when death by the wrongful act, neglect, or default of the defendant is shown or admitted, that upon any state of facts it is their duty to render a verdict against the plaintiff. "The reasonable expectation of pecuniary advantage from the continuance of the life of the deceased" is necessarily an inference of fact from all of the evidence, and can only be drawn by the jury, subject, of course, to the supervisory power of the court to prevent injustice by setting aside the verdict, if excessive.

The petition must be allowed, and a new trial awarded.

Petition allowed.

(73 S. C. 26)

JOHNSON v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina. Nov. 20, 1905.)

1. CARRIERS—RATE SCHEDULE — FAILURE TO POST—ACTION FOR PENALTY.

A complaint against a railroad company for failure to post schedule of rates under Civ. Code 1902, §§ 2092, 2093, providing that the railroad commissioners shall make reasonable rates of freight and passenger tariffs, and that the schedule of rates shall be posted by the railroad companies at their respective stations, must allege that each and every act required of the railroad commissioners has been done, in order to state a cause of action for failure to post said schedules.

2. SAME—NOTICE OF SCHEDULE.

Under Civ. Code 1902, § 2093, requiring the railroad commissioners to make schedule of rates for railroads in the state, and requiring railroad companies to post the same, 30 days is a reasonable notice by a railroad commission of schedule of rates made.

3. SAME—DEFENSES.

In an action for a penalty for failure to post rates made by a railroad commission, the railroad company cannot interpose as a defense that the commission has not published schedules of rates for all the railroads in the state; Civ. Code 1902, § 2093, providing that the schedule shall not be taken as evidence until schedules have been prepared for all the railroad companies in the state, only applying to the reception of the schedule as evidence.

4. PENALTIES—PROCEDURE — CONSTITUTIONAL LAW.

The word "prosecutions," in Const. art. 5, § 31, providing that all writs and processes shall run and all prosecutions shall be conducted in the name of the state, applies to indictments for crime, and does not affect suits under penal statutes, which may be brought in the name of any person in the manner provided by the statute creating the same.

Appeal from Common Pleas Circuit Court of Orangeburg County; Townsend, Judge.

Action by Estes C. Johnson against the Seaboard Air Line Railway. From an order sus-

taining a demurrer, plaintiff appeals. Affirmed.

Wolfe & Berry, for appellant. Lyles & McMahon, for respondent.

JONES, J. The plaintiff appeals from an order of Judge Townsend sustaining a demurrer to the complaint, which, after alleging that defendant is a corporation, is as follows: "(2) That sections 2092 and 2093 of the Civil Code of South Carolina (1902) provide that the railroad commissioners of said state shall fix a schedule of reasonable freight and passenger rates for each railroad corporation doing business in this state. (3) That the defendant is a railroad corporation doing business in said state, and that North is a station of said railroad corporation between Columbia, S. C., and Denmark, S. C., but the said station of North is wholly within the state of South Carolina. (4) That the railroad commissioners of said state, more than a year prior to the commencement of this action, fixed a schedule of freight and passenger rates for the defendant corporation. (5) That section 2093 of the Civil Code of South Carolina (1902) provides that any railroad corporation failing to post at any of its stations a copy of the schedules aforesaid shall incur and suffer a penalty of \$100 for each and every day during which time such corporation shall fail to post such schedule, and that such penalty may be sued for by any citizen of the said state, and the recovery shall be equally divided between the citizens so suing and the state of South Carolina. (6) That the defendant failed to post such schedules at the station of North, S. C., from January 1, 1903, to December 9, 1903, a period of 329 days, and that thereby the defendant has incurred and is liable for a penalty aggregating \$32,900. (7) That the plaintiff is a citizen of said state, and sues for the said penalty of \$32,900, according to the provisions of section 2093 of the Civil Code aforesaid. "Wherefore the plaintiff demands judgment for \$32,900 and his costs."

The fifth, sixth, and seventh grounds of demurrer were as follows, and of these the circuit court sustained the fifth and seventh, with leave to amend, and failed to mention the sixth. "(5) Because said complaint does not allege that the Railroad commissioners of the state of South Carolina had prepared and published such schedule for doing business in this state, or a schedule of just and reasonable rates and charges for the transportation of passengers and freight and cars on said railroad. (6) Because said complaint does not allege that said schedule has been published according to law, or that 30 days' notice thereof had been served upon the defendant company. (7) Because said complaint does not allege that the railroad commissioners of the state of South Carolina had prepared and published such schedules for all the railroad companies organized under the laws of the state of South Carolina,

or the time of the publication of such schedule."

1. We think the circuit court was correct in sustaining the fifth ground of demurrer. Section 2002, Code 1902, provides, among other things, that "the commissioners elected as hereinbefore provided shall, as provided in the next section of this chapter, make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this state on the railroads therein," etc. Section 2003 is as follows: "The said railroad commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of just and reasonable rates of charges for transportation of passengers and freight and cars on each of said railroads, and said schedule shall, in suits brought against any such railroad corporation wherein is involved the charges of any such railroad corporation for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all the courts of this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freight and cars upon the railroads, and said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedule. When any schedule shall have been made or revised it shall be the duty of all such railroad companies to post at all their respective stations a copy of said schedule for the protection of the people: Provided, that the schedule thus prepared shall not be taken as evidence as herein provided until schedules have been prepared and published for all the railroad companies now organized under the laws of this state, or that may be organized at the time of said publication. All such schedules purporting to be printed and published as aforesaid shall be received and held in all such suits as prima facie the schedule of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of the railroad commission that the same is a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that the same has been duly published as required by law: Provided, that thirty days' notice of any change or revision of the schedule of rates shall first be given to the railroad company to be affected thereby before the same shall go into effect. Any railroad company which shall fail to post at any of its stations a copy of the schedule of rates as provided in this section, shall be liable to a penalty of \$100 for each and every day in which it shall fail to post such schedule, to be recovered by any citizen who will sue therefor, one-half of such penalty to go to

the state, the other half to the citizen suing for the same." This, being a penal statute, must be strictly construed. *Holman v. Frost & Co.*, 26 S. C. 294, 2 S. E. 16. Under this statute it is the duty of the railroad commissioners "to make for each of the railroad corporations doing business in this state a schedule of just and reasonable rates and charges for transportation of passengers and freight and cars on each of said railroads." The complaint alleges that the railroad commissioners "fixed a schedule of freight and passenger rates for the defendant corporation." Probably to "fix" a schedule is, for the purpose of a demurrer, substantially the same as to "make" a schedule, and therefore we lay no stress on the failure in that particular to use the language of the statute. But the statute required that a just and reasonable schedule shall be made, and the complaint fails to allege that such a schedule was made, nor does it state facts from which the court might or must infer that the schedule made was just and reasonable. Furthermore, the schedule required by the statute to be made was not only of charges for transportation of passengers and freight, but also of transportation of cars, and it is not alleged that any such schedule was made by the railroad commissioners. In addition to this, we may add that the making of such a schedule for a railroad company necessarily must include a delivery of such schedule or a copy thereof to the railroad company to be affected thereby, or such promulgation of the schedule as will give the railroad company reasonable notice of the same. These things being done by the railroad commissioners, the statute provides that the railroad company shall post at all its stations a copy of such schedule for the protection of the people, and further provides a penalty for failure to do so. In an action to recover a penalty under a statute, it is essential to allege all the facts necessary to show a case falling within the terms of the statute. 16 Ency. Pl. & Pr. 275, and cases cited.

2. The circuit court having omitted to pass upon the sixth ground of demurrer, it is unnecessary and perhaps improper that we express an opinion upon the same. The statute does not expressly provide what notice the railroad commissioners shall give the railroad company in cases of the original making of the schedule, although it does require 30 days' notice in case of a change or revision of the schedule, and in section 2002, 30 days' notice is required before applying a joint rate as therein provided for. If the provision as to the notice of a change or revision of the schedule does not expressly apply to the making of a schedule, it is essential that some reasonable notice thereof be given, and in the light of the statute it would seem that the court should hold that 30 days is such reasonable notice.

3. We do not think the seventh ground of demurrer is well taken. The penalty attaches to any railroad company whenever it fails, after due notice, to post the schedule made for it by the railroad commissioners in accordance with the statute. The provision that the schedule thus prepared shall not be taken as evidence as herein provided until schedules have been prepared and published as aforesaid for all the railroad companies now organized under the laws of the state or that may be organized at the time of publication, etc., relates to such schedules as evidence in suits brought against any such railroad corporation wherein is involved the charges of any such railroad corporation for the transportation of any passenger, or freight, or cars, or unjust discrimination in relation thereto.

4. The fifth ground of demurrer, which was sustained by the circuit court, alleges that section 2093, supra, is in violation of section 31, art. 4, of the state Constitution, which prescribes that "All writs and processes shall run, and all prosecutions shall be conducted in the name of the state of South Carolina, * * * " in that it authorizes an action to be brought for the prescribed penalties in the name of a citizen of the state. We think the circuit court erred in sustaining this ground of demurrer. The word "prosecutions" in the provision cited has reference to strictly criminal prosecutions or indictments for crimes. Such was the construction put upon similar language in the Constitution of 1795. *Ward v. Tyler*, 1 Nott & McC. 22, and that is the ordinary meaning of the term in such connection. A penal action is a civil action, and must be brought as directed in the statute creating the same, or in accordance with the manner prescribed in the Code of Civil Procedure. 16 Ency. Pl. & Pr. 232, 242.

5. The second ground of demurrer, which was sustained by the circuit court, alleges that section 2093 violates the fourteenth amendment to the Constitution of the United States, in depriving defendant corporation of the equal protection of the law by authorizing an action to be brought for the penalty in the name of a citizen of the state, in violation of section 31, art. 5, of the state Constitution. We have held that the statute does not violate section 31, art. 5, of the state Constitution, and it is unnecessary that we inquire whether the statute denies the equal protection of the laws in any other particular than that alleged in the ground of demurrer.

The judgment of the circuit court is affirmed, in so far as it sustains the demurrer, with leave to amend on the fifth ground specified therein.

POPE, C. J., did not participate in this opinion because of illness.

(73 S. C. 572)

FISHBURNE v. MINOTT et al.

(Supreme Court of South Carolina. Nov. 7, 1905.)

1. VENUE—CHANGE—EFFECT — PROCEEDINGS IN ORIGINAL COURT.

Where a notice was given of an application for a change of venue, and the change was granted, a stay of proceedings in the original court followed as a necessary result, without a notice of motion therefor.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 136.]

2. SAME—MOTION.

A motion for a change of venue because the action is brought in the wrong county may be made in chambers on four days' notice, under Code Civ. Proc. §§ 147, 403.

3. OFFICERS—ACTION AGAINST—VENUE.

Under Code Civ. Proc. § 145, providing that an action against a public officer for an act done in performance of his duties must be tried in the county where the cause of action or some part thereof arose, the fact that some of the officer's codefendants lived in a county other than the one in which the cause of action arose does not give the right to sue in such other county.

Appeal from Common Pleas Circuit Court of Dorchester County; Dantzler, Judge.

Action by Julian Fishburne against Harriott K. Minott and others. From an order for a change of venue and stay of proceedings, plaintiff appeals. Affirmed.

Julian Fishburne, in pro. per. Buist & Buist, for respondent.

JONES, J. The appeal in this case is from an order of Judge Dantzler, dated September 28, 1904, granted at chambers, on the motion and affidavit of defendant G. Herbert Sass, changing the place of trial from Dorchester county, where the action was commenced, to Charleston county, providing for the transfer of all the papers filed in Dorchester county, and staying all other proceedings of the court for Dorchester county.

1. The appellant in his first exception contends that the order was erroneous, because no notice of a motion to stay proceedings was given. This is without merit, as notice was given to change the place of trial, and, that being granted, a stay of proceedings in Dorchester county followed as a necessary result.

2. In his second exception appellant contends that the affidavit upon which the order was based does not show that a fair and impartial trial cannot be held in Dorchester county. That is true, but the notice was not based upon that ground, and no suggestion of that ground was made anywhere.

The third exception alleges that the notice of the motion was insufficient, and that it should have been given 10 days to be heard before a judge sitting in regular term, not at chambers. This exception is, no doubt, based upon section 2735 of the Civil Code of 1902, which requires 10 days' notice of a motion

to change the venue on the ground that a fair and impartial trial cannot be had in the county where the action was commenced, and that the application must be made to the judge sitting in regular term. But the motion in this case, as already said, was not made on that ground, and is not governed by section 2785, Civil Code, but by section 147, Code Civ. Proc. 1902, and by section 403 of said Code. Section 147 provides that the court may change the place of trial in the following cases: "(1) When the county designated for that purpose in the complaint is not the proper county. (2) When there is reason to believe that an impartial trial cannot be had therein. (3) When the convenience of witnesses and the ends of justice would be promoted by the change." Section 403 provides that, when a notice of a motion is necessary, it must be served four days before the time appointed for the hearing. As the motion was not made on the ground stated in subdivision 2 above, no occasion arises in this case to notice the seeming conflict between section 147 of the Code of Procedure and section 2735 of the Civil Code. The notice of motion herein, having been served on September 17, 1904, for the hearing thereof on September 23, 1904, was sufficient. *Willoughby v. Railroad Co.*, 46 S. C. 320, 24 S. E. 308; *McFall v. Barnwell*, 54 S. C. 370, 32 S. E. 417. That such an order may be granted by a judge at chambers is shown in the case of *Utsey v. Railroad Co.*, 38 S. C. 399, 17 S. E. 141.

3. The motion was made upon the complaint in this case, as well as the affidavit of G. Herbert Sass. The complaint in the tenth, eleventh, and twelfth paragraphs thereof attempts to state a cause of action for damages against G. Herbert Sass, master of Charleston county, and H. A. M. Smith, Julian Mitchel, James Simons, and the Fidelity & Deposit Company of Maryland, as sureties on his official bond, for his conduct as such in the cases of Harriott K. Minott v. Julian Fishburne and Mary E. Lowndes v. Julian Fishburne, and that the cause of action arose in Charleston county. The affidavit shows that the individual sureties on the master's bond all live in Charleston county, and that the defendant corporation has its designated place at Charleston, S. C., and that its agent resides there. The "case" does not show expressly that Judge Dantzler based his order on the ground that the county designated for trial in the complaint is not the proper county, but that no doubt influenced his action. Section 145 of the Code of Civil Procedure 1902 provides that an action against a public officer, for an act done by him in virtue of his office, must be tried in the county where the cause of action or some part thereof arose, subject to the power of the court to change the place of trial. This provision of the Code is imperative as has been several times decided by this court, and fully justified the action of

Judge Dantzler. The fact that defendants Harriott K. Minott and Mary E. Lowndes reside in Dorchester county does not affect this question, as section 146 of the Code is expressly subject to the imperative provision of section 145. In so far as the action is against defendant Sass and the sureties on his official bond, this defendant resides, and the cause of action arose, in Charleston county. The judge may have also been influenced by the consideration that the convenience of witnesses and the ends of justice would be promoted by the change, but it is unnecessary to seek to sustain his order on that ground.

4. The fourth exception makes the point that no change of place of trial can be ordered before issue joined. The motion was made in this case before answer. In the case of *Willoughby v. Railroad Co.*, 46 S. C. 317, 322, 24 S. E. 308, this language was used: "The statute fixes no time at which the motion to change the place of trial shall be made. It only provides for such a change when certain facts are made to appear to the satisfaction of the circuit judge." This we regard as a correct statement. Originally section 147, supra, was section 149, and contained these words: "If the county designated for that purpose in the complaint be not the proper county, the action may notwithstanding be tried therein, unless the defendant before the time for answering expire, demand, in writing, that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court, as is provided in this section." Under this provision it was necessary to make the motion before answering. But by the act of 1879 (17 St. at Large, p. 14) the above-quoted words were stricken out, thereby enabling a party to make such a motion after answering. Still the right to make such motion before answering is not denied or affected by any statute. There might be some reason for holding that when such motion is made upon the ground that a fair and impartial trial cannot be had, or that the convenience of witnesses and the ends of justice would be promoted by a change of venue, a court would be justified in declining to hear such motion until, by the joining of issue, it should appear that there would be a trial, and some cases might be cited from other jurisdictions to that effect, but there is no reason whatever, in the absence of a statute denying the right, to hold that such a motion is premature before answer, when the ground of the motion is that the action is not brought in the proper county. The general rule that should govern in all cases is that the motion should be made without unnecessary delay, and before doing anything that should amount to a waiver of the right. 4 Ency. Pl. & Pr. 421. See, also, *McNair v. Tucker*, 24 S. C. 107.

The remaining exceptions, in so far as

they raise any material question, are controlled by what has been already determined.

The exceptions are overruled and the judgment of the circuit court is affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(72 S. C. 587)

FISHBURNE v. MINOTT.

(Supreme Court of South Carolina. Nov. 7, 1905.)

1. APPEAL—DISMISSAL OF ACTION.

The Supreme Court on appeal will not entertain a motion presented there for the first time to dismiss and strike from the files of the court a case because frivolous and vexatious.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1223-1226.]

2. PLEADING—EXTENDING TIME TO ANSWER.

Under Code Civ. Proc. § 405, providing that the time within which any proceeding in an action must be had after its commencement may be enlarged, on an affidavit therefor, to be served with a copy of the order, does not require notice of an application to extend time to answer or demur supported by affidavit to be served on the adverse party.

3. SAME—AFFIDAVIT.

Circuit court rule 19, providing that no order extending the time to answer or demur shall be granted unless the party applying therefor shall present a certificate of his attorney that from the statement to him by defendant he believes defendant has a good defense, does not apply where two of the defendants are out of the United States, and the other two are dependent on them for information necessary for their defense.

Appeal from Common Pleas Circuit Court of Charleston County; Dantzler, Judge.

Action by Julian Fishburne against Harriott K. Minott, Mary E. Lowndes, H. A. M. Smith, G. H. Sass, master, and his sureties. From order extending time of defendants to answer, plaintiff appeals. Affirmed.

Julian Fishburne, in pro. per. Mitchel & Smith, for respondent.

JONES, J. These are two separate appeals from separate orders of Judge Dantzler granted in the above-stated case, both dated September 22, 1904, one granting defendants Julian Mitchel and Henry A. M. Smith additional time in which to answer or demur or take other proceedings, the other granting the same right to the defendants Harriott K. Minott and Mary E. Lowndes. The summons and complaint were personally served on Harriott K. Minott and Mary E. Lowndes on the 9th day of September, 1904, and copies of the summons and complaint were sent by mail addressed to Julian Mitchel and Henry A. M. Smith on the 10th day of September, 1904. On September 22, 1904, Julian Mitchel, Jr., on behalf of these defendants, on an application at chambers, without notice to the plaintiff, procured the orders in question enlarging the time of answering, etc., until November 10, 1904, on his showing by affidavit that copies of the sum-

mons and complaint addressed to Henry A. M. Smith and Julian Mitchel were received at the office of Mitchel & Smith (of which firm he was a member) on the 12th day of September, 1904, and that the defendants Henry A. M. Smith and Julian Mitchel were at that time without the United States of America, in the kingdom of Great Britain, and were not expected to return within the United States until October 25, 1904. It further appeared by affidavit that the defendants Harriott K. Minott and Mary E. Lowndes were aunts of Henry A. M. Smith, and that he had entire charge and control of all their business interests, and had been their legal adviser and attorney for the past 15 years, and that said defendants were ignorant of all the matter alleged in the complaint, and that it was impossible for them to prepare their defense without consultation with their said agent and attorney.

1. Before proceeding to consider appellant's exceptions, we will notice briefly a preliminary motion submitted by respondents, that this court dismiss and strike the above-entitled cause from the files of the Supreme and circuit courts, on the ground that the same is frivolous and vexatious. It is contended that this court has the inherent power to grant such motion, and should exercise the power in this case. We are of the opinion that such a motion should not be first addressed to this court. Such a motion, being based upon the allegations of the complaint, is in the nature of a demurrer to the complaint. If the complaint states facts sufficient to constitute a cause of action, it is not frivolous, and, if it does not state facts sufficient to constitute a cause of action, the defendant has an adequate Code remedy by demurrer or motion to dismiss in the nature of a demurrer. Section 288 of the Code provides a method of procedure in case a demurrer, answer, or reply be frivolous, but the Code makes no express provision for summarily disposing of a complaint that is frivolous. Section 161 of the Code of Civil Procedure of 1902 provides that "there shall be no other forms of pleading in civil actions in courts of record in this state, and no other rules by which the sufficiency of the pleadings is to be determined, than those prescribed by this Code of Procedure." It may be that the circuit court, independent of the Code provisions, has the inherent power to summarily dismiss a complaint as frivolous and vexatious and an abuse of the process of the court (a power, if it exists, to be rarely exercised and only in a very clear case), but as to that we are not called upon to express an opinion. It is sufficient to say that this court as an appellate tribunal will not entertain such a motion presented here for the first time. This court has held that a demurrer to a complaint for insufficiency cannot be interposed for the first time in the Supreme Court. *Green v. Green*, 50 S. C. 528, 27 S. E. 952, 62 Am. St. Rep. 846. The reason

is quite as strong for declining to entertain this motion, which is in the nature of a demurrer for insufficiency. It is therefore adjudged that the motion be denied.

2. With respect to the orders in question, the appellant contends, first, that they are erroneous because no notice of application therefor was given. Section 195 of the Code of Civil Procedure provides that the court may, "in its discretion and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this Code of Procedure, or by an order enlarge such time," etc. Section 405 of the Code of Civil Procedure provides: "The time within which any proceeding in an action must be had after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a judge of the circuit court. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded." These sections give to the circuit court discretionary power, upon an affidavit showing grounds therefor, to enlarge the time for serving an answer or demurrer upon an *ex parte* application without notice. The statute does not require notice of the application as a condition for the exercise of such power; the only condition imposed being that there should be an affidavit showing grounds therefor. The provision that the order may be disregarded, unless a copy of such affidavit be served with a copy of the order, implies that the adverse party need not have notice before the granting of the order. Rule 57 of the circuit court does provide that "all questions for argument and all motions shall be brought before the court on a notice, or by an order to show cause," etc. If this rule of court be construed to apply to a motion of this kind, the effect would be to impose a condition on the exercise of the power to enlarge the time for answering, etc., which the statute granting the power does not impose. In the case of *Grollman v. Lipsitz*, 43 S. C. 330, 21 S. E. 272, this court held that rule 66 of the circuit court, requiring undertakings in attachment to be witnessed, was inoperative, as a rule of court cannot impose conditions not required by the statute. Section 403 of the Code implies that there are motions in which previous notice is not necessary by providing for four days' notice of a motion when notice is necessary. See *Latimer v. Sullivan*, 37 S. C. 120, 15 S. E. 798. The orders do not operate to the prejudice of the appellant, and do not fall within that class of motions which in their nature are such as, if granted, would affect the right of the adverse party and ought, therefore, to be noticed.

3. The only other question which requires any notice is that the orders conflict with rule 19 of the circuit court, which provides that "no order extending the time to answer

or demur to a complaint shall be granted unless the party applying for such order shall present to the judge to whom the application shall be made a certificate of the attorney or counsel retained to defend the action, that from the statement made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits," etc. Under the circumstances stated, it was impossible to comply with this rule; two of the defendants being out of the United States and the other two being dependent upon one of the absent defendants for information necessary for their defense in this case. Speaking generally with reference to all the exceptions made, they do not show that the judge committed any error of law, or in any wise abused his discretion in granting the orders in question. It is therefore the judgment of this court that the exceptions be overruled, and the said orders enlarging the time for answering, etc., be affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(124 Ga. 606)

HOWELL v. STATE.

(Supreme Court of Georgia. Jan. 13, 1906.)

1. INTOXICATING LIQUORS—ILLEGAL SALE — INDICTMENT.

An indictment for the unlawful sale of intoxicating liquor, contrary to the local option liquor law, need not allege that the sale was for a valuable consideration.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 236.]

2. CRIMINAL LAW—INSTRUCTIONS—APPEAL.

As has frequently been ruled, the failure to charge some other legal proposition applicable to the case is not available for an assignment of error on a charge in itself correct.

3. SAME—INSTRUCTIONS.

It was not error for the judge to give in charge to the jury sections 980 and 987 of the Penal Code of 1895, relating to the amount of mental conviction required to warrant a verdict of guilty.

4. INTOXICATING LIQUORS — ILLEGAL SALE—INSTRUCTIONS.

Nor was it error for the court to instruct the jury that the accused was charged with the violation of the local option liquor law, and to read to them section 1548 of the Political Code of 1895, relating to that law, and to charge them that peach brandy is an alcoholic liquor, which, if drunk to excess, will produce intoxication.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 336.]

5. CRIMINAL LAW—INSTRUCTIONS.

A correct instruction as to the rules for weighing testimony and reconciling conflicts therein was not rendered erroneous by a failure to charge, in the same connection, the law as to the statement of the accused.

6. SAME—INSTRUCTIONS.

The assignment of error upon the instructions as to the evidence of good character was not meritorious.

7. SAME.

The long excerpt from the charge, set out in the sixth ground of the amended motion for

a new trial, was not "vague, uncertain, and confusing," nor did the court express therein an opinion as to what had been proved.

8. CRIMINAL LAW — INSTRUCTIONS — PRISONER'S STATEMENT.

As to the prisoner's statement, the court read to the jury all of section 1010 of the Penal Code of 1895, except the last sentence. Such instruction was correct, and was not rendered erroneous by the failure of the court to tell the jury, in the same connection, that, if they believed the statement they should acquit the accused, or by the failure to instruct them that they were the exclusive judges of the statement and authorized to give the accused the benefit of any part of it.

9. SAME—INSTRUCTIONS AS TO VERDICT.

Where the charge of the court was full, fair, and substantially correct on all the issues in the case, the omission to instruct the jury as to the form of their verdict in the event they should find the accused not guilty was not cause for a new trial, when there was also an omission to instruct them as to the form of their verdict in the event they should find him guilty.

10. SAME—NEW TRIAL.

"An improper sentence is not a proper subject-matter of a motion for a new trial." *Truitt v. State* (decided January 12, 1906) 52 S. E. 890.

11. INTOXICATING LIQUORS—ILLEGAL SALE — EVIDENCE.

The evidence amply warranted the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Bill Howell was convicted of violation of a liquor law, and brings error. Affirmed.

Hines & Vinson, for plaintiff in error. R. W. Moore, for the State.

FISH, C. J. An indictment against Bill Howell charged that on a designated day, in a given county, he "did unlawfully sell" spirituous, malt, alcoholic, and intoxicating liquors, other than domestic wines, to named persons, contrary to the laws of the state, etc. The indictment was demurred to on the ground that it failed to charge that anything of value was paid for the liquor. The demurrer was overruled, and the accused accepted pendente lite. On the trial there was a verdict of guilty. The accused moved for a new trial, which was refused, and the case is here upon exceptions to the overruling of the demurrer and the motion for a new trial.

1. Section 451 of the Penal Code of 1895 declares: "Any person violating any provision of the local option law as embraced in sections 1541 to 1550, inclusive, of the Civil Code, shall be guilty of a misdemeanor." Section 1548 of the Political Code of 1895 provides: "If a majority of the votes cast at any election, held as by this chapter provided, shall be against the sale, it shall not be lawful for any person within the limits of such county to sell or barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or furnish at any other public places, any alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters,

or other drinks which if drunk to excess will produce intoxication." While the statute makes it penal "to sell or barter for valuable consideration" the liquors therein described, we are clearly of opinion that the words "for valuable consideration" are merely surplusage. The manifest purpose of the statute is to make unlawful the sale or barter, either directly or indirectly, or the giving away to induce trade at any place of business, or the furnishing at any other public place, in a prohibition county, of the liquors mentioned. "To sell property is, in the strict signification of the word 'sell,' to transfer it from one to another in consideration of a price paid or agreed to be paid in current money. And the word 'sold' imports a consideration of price." 25 Am. & Eng. Enc. L. 284. *Bouvier's Law Dict.* defines a "sale" to be "an agreement by which one of two contracting parties called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price"—citing 2 Kent, 363; *Pothier, Vente*, note 1. "A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent." *Five Per Cent. Cases*, 110 U. S. 471-478, 4 Sup. Ct. 210, 28 L. Ed. 108; *Northern Pac. R. Co. v. Sanders* (C. C.) 47 Fed. 604-606. "Sale" is a transmutation of property or a right from one man to another in consideration of a sum of money, as opposed to barter, exchange, and gifts. *Rapal & L. Dict.* "A sale in its broadest sense comprehends any contract for the transfer of property from one person to another for a valuable consideration. *Century Dictionary*; *Cain v. Ligon*, 71 Ga. 694, 51 Am. Rep. 281. It is often used in a more limited sense as embracing only those contracts which are founded upon a money consideration. In an act prohibiting the sale of intoxicating liquors the word 'sale' is to be construed in its broad sense, and therefore includes what is commonly known as barter and exchange." *James v. State*, 124 Ga. 72, 52 S. E. 295. As there must be a valuable consideration to constitute a sale, the words "to sell," in section 1548 of the Political Code of 1895, considered by themselves, necessarily mean to transfer the liquor for a valuable consideration. It follows that the demurrer was properly overruled.

2. On the trial the court instructed the jury as follows: "I charge you * * * that you are authorized to consider evidence as to the good character of the defendant. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury and to lead them to believe, in view of the improbability that a person of such character would be guilty of the offense charged, that the other evidence is false, or the witnesses are mistaken, and you are authorized, if you believe that the de-

fendant's character has been proven to be such and so good as to lead your minds to the belief that all of the testimony for the state is false, or such as to make you have a reasonable doubt of guilt, you should acquit him, but otherwise, if you do not find such proof of character as to justify this course." This charge was excepted to on the ground that "it took away from the consideration of the jury the good character of the defendant, unless the jury should determine that the evidence is false or the witnesses are mistaken; in other words, * * * that before they could consider the good character of the defendant they must at first come to the conclusion that the evidence for the state is false or the witnesses are mistaken, but, if they come to the conclusion that the evidence was false, they would not be authorized to consider the good character of the defendant." The exception was not well taken. *Seymour v. State*, 102 Ga. 803, 30 S. E. 263; *Rice, Evidence, Crim.* § 371.

3-11. The other assignments of error are sufficiently dealt with in the headnotes.

Judgment affirmed. All the Justices concurring.

(124 Ga. 243)

HILL v. LOUISVILLE & N. R. CO. et al.
(Supreme Court of Georgia. Nov. 13, 1905.)

1. CARRIERS—INJURY TO LICENSEE—MOVING TRAIN—NEGLIGENCE.

Where it was the custom of a railway company, at a given station on its line of road, to allow persons to get into its cars for the purpose of assisting passengers boarding the same, and also customary for it to give certain signals before the starting of the train, in order that such persons might safely alight, the company was not liable for the death of one who boarded its train for such purpose, and who, in attempting voluntarily to alight from the train after it had started without the usual signals, was by a sudden jerk of the train thrown under it and killed, when neither the conductor nor any other employé of the company had notice of the purpose of the deceased in boarding the train, or of his intention or attempt to alight therefrom.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1242.]

2. PLEADING—DEMURRER—CAUSE OF ACTION.

It is the duty of the trial judge to pass on the sufficiency of the facts alleged in a petition to show a cause of action in the plaintiff's favor, when this question is raised by demurrer, although the case be one wherein the plaintiff seeks to recover damages alleged to have been sustained in consequence of the negligence of the defendant.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 553-556.]

(Syllabus by the Court.)

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Action by Ida Hill, administrator, against the Louisville & Nashville Railroad Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

The petition of Mrs. A. E. Amaker made the following allegations: The Georgia

Railroad & Banking Company is a domestic corporation, owning a line of railway in Columbia county, Ga., which is operated by its lessees, the Louisville & Nashville Railway Company and the Atlantic Coast Line Railroad Company, under the name of the Georgia Railroad Company. Petitioner was the mother of W. A. Amaker, an unmarried son, upon whom she was entirely dependent for support, and who actually contributed to her support. On a specified day he went to Harlem, a station on defendants' road, in Columbia county for the purpose of assisting his sister-in-law and three small children in boarding defendant's train there as passengers. The train was behind schedule time, and as it approached the station he, his sister-in-law, and the three children ranged themselves beside the track, where passengers usually board the train, and as soon as the train stopped they proceeded with all due haste to board it. When he, "with all due haste and diligence, had gotten the children and bundles inside the door of the car, and a seat or two therefrom, and before either the mother or children were seated, and before he could deposit the bundles, said train of cars slowly started in motion, whereupon he threw the bundles down and rushed out of the car, by the door by which he had entered, onto the platform and down the steps, attempting with due diligence to alight therefrom; [and] while in the act of alighting with due caution a sudden lurch or jerk of the train threw him to the ground, and his right leg was caught under the train of cars, crushed, and mangled, producing injuries" from which he died in a few hours. When the train reached Harlem there were a number of passengers to get on and off. Neither the conductor nor any of the train employes came to assist the sister-in-law of petitioner's son and her children to get aboard, "although the conductor, flagman, and other employes saw them, or could have seen them, in the act of boarding the cars and after they entered the cars. * * * It was the custom of said conductor and the other employes of said train of cars, and the custom of the defendant in all its passenger trains, in receiving passengers at said station, before the train started, to halloo, 'All aboard!' to ring the bell or blow the whistle of the engine, so as to put persons assisting passengers to board the cars, and any other persons not passengers, and passengers intending to alight from the cars, on notice to leave the cars; but no notice of this kind or any other kind was given before the train of cars was put in motion. It is the custom of said defendant to permit persons not passengers to enter its cars at stations to assist passengers to board its cars and to alight therefrom." The train did not stop at the station a reasonable time to allow passengers to board the cars, nor to allow plaintiff's son to assist his sister-in-law and her children to get

aboard; and if reasonable time had been given him he would have alighted in safety. "At the time of his injury he was in the exercise of ordinary care and diligence, and could not have avoided his injuries, which resulted in his death, by the exercise of ordinary care and diligence." His age and earning capacity were set out, as well as the amount of damages claimed. The plaintiff died pending the suit, and Ida Hill, her administratrix, was made party plaintiff. A general demurrer to the petition was sustained, and the plaintiff excepted.

Henry C. Roney, for plaintiff in error.
Jos. B. & Bryan Cumming, for defendant in error.

FISH, O. J. By reference to the petition it will be seen that the allegations of negligence, briefly stated, were: (1) That it was the custom of the defendants to allow persons to enter the cars, in order to assist passengers boarding the train, and, before starting the train, to give certain signals for such persons to get off, but on this occasion none of the usual signals were given, and before Amaker, who, in assisting his sister-in-law and her children with their bundles, had entered the car, could deposit the bundles, and while he was standing in the aisle of the car, the train started off slowly, it not having stopped a reasonable length of time for him to render such assistance and leave the car in safety. (2) That upon the starting of the train he rushed out of the door, onto the platform, and down the steps of the car, to alight therefrom, and while in the act of alighting with due caution a sudden lurch or jerk of the train threw him to the ground, causing the injuries from which he died. Assuming, as we must in passing on the sufficiency of the petition to withstand the demurrer thereto, all the allegations of negligence on the part of the defendants to be true, we are clearly of opinion that no cause of action was set forth. In *Simmons v. Seaboard Air Line Railway*, 120 Ga. 225, 47 S. E. 570, it was held: "(1) If, with a clear chance to avoid the consequences of defendants' negligence or breach of duty, the plaintiff voluntarily assumes the risk occasioned thereby, such conduct on his part is not merely contributory negligence, lessening the amount of damages, but a failure to avoid danger, defeating the right to recover. (2) The fact that in stepping from a moving train the plaintiff may not have been guilty of negligence defeating his right to recover does not entitle him to a verdict, unless it also appears that the carrier was at the time guilty of negligence which was the proximate cause of the plaintiff's injury." As was said by Mr. Justice Lamar in rendering the opinion in that case, it is ordinarily a question for the jury to determine whether it is negligence, barring a recovery, for a passenger to step from a moving train; and a number of cases were

cited wherein this court decided such conduct did not prevent a recovery, when the passenger was injured as the result of a sudden and negligent jerk of the train while he was in the act of alighting. "But in all of these cases it will be seen that the mere fact that the passenger may not have been guilty of negligence was not the basis of his right to recover. Even if he was free from fault in stepping from the moving train, that did not make the company liable. It has also to appear that the carrier was guilty of negligence, and that negligence must have been shown to be the cause—the proximate cause—of the injury. *Hardwick v. Georgia R. Co.*, 85 Ga. 509, 11 S. E. 832." The negligence of the defendants, in the case now under consideration, was the starting of the train too soon and without giving the usual signals. After such negligence came into existence and after Amaker was fully aware of it, he, rather than to go back in the car and rely on his right of action, if any he had, for proximate damages resulting to him from such negligence (*Simmons v. Seaboard Air Line Ry.*, supra), voluntarily took the risk of alighting from the moving train. The petition alleged that Amaker assisted Mrs. Attaway, his sister-in-law, and her children, with their bundles, in boarding the train at the usual place for passengers to get on; "that there were a number of passengers to get off, and a number to board the cars; that neither the conductor of said train nor any of the employees thereof appeared to assist Mrs. Attaway, and her children to board the same, although the conductor, flagman, and other employees saw them, or could have seen them, in the act of boarding the cars and after they entered the cars." Even if from these allegations it could be legitimately inferred that the conductor or any employee of the defendants knew that Amaker had boarded the train, there was certainly nothing in the petition to show that the conductor, or any other employee of the defendants, knew that he got aboard merely to assist his relative and her children, and that he did not intend to accompany them on their journey.

No employee of the defendants knew, so far as the petition shows, of Amaker's intention, or of his attempt to alight, and therefore no opportunity was given defendants' employees, by skillful handling of the locomotive and train, to guard against a sudden jerk as he was in the act of alighting. The jerk was not alleged to be negligent, and he was bound to anticipate the usual jerks incident to the running of the train.

Granting that the defendants owed Amaker the duty of stopping the train a reasonable length of time for him to assist his relatives in boarding it and securing seats or depositing their bundles, and for him to then alight, and that they owed him the further duty of giving the usual signals to

alight, and that they failed to perform such duties, it is clear that their negligence in these respects was not the proximate cause of his injuries. He knew of such prior negligence of the defendants, and had full opportunity to escape its consequences. With such clear chance, he chose not to avoid, but to risk, the danger of alighting from the moving train, and, as was said in *Simmons v. Seaboard Air Line Railway Co.*, supra: "This was not contributory negligence lessening the damages, but the failure to avoid a known danger which defeats [a] right to recover" for his death. That the plaintiff was not entitled to recover on the allegations of the petition, see *Coleman v. Georgia Railroad & Banking Co.*, 84 Ga. 1, 10 S. E. 498, and *McLarin v. Atlanta & West Point R. Co.*, 85 Ga. 504, 11 S. E. 840. In this connection, see, also, *Meeks v. Atlantic & Birmingham R. Co.*, 122 Ga. 268, 50 S. E. 99. In *Suber v. Georgia, Carolina & Northern Ry. Co.*, 96 Ga. 42, 23 S. E. 387, relied on by counsel for plaintiff in error, it appeared that the conductor of the train knew of Suber's intention to assist his relatives in boarding the train and that he did not intend to become a passenger.

2. Counsel for plaintiff in error contended that, as the case involved the question of negligence, the judge should have submitted it to the jury, and it was error for him to decide the question. It is the duty of the trial judge to pass upon the sufficiency of the facts alleged in a petition to show a cause of action in the plaintiff's favor, when this question is raised by demurrer, although the case be one wherein the plaintiff seeks to recover damages alleged to have been sustained in consequence of the defendants' negligence. *Jarrett v. Atlanta & West Point R. Co.*, 83 Ga. 347, 9 S. E. 681.

Judgment affirmed. All the Justices concur.

(124 Ga. 515)

ANDREW v. CARITHERS.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence, so far as it was material to the issues involved, was purely cumulative in character, and furnished no ground for the grant of a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 218-220.]

2. APPEAL—HARMLESS ERROR.

The exclusion of evidence as to the market value of the land in controversy, even if erroneous, was harmless, for it went only to the question of the measure of the plaintiff's damage, and the jury by its verdict determined that she had not been damaged at all.

3. TRIAL—INSTRUCTIONS.

The charge of the court of which complaint was made merely presented to the jury the two conflicting theories contended for by the parties, giving correctly the law applicable to each theory, and leaving the jury to say which theory was established by the evidence. It was entirely free from error.

4. APPEAL—REVIEW—EVIDENCE.

The evidence was conflicting. That for the defendant abundantly supported his contentions. The jury found in his favor; the judge, by overruling the motion for a new trial, approved the verdict; and this court will not interfere with the judgment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3948-3950.]

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action between F. P. Andrew and J. J. Carithers. From the judgment, Andrew brings error. Affirmed.

Z. B. Rogers, for plaintiff in error. Jos. N. Worley, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 248)

BURKE & WILLIAMS v. MACKENZIE.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. GUARDIAN AND WARD—CONTRACTS.

A guardian cannot bind the estate of his ward by any contract other than those specially allowed by law.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 219.]

2. SAME—IMPROVEMENT OF REAL ESTATE.

A contract for the improvement of the real estate of the ward by the erection of buildings thereon is not one which the law authorizes the guardian to enter into and charge the ward's estate therefor.

3. EQUITY — JURISDICTION — IGNORANCE OF LAW.

Mere ignorance of the law, where there is no fraud or misplaced confidence, is not a ground for equitable relief.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 15, 16.]

4. SAME — UNAUTHORIZED IMPROVEMENTS ON WARD'S ESTATE.

The petition set forth no cause of action, and was properly dismissed on demurrer.

(Syllabus by the Court.)

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action by Burke & Williams against J. H. Mackenzie, guardian of L. E. Mackenzie. Judgment for defendant, and plaintiffs bring error. Affirmed.

Burke & Williams, a partnership, brought an equitable petition in the superior court of Burke county against J. H. Mackenzie, as guardian of L. E. Mackenzie, alleging: The defendant was guardian of his minor son, who owned an unimproved lot in Waynesboro, Ga., and defendant employed petitioners to erect a dwelling house thereon; the petitioners to furnish the labor and material at a price of \$1,440, which was subsequently increased by \$56.60. Petitioners erected the house, and received from the defendant from time to time various sums amounting to \$1,192.37, leaving a balance due them of \$304.23. Petitioners filed a lien, in terms of the statute, for the balance due.

The defendant filed a petition in the superior court, praying for an order authorizing him to mortgage the premises whereon the house was erected, for the purpose of improving the same and to pay for improvements already made upon the same, which had made it capable of yielding an income. This petition was granted, and an order passed as prayed. In the meantime the defendant moved into the house built by petitioners, and occupied the same with his family, but, since the granting of the order above set out, has failed and refused to mortgage the premises and pay petitioners. Petitioners alleged their ignorance of the law which imposed a liability upon a ward's estate for contracts of a guardian only in specified instances, the insolvency of the defendant as an individual, the value of the improvements, and the inadequacy of any remedy at law, and prayed for a general judgment for the foreclosure of their lien against the property, and alternatively for a judgment against the income of the property, and that a receiver be appointed to collect the rents and apply the same to petitioners' demand, and for general relief. A general demurrer was sustained, and the plaintiffs excepted.

H. J. Fullbright and W. R. Callaway, for plaintiffs in error. Brinson & Davis, for defendant in error.

COBB, P. J. "As a matter of law, guardians of the property of wards are trustees, whose powers over the property of their cestuis que trust are defined by law. Among these powers are not included the execution of a contract binding the estate of his wards." *Howard v. Cassels*, 105 Ga. 416, 81 S. E. 562, 70 Am. St. Rep. 44. See, also, *Fidelity Co. v. Rich*, 122 Ga. 506, 50 S. E. 338. The general rule is that trustees are not authorized to create any lien upon the trust estate, except such as are authorized by law. Civ. Code 1895, § 3186. The guardian cannot, by any contract, except those specially allowed by law, bind his ward's property or create any lien thereon. Civ. Code 1895, § 2555. It is, therefore, incumbent upon one seeking to charge the ward's property by a contract of the guardian to show that the claim set up by him is one which the law specially authorized the guardian to contract and bind the ward's property therefor. The law authorizes a guardian to make contracts for labor and services for the benefit of the estate of the ward, and such contracts, when made in good faith, are a charge upon the estate whenever approved by the ordinary. Civ. Code 1895, § 2549. If the claim of the plaintiffs is such that the ward's estate is chargeable therefor, it must be under the provision of law just referred to; for there is no other that our attention has been called to which has any bearing upon the subject. The claim does not fall within the

terms of this section. The contract of the guardian for the erection of the house was not a contract for labor and services for the benefit of the ward's estate, within the meaning of that law. The undertaking of the guardian, therefore, was simply an individual undertaking on his part, and the plaintiffs must look to him for payment, unless the allegations of the petition are such that the principles of equity would authorize relief to be granted either by charging the corpus of the estate or the income or some part thereof of the property improved. The corpus cannot be charged with this claim.

It is therefore to be determined whether any portion of the income should be subjected in equity to the payment of the debt due the plaintiffs. The plaintiffs knew that the property belonged to the ward. Their claim of equity arose from their ignorance of the law that the guardian could not charge the estate of the ward by a contract of the character entered into by them. Their ignorance of the law, when there is no fraud or misplaced confidence, is no more a ground of relief in equity than such ignorance would be at law. In *Malone v. Bulce*, 60 Ga. 152, there was ignorance as to a fact—that is, as to who was the true owner of the property which was improved under the contract made with the trustee; the plaintiffs in that case being under the impression that they were dealing with the defendant as an individual, and improving his property, when, as a matter of fact, he held the title as trustee. A guardian in certain instances, by having his accounts approved by the ordinary, may place himself in a position where he would obtain credit in a settlement with the ward for amounts paid out by him. But this does not authorize him to make contracts from which a right will accrue to the person contracted with to bring a suit subjecting the ward's estate to the payment of the debt. The case is one of peculiar hardship, but no more peculiar than any case where ignorance of the law is involved and loss results from such ignorance. The defendant was under no legal obligation to the plaintiff to obtain an order from the judge of the superior court to authorize an incumbrance to be placed upon the ward's property for the purpose of paying the debt, and equity, therefore, will not compel the guardian to proceed under an order thus obtained. If the guardian should see fit to act under this order, it may be that in a settlement with his ward he would be entitled to credit for the amount paid thereunder to the plaintiffs; but the plaintiffs cannot compel him to incumber the estate for the purpose of making the payment. The petition set forth no cause of action, and was properly dismissed on demurrer.

Judgment affirmed. All the Justices concurring.

(124 Ga. 251)

BAIRD v. SMITH.

(Supreme Court of Georgia. Nov. 18, 1905.)

1. JUSTICES OF THE PEACE — CERTIORARI — ANSWER—EXCEPTIONS.

It is not error to overrule exceptions to the answer of a justice of the peace to a writ of certiorari, where the evidence alleged in such exceptions to have been omitted was immaterial, and where the answer contained substantially all of the evidence introduced on the trial that was favorable to the party excepting.

2. DEPOSITIONS—OBJECTIONS—PREAMBLE.

An objection to the introduction of interrogatories, to be used in the justice's court of the 120th district, G. M., Richmond county, on the ground that in the preamble or heading of the answers to the same the parties acting as commissioners referred to the case as one pending "in the justice court of Dooly county, 120th district, G. M.," was properly overruled, where it appeared that the case and court in which it was pending were properly stated in the caption to the interrogatories and also at the head of the answers.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by G. W. Smith against H. W. Baird. Judgment for plaintiff, defendant brings error. Affirmed.

Smith sued Baird in a justice's court for rent. Baird acknowledged indebtedness, with the exception of one month's rent, as to which he denied liability. The evidence was that he and his mother and sister occupied the house of plaintiff. Baird testified that he vacated the premises on February 29th, leaving the house in the possession of his mother and sister, to whom he had previously sublet a part of the house, and that he notified his landlord of his action in the matter by a letter written March 2d, which he sent in regular course of mail. Smith testified, by interrogatories, that he received the letter on March 3d, but that he looked to the defendant to pay the rent for March; that the defendant's mother offered to pay a part of the rent for March, but he would not accept it, telling her to forward it to her son, to whom he looked for the payment of the rent. Upon judgment being rendered against the defendant, he carried the case by writ of certiorari to the superior court. In his answer to the writ the justice set forth substantially the same evidence contained in the petition for certiorari, omitting only to state that the defendant testified that he had told his mother and sister that they would have to make arrangements with Smith in regard to their remaining in the house longer than February 29th, on which day he intended giving up the premises, and that he "admitted that he was due Mr. Smith rent for three months, one month in 1902, and January and February, 1904, at \$9 per month, amounting to \$27." Before the calling of the case the defendant objected to the answer of the magistrate, for the reason that it failed to fully set out his testimony, which objection the court overruled, on the ground that

it should have been filed at the first term of the court, being in the nature of a traverse pro tanto. One of the grounds for certiorari urged in the court below was that on the trial of the case in the justice's court the magistrate admitted over the defendant's objection interrogatories of the plaintiff, the answers of which recited that they were to be used in the justice's court for the 120th district, G. M., of Dooly county, whereas the case was pending in the justice court of the 120th district, G. M., of Richmond county. After hearing the certiorari the same was overruled, and the defendant excepted.

Julian Z. Zachry, for plaintiff in error.
D. G. Fogarty, for defendant in error.

BECK, J. (after stating the facts). 1. Before this case was called for trial in the court below, the plaintiff in error filed objections to the answer of the justice of the peace, alleging that he had not fully set out in his answer the plaintiff's evidence, that the plaintiff in error had testified "that he left his mother and sister living in the house he rented from Smith, but told them they would have to make arrangements with Mr. Smith in regard to their remaining in the house any longer after February 29, 1904; that the house was rented by the month, and not by the year." Whether these objections are such exceptions to the justice's answer as are contemplated in Civ. Code 1905, § 4647, or whether they should be treated as a traverse pro tanto of the justice's answer, the overruling and disallowing them was not erroneous, because from no point of view can the evidence recited in them be considered as material to the cause of plaintiff in error; for had the testimony alleged in said objections to have been omitted been included in the evidence as set forth in the justice's answer, it could not have had the effect of altering or changing the judgment of the court, which was adverse to the defendant in the case. Under the testimony of Baird himself, he had rented Smith's house by the month, and, although he left the house on February 29th, he did not give his landlord, Smith, notice of his intention to quit until the 2d day of March. This notice was by a letter, which Smith did not receive until the 3d day of March; and it will be remembered that Baird had been occupying this house as a tenant by the month for three years, and his mother and sister, whom he had in the house with him, whether as renters or subtenants it is not necessary to discuss, continued to occupy the rented premises during the month of March.

2. The interrogatories should not have been suppressed for any reason argued in the objections of the plaintiff in error. It is true that the parties acting as commissioners had made a mistake in the caption or preamble to the answer, and had referred to the case as one pending "in the justice court of Dooly

county," while as a matter of fact the case was pending in the justice's court for the 120th district, G. M., of Richmond county; but in the caption to the interrogatories, the case, as well as the court in which it was pending, was properly stated, and then at the head of the answers and immediately preceding the caption thereto the case was again correctly stated, and the answers and interrogatories were returned together to the proper court. There could exist no doubt as to the case for which the evidence was intended. "Even where the answers to interrogatories were headed with a case different from that stated in the questions and commission, but there appeared enough to show that the answers were really intended for this latter case, it was held that they might be read in the latter case." *Mathis v. Colbert*, 24 Ga. 384.

Judgment affirmed. All the Justices concurring.

(124 Ga. 437)

ADKINS v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

The evidence being sufficient to warrant the verdict, and there being no complaint that any error of law was committed on the trial, the discretion of the court in refusing to grant a new trial will not be interfered with.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Charles Adkins was convicted of crime, and brings error. Affirmed.

Geo. A. H. Harris & Son, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 437)

JOHNSON v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

No error of law having been complained of, and the presiding judge having overruled the motion for a new trial and thus approved the verdict, and the evidence being sufficient to sustain it, this court will not interfere.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Daniel Johnson was convicted of crime, and brings error. Affirmed.

Geo. A. H. Harris & Son, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 437)

SPIVEY v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

No error of law was complained of; the evidence, while entirely circumstantial, was sufficient to authorize the verdict of guilty; and, the trial judge being satisfied therewith, this court will not interfere with his refusal to grant a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3068.]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Will Spivey was convicted of crime, and brings error. Affirmed.

Geo. A. H. Harris & Son, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concurring.

(104 Va. 733)

HOOVER et al. v. SAUNDERS.*

(Supreme Court of Appeals of Virginia. Jan. 18, 1906.)

1. STATUTES — CONSTRUCTION — GIVING EFFECT TO ENTIRE STATUTE.

A statute must be construed so as to make all its parts harmonize, if practicable, and give a sensible effect to each.

2. EXCEPTIONS, BILL OF — TIME FOR SIGNING — EXPIRATION OF TERM.

Code 1904, § 3385, providing that any bill of exceptions may be signed by the judge "either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within 30 days after the end of such term," gives the court power to retain the case, for the purpose of signing bill of exception, during the vacation immediately following the term at which the opinion excepted to is announced, and for 30 days after the adjournment of such term, if the vacation should last that long; but the beginning of the new term, although within the 30 days, puts an end to the court's jurisdiction for that purpose and it cannot afterwards be resumed.

Error to Corporation Court of Newport News.

Action by A. F. Saunders against W. B. Hoover and another. From a judgment for plaintiff, defendants bring error. Dismissed.

O. D. Batchelor and W. R. Perkins, for plaintiffs in error Jeffries & Lawless, for defendant in error.

HARRISON. J. We are met at the threshold of this case with a question of jurisdiction.

The term of the corporation court of the city of Newport News, at which the final judgment complained of was rendered, adjourned on December 10, 1904. At that term certain exceptions were taken to the opinions of the court. The next succeeding term of the court began its session on December 12, 1904. The bills of exception, which were taken during the term at which the judgment was rendered, were not signed until January 7, 1905, which was during the vacation following the last-mentioned term, which began on the 12th day of the preceding December.

Formerly, after the judgment became final by the adjournment of the court, jurisdiction over the case was lost, and with it the power of the court to sign the bills of exception. This rule was changed by statute approved December 31, 1903, which, so far as necessary to be quoted, is as follows:

"Any bill of exceptions may be tendered to the judge, and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within thirty days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon, and any bill of exceptions so tendered, and signed by the judge as aforesaid, either in term time or vacation, shall be a part of the record of the case." Va. Code 1904, § 3385.

The plaintiff in error insists that the power to sign the bills of exception is not limited to the period of the vacation immediately following the term at which the final judgment was rendered, but it is by the terms of the statute extended to a period of 30 days after the end of such term. This construction would eliminate from the statute entirely the words, "in vacation," and make it read, "any bill of exceptions may be tendered to the judge, and signed by him, either during the term or within 30 days after the end of such term," etc.

If the Legislature had intended that the exceptant should have 30 days after the adjournment of the term at which the final judgment was rendered in which to have his bills of exception signed, although the vacation following such term did not last for 30 days, its purpose could have been easily accomplished, as already seen, by omitting from the statute the words "in vacation." Upon well-settled principles we are not at liberty to deal with the statute in the manner indicated. It is a familiar canon of construction that every part of an act must be given effect if it be possible. A statute must be viewed in connection with the whole, so as to make all of its parts harmonize, if practicable, and give a sensible, intelligent effect to each. It is not to be presumed that the Legislature intended any part of a statute to be without meaning. On the contrary, the presumption is, as well on the ground of good faith as on the ground that the Legislature would not do a vain thing, that it intends its acts and every part of them to be valid and capable of being carried into effect. Sutherland on Stat. Constr. §§ 325-331; Dwarrris on Stat. Constr. pp. 188, 189, 271; Fox's Adm'rs v. Com., 16 Grat. 1; Life Ins. Co. v. Cogbill, 30 Grat. 72-81.

It is clear from the statute that, when the term has ended at which the final judgment was rendered without the bills of exception being signed, such bills cannot then be signed, except in vacation. This is imperative. The language of the statute is, "Either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within 30 days after the end of such term." The words "such term" clearly refer to the term at which the opinion was announced. Under the statute there are two limitations upon the time in which the bills of exception can be signed: First, it must be in vacation; and, second, it must be not later than 30 days after the adjournment of the term at which the opinion excepted to was announced. With most of our courts the vacations last longer than 30 days, and the purpose of the Legislature evidently was, where that was the case, to limit the time to 30 days, but in every case to limit the time in which bills of exception could be signed to the vacation following the term at which the final judgment was rendered.

*Rehearing denied.

The plaintiff in error seems to concede that the bills of exception can only be signed in vacation, after the adjournment of the term at which the opinion excepted to was announced, but contends that, inasmuch as the signing in this case was within the 30-day limit, the requirement of the statute is met, notwithstanding the fact that the signing was done during the vacation following the second term, which began December 12, 1904.

If this position were sound, the judge could, under the statute, notwithstanding the intervention of another term, sign the bill of exceptions during the vacation following such second term, or following any succeeding term, until 30 days had elapsed. As said by the learned counsel for the defendant in error, the court, as in this case, would have jurisdiction to sign the bills of exception for the first 4 or 5 days after it adjourned, then lose that jurisdiction during the succeeding term, and then, by the adjournment of that term, regain its jurisdiction, have the case again in its breast, with the power to sign bills of exception restored, for the next 5 or 6 days, then lose jurisdiction again when another term began, and so on from term to term until 30 days had been accomplished. It can hardly be supposed that the Legislature intended such a result, or intended to suspend the benefits of the judgment thus indefinitely, while the judgment debtor was dallying with the question whether or not he would perfect his bills of exception.

We are of opinion that the statute gives the court power to retain the case for the purpose of signing bills of exception during the vacation immediately following the term at which the opinion excepted to was announced, and for 30 days after the adjournment of such term, if the vacation should last that long, but that the beginning of a new term although within the 30 days, puts an end to the court's jurisdiction for that purpose, and it cannot afterwards be resumed.

It follows from what has been said that the corporation court of the city of Newport News was without jurisdiction to sign the bills of exception in this case after entering upon the new term which began December 12, 1904. The bills of exception are, therefore, not properly a part of the record before us, and for this reason the writ of error must be dismissed as improvidently awarded.

(58 W. Va. 595)

KARNES v. JOHNSTON.

(Supreme Court of Appeals of West Virginia.
Jan. 16, 1906.)

1. INSANE PERSONS—APPOINTMENT OF COMMITTEE—NOTICE.

The appointment by a county court of a committee for a person as insane, upon a finding by a justice that such person is insane un-

der an inquisition under section 9, c. 58, Code 1899, without notice to such person, is void.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, § 51.]

2. SAME—EVIDENCE OF INSANITY.

A justice's order finding that a person is insane, not committing him to a hospital for the insane, but leaving him freedom of person until the appointment of a committee, and then committing him to the custody of such committee, is not admissible as evidence of insanity in a proceeding to appoint a committee.

3. FORCIBLE ENTRY AND DETAINER — EVIDENCE OF ENTRY.

The plaintiff, in an action of unlawful entry and detainer appealed to the circuit court from a justice's court, must show that the defendant's entry was within two years before the action. The record must show that fact to sustain a judgment for the plaintiff.

(Syllabus by the Court.)

Error from Circuit Court, Mercer County. Action by Robert O. Karnes against James H. Johnston. Judgment for plaintiff, and defendant brings error. Reversed.

Hale & Pendleton, for plaintiff in error.
C. R. McNutt, for defendant in error.

BRANNON, J. Robert O. Karnes, as committee for Huldah Alvis, lunatic, brought an action of unlawful entry and detainer against James H. Johnston before a justice of Mercer county to recover possession of land, which went by appeal to the circuit court, where the case was tried by the judge in lieu of a jury, and judgment rendered for the plaintiff. Upon the trial the plaintiff gave in evidence, against the objection of the defendant, an order made by the county court reciting that a justice of the peace appeared in open court and made known to the county court on oath that Huldah Alvis was, in the mode prescribed by law, found by him to be a lunatic, and was so adjudged by said justice, and that the custody of her person had been by said justice directed to be turned over to her committee, when one should be appointed, and appointing Karnes a committee for her. No notice of this proceeding in the county court was given to Huldah Alvis. This court has decided that the appointment of a committee for an insane person by the county court or its clerk without notice is void. *South Penn Oil Co. v. McIntire*, 44 W. Va. 296, 28 S. E. 922. But it is said that the doctrine is only applicable under section 34 of Code 1899, c. 58, where a person is suspected of being a lunatic, and where it is sought to appoint a committee for him, and to adjudge him for the first time on same motion to be insane, and that section 33 does not require a notice where he has been found insane by a justice upon an inquisition under Code 1899, c. 58, § 9. The McIntire Case and others in this court were not cases where the person had been found by a justice to be insane, as in this case.

The question then arises, is notice of the appointment of a committee for a person as insane required where he has been found by a justice to be insane upon such inquisition?

It is argued that as section 83 authorizes a county court to appoint when a justice has found one insane, without providing for notice, and as section 84 provides that a county court may appoint when one is suspected of being insane, and in words requires notice, therefore no notice is required in this case, because the justice has found the person to be insane. If we give section 83 effect to warrant such appointment without notice, it would be unconstitutional, because it would deprive a person, without due process of law, of the dearest rights, personal freedom, which is "liberty," and the possession, perhaps during life, of his property. We should not give section 83 a construction rendering it unconstitutional; but we should adopt such a process under it as would not render it obnoxious to the Constitution. In some instances a statute will be, or will not be, unconstitutional dependent on a procedure under it. An instance is *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214, where it was held that the fact that legal proceedings under the process to enforce forfeiture of land for nonentry for taxes avoided the imputation of unconstitutionality against the forfeiture clause of our Constitution. There is section 83 giving power, so far as its dry letter goes, to appoint a committee merely upon a justice finding lunacy; but there is also the constitutional demand that no one shall be deprived of liberty or property without due process. The judiciary, in the practical application of section 83, must call for a procedure demanded by the Constitution. As we said in *Evans v. Johnson*, 39 W. Va. 303, 19 S. E. 624, 23 L. R. A. 737, 45 Am. St. Rep. 912: "A statute will not be construed to authorize proceedings affecting a man's person or property without notice. It does not dispense with notice." Notice is presumed to have been intended by the Legislature, unless in words denied. If such finding by a justice were conclusive upon the insane person, then notice would seem to be useless. It is effectual to commit him to a hospital for insane. But the question is, how far is such finding of a justice operative in a collateral proceeding, a distinct proceeding, namely, a proceeding for the appointment of a committee? In such collateral proceeding it is not conclusive, but only an item of evidence, *prima facie* evidence of the fact of insanity. 16 Am. & Eng. Ency. L. (2d Ed.) 606. It would be going far to say that the finding of a justice upon an inquisition of lunacy under section 9, c. 58, Code 1899, which has for its sole and only purpose the confinement of a lunatic in a hospital, has the further effect, the conclusive effect, of establishing insanity for all purposes; that it can be made a basis, without further question or contestation, of an order for the appointment of a committee to deprive the person of his property. It is only *prima facie* evidence of insanity—admissible, but not conclusive. The party has right to contest it.

The finding of the inferior tribunal cannot bar the right of the party to contest the charge of insanity and prevent the appointment of a committee. The two proceedings are distinct. *Harrison v. Garnett*, 86 Va. 763, 11 S. E. 123. Therefore he must have notice, because he has a right to meet and defeat the *prima facie* case made by the finding of the justice.

It is argued in a brief that under circumstances the judgments of inferior tribunals are to be regarded as effective as though of courts of general jurisdiction. The general rule is that jurisdictional facts must appear in the justice's record. The counsel admits this proposition, but lays down the proposition above stated of the finality of justices' judgments; but in laying it down he cites the *Ency. Pl. & Prac.* vol. 12, 672, stating that where it appears affirmatively that the justice has acquired jurisdiction, "both of the subject-matter of the action and the person of the defendant, then the same presumptions are indulged in favor of the regularity and validity of the proceedings of such justice's court as are extended to courts of general jurisdiction." That is a correct statement of the law, and is so laid down in *Shank v. Town of Ravenswood*, 43 W. Va. 242, 27 S. E. 223. But note that authority demands that there be jurisdiction of the person and subject-matter. There is no jurisdiction over Huldah Alvis, for want of notice. Therefore the order of the county court appointing Johnston a committee is void, and was not evidence.

There is another reason why the county court order is abortive. The record shows that, whilst the justice declared Huldah Alvis insane, he did not find that she should be confined in a hospital for the insane, did not commit her to the jail, did not place in or commit her to the custody of the sheriff, nor turn her over to any person to be kept and cared for, as provided in section 10, c. 58, Code 1899, but left her in the exercise of freedom of her person until a committee should be appointed, and ordered that then she be turned over to such committee, and ordered her then into his custody. Now, the justice under said section exercises a special, a limited, jurisdiction, having for its sole and only purpose the finding of lunacy for commitment to the hospital for insane. His jurisdiction goes no further. In this case he exercised, not that jurisdiction, but assumed a general jurisdiction to pass on the question of insanity, not for the purpose of confining the lunatic in a hospital for detention and cure, but simply in order that a committee might be appointed for her. He could hold no inquest for such purpose. The law authorized him to find insanity; and, further, as part of his judgment, to commit to the hospital. For this reason, it does seem to me that the justice's finding is wholly abortive to warrant the appointment of a committee. *Harrison v. Garnett*, 86 Va. 763, 11 S. E. 123.

Another question is presented in the case.

The record does not show that the entry of the defendant was within two years next before the suit, as required by Code 1899, c. 50, § 211. A justice under this section cannot give judgment unless the entry was within two years next before the suit. But it is contended that the defendant has to prove this as matter of defense, as under the ordinary statute of limitation he must plead the statute and sustain his plea. The defendant contends that the plaintiff carries the burden of showing the entry within such two years. The jurisdiction of the justice under this statute is a special and limited one, conferred by the statute, and we think that the plaintiff must show, not only an entry, but an entry within two years before the suit. It is a part of the very letter of the statute giving the action; not the general statute of limitations. In *Billingsley v. Stutler*, 52 W. Va. 92, 43 S. E. 96, the syllabus says that "to sustain an action of unlawful entry and detainer, the plaintiff must show that his right of action accrued within three years from the commencement of his action, otherwise, he will be remitted to his action of ejectment." I cannot say that the point of where rests the burden of proof in this matter was exactly decided, but the language just quoted imports it.

Judgment reversed, and action dismissed.

(58 W. Va. 565)

BALTIMORE BARGAIN HOUSE v. ST. CLAIR et al.

(Supreme Court of Appeals of West Virginia. Jan. 16, 1906.)

1. APPEAL—WHEN LIES—APPOINTMENT OF RECEIVER.

A decree or order in a chancery case appointing a receiver, and thereby changing the possession, of personal property, is appealable.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 683.]

2. RECEIVERS—APPOINTMENT—DISCRETION OF COURT.

The appointment of a receiver is not a matter of right. The power to appoint is a discretionary one, to be exercised with great circumspection. The discretion is not arbitrary or absolute, but sound and judicial.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 14.]

3. SAME—NOTICE OF APPLICATION.

There is no principle of the law of receivership of greater wisdom and more firmly established than that requiring notice of the application.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 54.]

4. SAME.

A receiver of personal property may be appointed in vacation, without notice of the application, before service of process in the suit, in cases in which to require notice would be unreasonable, or would likely defeat the purpose for which a receiver is necessary, and in cases of great emergency; these cases constituting exceptions to the general rule requiring notice.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 55, 56.]

5. SAME—FAILURE TO GIVE NOTICE.

Where notice is not given, the bill should, in addition to showing the necessity for the

appointment of a receiver, set out the grounds which excuse failure to give notice; or they must at least appear by the affidavits filed in support of the application.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 57, 62.]

6. TRUSTS—EQUITY—REMOVAL OF TRUSTEE.

Equity, by virtue of its general jurisdiction over the administration of trusts, has power to remove trustees for cause.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 216-218.]

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—REMOVAL OF TRUSTEE—BILL IN EQUITY.

A bill brought to remove a trustee to whom personal property has been assigned for the benefit of creditors, and to appoint a receiver for the trust property, to be sufficient, must contain full and precise allegations showing the necessity for the removal, and that there is danger of loss or misappropriation of the trust property.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, §§ 696, 697.]

8. RECEIVERS—APPOINTMENT.

A receiver may only be appointed in a pending case. A suit does not lie for the sole purpose of appointing a receiver, but the court must have jurisdiction of the suit on some other ground before it can make the appointment.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 5-11.]

9. SAME.

The appointment of a receiver cannot be made in vacation any more than in term, except in a pending case.

10. INJUNCTION—BILL—VERIFICATION.

A bill of injunction may be sworn to by the agent or attorney of the plaintiff, but, if so, it must appear from the verification that the person verifying the bill knows the contents thereof; otherwise, the verification is fatally defective.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 263, 265.]

(Syllabus by the Court.)

Appeal from Circuit Court, Taylor County.

Action by the Baltimore Bargain House against John G. St. Clair, trustee, and others. Decree for plaintiff, and defendants appeal. Reversed.

W. R. D. Dent and J. G. St. Clair, for appellants. Ira E. Robinson and Hugh Warder, for appellees.

COX, J. Mary L. Bell and Fanny E. Bell, partners in the mercantile business in the city of Grafton, under the firm name of "Bell's Racket Store," by deed dated and recorded on the 25th of July, 1904, made an assignment of all their stock of store goods to John G. St. Clair, trustee, for the benefit of their creditors. Two days previous to this assignment Fanny E. Bell, by deed of record, assigned her one-half interest in this stock of store goods to Hugh Warder, trustee, to secure and save harmless certain individual indorsers. On the 29th day of July, 1904, process was issued in this suit in chancery, brought in the circuit court of Taylor county by the Baltimore Bargain House, a corporation, against St. Clair, trustee, Mary L. Bell, Fanny E. Bell, Hugh Warder, trustee, and the creditors and indorsers secured by

the two deeds of assignment. The suit is for the purpose of removing St. Clair trustee, and appointing receivers to sell and dispose of the stock of store goods and collect the accounts, and for the ascertainment and payment of the partnership debts. Before process was served, and without notice, in vacation, on the 29th of July, 1904, the judge of the circuit court of Taylor county, upon presentation of the bill and exhibits, entered an order appointing John G. St. Clair and Hugh Warder special receivers of said stock of store goods, and directing them to take possession thereof and sell the same after executing bond, and enjoining St. Clair trustee from selling or disposing of the trust property and from collecting the accounts. On the 23d of August, 1904, St. Clair trustee and Mary L. Bell, before the judge in vacation, after notice, moved the dissolution of the injunction, which motion was overruled, and St. Clair trustee and Mary L. Bell appeal.

Our first duty is to determine the extent of the appeal granted. The petition for the appeal expressly prays for an appeal from the order refusing to dissolve the injunction. It also refers by date to the order appointing receivers and enjoining the trustee, and assigns errors therein. We think the petition, fairly construed, asks an appeal from both orders, and that the appeal granted was intended as an appeal from both. So treating the appeal, are both orders appealable? The seventh paragraph of section 1, c. 135, Code 1899, expressly gives an appeal from an order or decree in chancery refusing to dissolve an injunction, and from an order or decree requiring the possession or title of the property to be changed. The language used in the opinion in *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. 735, may be said to indicate that the provision in relation to change of possession applies only to real estate, and not to personal property. A doubt as to whether or not that provision applies to personal property is expressed in the cases of *Harris v. Hauser*, 26 W. Va. 595, and *Hutton v. Lockridge*, 27 W. Va. 435. However, the cases of *Robrecht v. Robrecht*, 46 W. Va. 738, 34 S. E. 801, and *Ruffner Bros. v. Mairs*, 33 W. Va. 655, 11 S. E. 5, hold that a decretal order appointing a receiver for personal property, and thereby changing the possession thereof, is appealable. See, also, *Shannon v. Hanks*, 88 Va. 338, 13 S. E. 437; *Barry v. Briggs*, 22 Mich. 205; *Lewis v. Campau*, 14 Mich. 458, 90 Am. Dec. 245. It seems clear that the provision permitting an appeal from an order or decree in chancery, where the possession of the property is changed, applies to personal property as well as to real estate.

Both orders being appealable, the question to be decided is: Were the appointment of receivers and the awarding of an injunction against the trustee proper? The receivers were appointed without notice, before service of process in this suit, by the judge

in vacation. The statute (section 28, c. 133, Code 1899) permits the appointment of a special receiver in any proper pending case, where there is danger of loss or misappropriation of the property involved, and expressly requires notice of the application for a receiver of real estate, or the rents, issues, and profits thereof. Therefore what we shall hereafter say in this opinion will relate to the appointment of receivers of personal property. The statute is silent as to notice of the application for a receiver of personal property. In *Ruffner Bros. v. Mairs*, supra, it is said that in the light of the authorities the better practice is to require notice to be given to the defendant before passing upon the application for a receiver, unless it be in cases of the greatest emergency and imperative necessity. In the case of *Oil Co. v. Gale*, 6 W. Va. 527, Judge Haymond, in delivering the opinion of the court, said: "It is true as a general rule, though not universal, that notice is, or should be, required of the time and place of making the application for the appointment of a special receiver. The authorities cited in support of this general rule show that there are recognized exceptions. These exceptions are such cases as that immediate action is or may be necessary to prevent great injury." Universally, so far as we have been able to examine, the authorities recognize that there are certain well-established exceptions to the general rule requiring notice of the application. *Fredenheim v. Rohr*, 87 Va. 764, 13 S. E. 193, 208; *Page on Receivers*, 148-150; *Moritz v. Miller*, 87 Ala. 331, 6 South. 269; *Hogg's Eq. Prin.* § 141; *Smith on Receiverships*, § 5; *High on Receivers*, § 117; note to *Cameron v. Imp. Co.*, 72 Am. St. Rep. 36, and cases cited; 17 Enc. Pl. & Pr. 717; *Anderson on Receivers*, §§ 121, 122, and 123. Classifications of exceptions to the general rule are given in 17 Enc. Pl. & Pr. 719, and in *Hogg's Eq. Prin.* § 141, and in *Smith on Receiverships*, § 5. It is clear from the authorities that in cases where to require notice would be unreasonable, or would likely defeat the very object for which a receiver is necessary, or where a great emergency exists, a receiver may be appointed without notice. It may be argued that our case of *Batson v. Findley*, 52 W. Va. 343, 43 S. E. 142, requires notice in all cases of ex parte or vacation applications. We do not so interpret that decision. The first point of the syllabus would seem to go that far, but, when read in the light of the opinion, it does not do so. In the opinion, on page 354 of 52 W. Va., and page 146 of 43 S. E., it is said: "In every instance, before process served—and the application is thus ex parte—such notice must be given, except in cases of emergency, where it is impracticable, else the appointment will be reversible." This explains point 1 of the syllabus, and reconciles the case on this point with our other decisions and the universal law of the land. Where

notice is not given, the bill should, in addition to showing the necessity for the appointment, set out the grounds which excuse failure to give notice; or they must at least appear by the affidavits filed in support of the application. 17 Enc. Pl. & Pr. 735; *Florence Bank v. U. S. Savings, etc., Co.*, 104 Ala. 297, 16 South. 110; *Wabash R. Co. v. Dykeman*, 133 Ind. 58, 32 N. E. 823; *French v. Gifford*, 30 Iowa, 148; *Anderson v. Cecil*, 86 Md. 490, 38 Atl. 1074; *Verplanck v. Mer. Ins. Co.*, 2 Paige (N. Y.) 438; *Virginia, etc., Steel Co. v. Wilder*, 88 Va. 942, 14 S. E. 808.

While a receiver for personal property may thus, in cases constituting exceptions to the general rule, be appointed in vacation without notice, yet the appointment of a receiver is not a matter of right. The power to appoint is a discretionary one, to be exercised with great circumspection. The discretion is not arbitrary or absolute, but sound and judicial. *Anderson on Receivers*, § 49. See, also, note 5. A court of equity, by virtue of its general jurisdiction over the administration of trusts, has the power to remove trustees for cause. *Rankin v. Bradford*, 1 Leigh, 163; *Shelton v. Jones' Adm'r*, 26 Grat. 891; *Lewis' Adm'r v. Glenn*, 84 Va. 947, 6 S. E. 866; *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. 735; *Machir v. Sehon, Sheriff, et al.*, 14 W. Va. 781. A bill brought to remove a trustee to whom personal property has been assigned for the benefit of creditors, and to appoint a receiver for the trust property, to be sufficient must contain full and precise allegations showing the necessity for the removal, and that there is danger of loss or misappropriation of the trust property. 28 Am. & Eng. Enc. Law, 838; note to *Lee v. Randolph*, 2 Hen. & M. 12; *Wilson v. Maddox*, 46 W. Va. 641, 33 S. E. 775. See, also, *Coal Co. v. Coal Co.*, 43 W. Va. 721, 29 S. E. 514; *Dunlap v. Hedges*, 35 W. Va. 287, 13 S. E. 656; *Penn v. Whiteheads*, 12 Grat. 74; *Page on Receivers*, § 137; *Anderson on Receivers*, § 663; Enc. Pl. & Pr. 723, 724, and cases cited in note 1, p. 724; *Hogg's Eq. Proc.* § 745.

The allegations of the plaintiff's bill claimed to justify the taking of the property out of the hands of the trustee and the placing of it in the hands of the receivers are, in substance, as follows: That the defendants *Mary L. and Fanny E. Bell*, partners, etc., are insolvent, and are indebted to plaintiff; that the assignment of the 25th of July, 1904, is void, as creating a preference; that plaintiff is not named therein; that the assignment requires the trustee to sell the trust property after four weeks' notice, and to pay the proceeds, first, to the expenses of sale, commissions, etc., and the remainder to *Mary L. and Fanny E. Bell*; that the trustee has not given bond, and refuses to do so; that the publication of notice of sale requires delay, during which rent, etc., will have to be paid, causing a waste of the property; that it is the intention of the trustee to carry out the provisions of the assignment, and, after pay-

ing the cost and expenses of sale, to pay the remainder to *Mary L. Bell and Fanny E. Bell*, ignoring the claims of creditors. The allegations are very general. The goods are not alleged to be perishable. The delay by notice and waste by payment of rent, as alleged, do not show unreasonable delay or waste. The amount of the rent is not stated. While it is alleged that the *Bells* are insolvent, yet they have assigned their property to a trustee for the benefit of their creditors. There is no allegation that the trustee is insolvent, or that he has lost, misapplied, or misappropriated any of the trust property. It is alleged that he has not given bond, and refuses to do so, but not that he has failed to give bond after notice, under section 6, c. 72, Code 1899, which then provided how a trustee may be required to give bond. The claim that the assignment is void as creating a preference is wholly without foundation, when the assignment is considered. It is for the benefit of all the creditors of the partnership, without preference or priority, naming some, and adding a general clause including all others. Plaintiff claims that it was not named in the assignment. Its debt was therein named to "Baltimore Bargain," instead of "Baltimore Bargain House." This is immaterial, because, if not named, it was, nevertheless, secured thereby. The claim that it is the intention of the trustee, after paying costs and expenses of sale, to carry out the provisions of the assignment, and pay the balance to the debtors, ignoring the creditors, is not sufficient as alleged. The bill makes this allegation upon information and belief, but does not allege that the trustee has ever expressed such intention. Again, the bill alleges that it is the intention of the trustee to carry out the provisions of the assignment. This is inconsistent with the allegation that the trustee intends to pay over the remainder of the proceeds to the debtors after paying the costs and expenses of sale, ignoring the creditors. The legal effect of the assignment is to give a lien to all the creditors of this insolvent firm. The trustee is bound, in the performance of his duties, by the legal effect of the instrument under which he acts. He cannot ignore the rights of creditors and pay to the debtors. From the allegations of the bill we find no absconding or nonresident debtor, no insolvent trustee, no emergency case, no excuse for failure to give notice; in fact, no facts justifying the appointment of a receiver, either with or without notice, or justifying the injunction against the trustee.

It is argued that the court had no jurisdiction to appoint a receiver in this cause, because the bill was not maintainable upon other grounds. A receiver may only be appointed in a pending case. A suit does not lie for the sole purpose of appointing a receiver, but the court must have jurisdiction of the suit on some other ground before it can make the appointment. Section 28, c.

133, Code 1899; *Rainey v. Freeport Smokeless C. & C. Co* (decided at this term) 52 S. E. 528; *Hogg's Eq. Proceed.* § 731; 17 Am. & Eng. Enc. Law, 684; *Harwell v. Potts*, 80 Ala. 70; *State v. Union Nat. Bank*, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; *Jones v. Schall*, 45 Mich. 380, 8 N. W. 68; *Mabon v. Ongley Elec. Co.*, 156 N. Y. 196, 50 N. E. 805; *Robinson v. W. Va. Loan Co. (C. C.)* 90 Fed. 770. An appointment cannot be made in vacation any more than in term, except in a pending case. *Harwell v. Potts*, supra; *State v. Union Nat. Bank*, supra; *Pressley v. Harrison*, 102 Ind. 14, 1 N. E. 188; *Pressley v. Lamd*, 105 Ind. 171, 4 N. E. 682; *Guy v. Doak*, 47 Kan. 236, 866, 27 Pac. 968. The bill does not ask or pray that the trust property be administered through the trustee. Its general object is to administer the trust property by means of receivers. It is not our province upon this appeal to pass finally upon the sufficiency of the bill farther than to repeat that its allegations are insufficient for the appointment of receivers, and an injunction against the trustee. It might be stated, as an additional reason for dissolving the injunction, that the bill was not properly verified, and that the exhibits, and the bill, without verification, do not show a proper case for injunction. The bill was sworn to by the attorney for the plaintiff. The verification used did not follow the form provided for an agent or attorney by section 42, c. 125, Code 1899, and was not to the same effect. While the attorney for the plaintiff verified in a positive manner, yet it does not appear from the verification that the attorney knew the contents of the bill. This is essential, and must appear from the verification; otherwise, it is fatally defective.

The order appointing receivers, entered on the 20th of July, 1904, and the order overruling the motion to dissolve the injunction, entered on the 23d of August, 1904, are reversed, and the motion to dissolve the injunction is sustained; and this cause is remanded for any further proceedings which may be proper herein.

(140 N. C. 205)

CRAWFORD v. MASTERS.

(Supreme Court of North Carolina. Dec. 12, 1905.)

1. APPEAL—REVIEW—DISCRETION OF TRIAL COURT.

Under Clark's Code, § 893, relating to issues of fact, the court, in addition to the issues in its discretion, may submit questions pertinent to the matters in controversy; but its refusal to do so is not reviewable.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3859.]

2. EJECTMENT—DISCLAIMER—PLEADING.

In an action for the recovery of land, if defendant wishes to disclaim as to any portion of the locus in quo, and put in issue the title to a specific portion, he must do so in his answer.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 196.]

3. JUDGMENT—CONFORMITY TO PLEADING AND VERDICT.

In an action for the recovery of land, the judgment must conform to the verdict in designating the extent of recovery, and must be rendered for the premises described in the complaint.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 434-454.]

4. EJECTMENT—JUDGMENT.

In an action for the recovery of land, where plaintiff alleged ownership and defendant admitted possession, and the court instructed that the burden was on plaintiff to establish by a preponderance of the evidence his right of possession to the boundary contended for, and as to the true location of his boundary set out in his deed, and if they found, by the greater weight of the evidence, that the boundary was as contended by defendant, they should answer the issue, an affirmative finding on the issue entitled plaintiff to judgment according to the description of the lot in his complaint.

5. APPEAL—HARMLESS ERROR.

In an action for the recovery of land, the admission of an agreement between third persons as to the measure of liability on breach of warranty, having no bearing on the issue, was not prejudicial to defendant.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4154, 4155.]

Appeal from Superior Court, McDowell County; McNeill, Judge.

Action by F. P. Crawford against D. S. Masters. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action for the recovery of the possession of a lot in the town of Marion. Plaintiff alleged that he was the owner of the lot, and that defendant was in possession and wrongfully detained the same. Defendant denied each allegation of the complaint. Plaintiff introduced grant and several deeds for the purpose of showing title out of the state, and that defendant and himself claimed under a common source. He introduced several deeds constituting his chain of title. The description of the lot in controversy, set out in the complaint, and the deed under which he claimed, is in the following words: "Also one other lot or parcel of land containing about three-fourths of an acre adjoining the above on the southwest, and is now inclosed with the above-named town lot. For the courses and distances reference can be had to a deed from E. S. Hull to John Isbell; said lots being sold by Benj. Weeks, administrator of John Isbell, etc." Plaintiff testified that he purchased the lot in controversy, together with adjoining lot, June 3, 1890, from J. S. Brown; that said Brown showed him the boundaries; that his son-in-law was there in possession; that both lots were inclosed as one by a rail fence, save a small part in front, which was inclosed with a paling; that he had been in possession, etc., up to time of bringing action. There was other testimony on behalf of plaintiff in regard to fence. The defendant introduced a number of witnesses contradicting plaintiff's testimony in respect to the location of the fence. At the close of defendant's evidence he admitted in open court that he was in possession of the lot west of the new

street. Defendant tendered the following issues: "(1) Is the plaintiff the owner and entitled to the lands described in the complaint? (2) Where is the western boundary of the second lot described in the complaint? (3) Is the defendant in possession of any land to which plaintiff has shown title?" The court declined to submit the issues, and in lieu thereof submitted the issue: "(1) Is the plaintiff the owner and entitled to the possession of the lands described in the complaint? Ans. Yes." Defendant excepted. The parties introduced a map showing the respective contentions in regard to the boundary. The plaintiff introduced an agreement entered into between W. R. Whitson and W. S. Masters in regard to the measure of liability in the event of a breach of warranty, etc. Defendant excepted. There was no exception to the charge as given. Defendant submitted several prayers for special instructions, some of which were declined. The defendant moved for judgment upon the verdict, which was refused, and he excepted. He also excepted to the form of the judgment, and appealed.

Justice & Pless, for appellant. P. J. Sinclair, for appellee.

CONNOR, J. (after stating the facts). The plaintiff alleged that he was the owner of the lot in controversy, and that defendant was in the wrongful possession. Both these averments defendant denied. Pending the trial defendant admitted that he was in possession of that portion of the lot in respect to which there was a controversy. With this admission there was but one issue arising upon the pleading—that of title. It is elementary that the issues should be directed to the matter alleged on the one side and denied on the other. If the judge, in his discretion, deem it proper, he may, in addition to the issues, submit questions to the jury pertinent to the matters in controversy; but he is not compelled to do so, and his refusal is not reviewable. Clark's Code, § 393, and cases cited. In an action for the recovery of land, if the defendant wishes to disclaim as to any portion of the locus in quo, and put in issue the title to only a specific portion, he should do so in his answer. If he denies the title to the entire boundary, and the issue is decided against him, the judgment will be signed in accordance with the allegation in the complaint, unless the jury shall, by their verdict, restrict the boundary of the recovery. Whatever may have been the rule under the action of ejectment, as it prevailed prior to the adoption of our Code of Procedure, in regard to the form and effect of the judgment, it is well settled that in the civil action for the recovery of real estate the judgment must follow and conform to the verdict in designating the extent of the recovery, and must be rendered for the premises described in the complaint. Sedg. & Wait, Trial Title, § 523. In this record the plaintiff alleged ownership

of a lot inclosed with another lot conveyed in the same deed. The boundaries were marked by a fence. There was a controversy as to the location of the fence. His honor instructed the jury that the burden was on the plaintiff to establish, by a preponderance of the evidence, his claim and right of possession up to the boundary contended for; that he must satisfy them as to the true location of his boundary and fence set out in his deed, as well as his possession within the same; that, if they found by the greater weight of the evidence that the fence was at the point contended for by the defendant (explaining by reference to the map the respective contentions), they should answer the issue "No." The finding upon the issue in view of the admission settled the matter in controversy, and entitled the plaintiff to judgment according to the description of the lot in his complaint. His honor's charge was full and clear, both in respect to the subject-matter of the litigation and the testimony bearing upon the respective contentions of the parties.

We have examined the instructions asked by the defendant, and think that, in so far as they were correct propositions, they were given by the judge below. The agreement between Whitson and Masters, to the introduction of which the defendant objected, does not appear to us to have much, if any, bearing upon the issue. We cannot see how its admission prejudiced the defendant. We have examined the entire record in the light of the defendant's exceptions and brief, and find no error. The case was fairly tried, and the judgment was drawn in accordance with the pleadings and verdict.

No error.

(140 N. C. 157)

FURR v. JOHNSON.

(Supreme Court of North Carolina. Dec. 5, 1905.)

1. MARRIAGE—LICENSE—WRONGFUL ISSUANCE—ACTION FOR PENALTY—INSTRUCTIONS.

In an action against a register of deeds to recover the statutory penalty for issuing, without plaintiff's consent, a license for the marriage of his daughter under 18 years of age, the court correctly charged that it was the duty of the register, in issuing a marriage license, to make such inquiry for legal objections to the marriage and as to the age of the parties as a prudent business man, acting in the most important affairs of life, would make, and to exercise his duties in such respect carefully and conscientiously, and not as a mere matter of form, and that, if the defendant failed so to do, he did not make reasonable investigation.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, § 34.]

2. SAME—REASONABLE INQUIRY BY OFFICER.

It was proper for the court to instruct the jury that if they found that the prospective groom told defendant that the girl was 18, that he had seen her age in the Bible, and that she had told him she was 18, and should find that defendant knew the witness well, and knew him to be a man of good character, and that he stated to defendant that the girl was 18 and that he lived just across the street from her

family, and defendant honestly believed such statements, he made reasonable inquiry.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, § 34.]

3. SAME — DUTY OF OFFICER — EXAMINING WITNESSES.

The act of 1877, imposing a penalty for issuing a license for the marriage of a girl under 18 without the consent of her father, etc., and declaring that the register shall have power to make inquiry by examination of the witnesses under oath, does not render an inquiry under oath a prerequisite to a reasonable inquiry.

4. SAME — ACTION FOR PENALTY — BURDEN OF PROOF.

Section 1816 of the statute in relation to the issuance of marriage licenses (Code 1883, p. 691) provides a penalty for knowingly and without reasonable inquiry issuing a license to any persons within the inhibition of the statute. *Held* that, in an action for the penalty, the burden is on plaintiff to show that the license was issued knowingly and without reasonable inquiry.

Appeal from Superior Court, Cabarrus County; Justice, Judge.

Action by E. A. Furr against W. Reece Johnson, as register of deeds, to recover a statutory penalty for issuing, without plaintiff's consent, a license for the marriage of his daughter. From a judgment in favor of defendant, plaintiff appeals. *Affirmed*.

T. D. Maness and Adams, Jerome & Armfield, for appellant. L. T. Hartsell and Montgomery & Crowell, for appellee.

CONNOR, J. This is an action against the register of deeds to recover the statutory penalty for issuing, without plaintiff's consent, a license for the marriage of his daughter, who was under 18 years of age and resided with him. The judge correctly charged that it was the duty of the register of deeds, in issuing a marriage license, "to make such inquiry for legal impediments to the marriage and as to the age of the parties as a prudent business man, acting in the most important affairs of life, would make, and to exercise his duties in this respect carefully and conscientiously, and not as a mere matter of form; and, if the defendant failed to do so in the issuing of the license for the marriage of plaintiff's daughter, then he did not make reasonable inquiry, and the jury will answer the third issue "No." Where there is a conflict of evidence, whether there has been "reasonable inquiry" is to be submitted to the jury upon all evidence under proper instructions; but, if the facts are agreed, it is a matter of law. *Joyner v. Roberts*, 114 N. C. 389, 19 S. E. 645; *Harrum v. Marsh*, 130 N. C. 154, 41 S. E. 6. The court instructed the jury, and, we think, properly, that if they found that "Goodman [the prospective groom] told the defendant that the girl was 18, for he had seen her age in the Bible and she had told him she was 18 years of age, and should further find from the evidence that the defendant knew the witness Lowder well, and knew him to be a man of good character, and that

he stated to Johnson that the girl was 18 years of age, and that he lived just across the street from her family, and signed the paper, not under oath, and that defendant honestly believed these statements and acted on them, believing them, the defendant made reasonable inquiry, and you will answer the third issue "Yes."

We cannot concur with the defendant's contention that there was not reasonable inquiry because the witnesses were not examined by the register under oath. The act of 1887 (Acts 1887, p. 583, c. 331), now Revisal, § 2067, does not require that the register shall make inquiry by examination of the witnesses in such cases under oath, but merely declares that he shall have "the power to do so." His using, or failing to use, such discretionary power, is merely a circumstance to be considered by the jury. In *Agent v. Willis*, 124 N. C. 29, 32 S. E. 322, the examination of the witness was made by the register upon oath, but the court held that, under the suspicious circumstances attendant upon that case, there was not reasonable inquiry. In *Trolinger v. Boroughs*, 133 N. C. 312, 45 S. E. 662, a rule easily understood and very proper to be followed is laid down: "While we may not prescribe any rule for the guidance of the register, it would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care."

In regard to the plaintiff's exception to his honor's instruction that the burden of proof is upon the plaintiff upon the third issue, it may be said the statute gives to any one who will sue for the same a penalty to be recovered of "every register of deeds who shall knowingly, or without reasonable inquiry, issue a marriage license for the marriage of any two persons within the inhibition. The cause of action, therefore, consists in the violation of section 1816 (Code 1883, p. 691), "knowingly and without reasonable inquiry." We cannot perceive why the burden of proof upon this issue is not upon the plaintiff. If the two first issues had been found for the plaintiff, and no verdict upon the third issue had been rendered, certainly no judgment could have been signed against defendant. The plaintiff would not have made out his case. It will hardly be contended that the court could, as matter of law, have instructed the jury to answer the third issue for the plaintiff, because the defendant had introduced no evidence tending to show that he did not have knowledge, or that he made reasonable inquiry. Yet

such is the duty of the court when the burden is upon the defendant and no evidence is introduced tending to persuade the jury to sustain his contention. Such is the basis and result of the application of the rule—the test. *Wallace v. Robeson*, 100 N. C. 207, 8 S. E. 650. If the general issue, as upon a plea of non debet, had been submitted, the court would instruct the jury that before they could find for the plaintiff he must show to them, by a preponderance of the evidence, a state of facts commensurate with the essential allegations of his complaint. The fact that the case was tried upon three issues does not change the rule. The burden of each issue remains on the plaintiff until he brings the acts of defendant within the penalizing language of the statute. While the burden of proving the issue is on the plaintiff, he may, as a part of his proof, rely upon the facts shown by him, and defendant's failure to introduce testimony peculiarly within his knowledge and possession, as tending to sustain his contention, and to persuade the jury to so find. This is a very different matter from casting the burden of proof on the issue upon the defendant. The rule of practice is illustrated in many cases, as, for instance, when the plaintiff, in actions to recover damage for negligence, invokes the doctrine *res ipsa loquitur*. As in those cases the physical facts speak for themselves, so here the manner in which and circumstances under which the defendants issued the license become evidential upon the question of knowledge or absence of reasonable inquiry. If the plaintiff relies upon the averment that the defendant knowingly issued the license in violation of the provisions of the statute, he certainly has the burden of proving the allegation. We are unable to see why the same rule does not obtain when he relies upon the averment that defendant did not make reasonable inquiry.

The rule laid down by Judge Elliott in his work on Evidence—quoted in *Meredith v. Railroad*, 137 N. C. 478, 50 S. E. 1: "As a rule, it is only where the fact negatived is peculiarly within the knowledge of the adversary that the burden is, in any sense shifted to the latter, and even then it is the burden of going forward rather than the burden of ultimately establishing the case. The fact that the party having peculiar knowledge of the matter fails to bring it forward may raise a presumption or justify an inference in favor of his adversary's claim, and thus to shift the burden of proceeding in order to win; but the burden of establishing the issue is not shifted, nor is it ordinarily determined in the first instance by the mere fact that a negative is involved, or that some fact is peculiarly within the knowledge of the adverse party"—is approved by us. While in many instances the plaintiff is required to prove a negative, he may, when the evidence is peculiarly within the

knowledge or possession of the defendant, rely upon defendant's failure to produce such evidence as a cogent fact tending to sustain his contention, and, considered with other circumstances, may persuade the jury to find the issue in his favor. This rule pertains only to the mode of proof, and not to the burden of the issue. *Stewart v. Carpet Co.*, 138 N. C. 80, 50 S. E. 562; *Ross v. Cotton Mill* (at this term) 52 S. E. 121. In this case defendant went upon the stand and testified in respect to the manner and extent of the inquiry made by him. The plaintiff likewise introduced testimony. His honor correctly charged the jury that the burden of proof, on the issue, was upon the plaintiff. If the Legislature intended to make the issuing of the license contrary to the statute a *prima facie* case, or presumptive evidence of knowledge, or want of reasonable inquiry, it could easily have done so by making the matter one of defense by way of a proviso, or, as it frequently does, by declaring that the proof of certain facts should constitute presumptive evidence, or declare them to be a *prima facie* case. Many of our criminal and penal statutes have such provisions. They have been sustained by this court. *State v. Barrett*, 138 N. C. 630, 50 S. E. 506.

The judgment must be affirmed.

(140 N. C. 163.)

SPRINKLE v. WELLBORN.

(Supreme Court of North Carolina. Dec. 5, 1905.)

1. DEED—FRAUD—PRESUMPTION.

Where, when a deed was executed, the grantor had not sufficient mental capacity to make it, and the grantee had notice thereof, fraud is presumed; that is, there is a constructive fraud, authorizing relief, though there was no actual fraud or undue influence.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 149, 151.]

2. CANCELLATION OF INSTRUMENTS—ALTERNATIVE RELIEF.

Where a vendee, who has obtained a deed by fraud, has conveyed the property to a bona fide purchaser, equity in a suit to cancel the deed, will give the original grantor a personal judgment against his grantee for the difference between the price he received for the land and what he paid for it.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 115.]

3. APPEAL—HARMLESS ERROR.

Striking out the answer of the jury to the issue whether there was actual fraud or undue influence in obtaining a deed, and substituting the opposite answer, is harmless, where fraud is to be presumed from the fact of insanity of the grantor.

4. SAME—OBJECTION NOT MADE AT TRIAL.

Objection to counsel having referred in argument to records as evidence, when they were merely introduced for the consideration of the court alone, for the purpose of passing on the competency of a witness, not having been made at the trial, may not thereafter be made.

5. SAME—OBJECTION WAIVED.

Objection to counsel for one party referring to certain records as evidence is waived by that party doing the same.

6. TRIAL—INSTRUCTIONS.

The court need not give a requested instruction, where it is substantially covered by instructions given.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

7. DEEDS — MENTAL CAPACITY OF GRANTOR — NOTICE TO GRANTEE.

Evidence in a suit to avoid a deed held sufficient to sustain a finding that grantee had notice that the grantor had not sufficient mental capacity to make the deed.

Appeal from Superior Court, Wilkes County; Cooke, Judge.

Action by Nancy Elvira Sprinkle, by W. R. Sprinkle, her guardian, against J. M. Wellborn and another. From an adverse judgment, defendant Wellborn appeals. **Affirmed.**

This action was brought by the plaintiff, Nancy Elvira Sprinkle, who is represented by her guardian, W. R. Sprinkle, against the defendant J. M. Wellborn to set aside a deed made by the said Nancy Elvira Sprinkle to the defendant Wellborn on the 19th day of October, 1886, for want of mental capacity to make the same, and for fraud and undue influence in procuring the execution of the said deed. Issues were submitted to the jury which, with the answers thereto, are as follows: "(1) Did Nancy E. Sprinkle at the time of executing the deed of October 19, 1886, have sufficient mental capacity to make the same? A. No. (2) If Nancy E. Sprinkle had not sufficient mental capacity at such time to make such deed, did J. M. Wellborn have notice of it? A. Yes. (3) Was any fraud or undue influence practiced on Nancy E. Sprinkle by J. M. Wellborn to induce her to make such deed? A. No. (4) What was the amount of the benefit derived by Nancy E. Sprinkle from the consideration for the deed to the river farm? A. [by consent]. \$1,299 [the amount of the Salmons mortgage debt]; the value of the mountain or Miller tract of land and the value of the cattle delivered to her, and all as of date October 19, 1886. (5) What was the value of the river farm October 19, 1886? A. \$4,000. (6) What has been the average annual rental value of said river farm since October 19, 1886? A. \$200. (7) What was the value of the mountain or Miller tract October 19, 1886? A. \$1,500. (8) What has been the average annual rental value of said mountain or Miller tract since October 19, 1886? A. \$75. (9) What was the value of the cattle received by Nancy E. Sprinkle in said trade? A. \$75. (10) If the said Nancy E. Sprinkle had not sufficient mental capacity to make said deed, did the defendant Greenwood have notice thereof? A. [by consent]. No. (11) Was the defendant Greenwood a purchaser for value without notice of any fraud on the part of Wellborn to procure the deed to himself, if any such was practiced? A. [by consent]. Yes." There was no objection to the issues. It is not necessary to state the evidence. It was voluminous, but the only ma-

terial portion of it will be stated in the opinion.

The defendant requested the court to give a number of instructions, all of which were given, except those numbered 3, 13, and 14, which will be noticed hereafter. The material instructions given in response to the defendant's prayers, upon the issue as to mental capacity, were as follows: "(1) The law fixes no particular standard of intelligence necessary to be possessed by parties in making a contract; and, although a person may not have sufficient intelligence to manage his affairs in a proper and prudent manner, still he may be capable of making a binding contract. (2) It is not required that a person should be able to make a disposition of his property with judgment and discretion. It is sufficient if he understands what he is about. If a person knows what he is doing and is aware of the nature of the particular transaction, such person has sufficient mental capacity to make a contract, although that person may not act wisely or discreetly, or make a good bargain. (3) If the jury find from the evidence that on the 19th of October, 1886, Nancy E. Sprinkle had sufficient mental capacity to understand what she was about and the nature and extent of the property when she executed the deed, and that she understood the nature and effect thereof, they will answer the first issue 'Yes,' although they also find from the evidence that she was eccentric, and that her mind was weak and flighty, and that the trade she made was not a prudent one, and was not made in the exercise of discretion and good judgment. (4) If the jury find from the evidence that at the time the deed was executed to wit, October 19, 1886, Nancy E. Sprinkle had sufficient mental capacity to understand and appreciate that she was making a deed by which she passed the title to the river farm to the defendant Wellborn, that she was depriving herself of the ownership and control thereof, and that she was getting in exchange therefor the farm in Ashe county and the cattle mentioned in the evidence, and that the mortgage to Salmons was to be paid by the defendant, then they will answer the first issue 'Yes,' although they may also find that it was not a prudent trade, and was not made with discretion and good judgment. (5) Mere weakness of mind and susceptibility to undue or fraudulent influences, however clearly shown, will not vitiate a contract unless it was induced by fraud. Where there is a legal capacity, there cannot be an equitable incapacity, apart from fraud. If a person be of sound mind, he has the right to dispose of his property, and his will stands in place of a reason, provided the contract justified the conclusion that he exercised deliberate judgment, such as it is and has not been circumvented or imposed upon by artifice or undue influence which amounts to fraud." The following in-

structions, which the defendant requested the court to give the jury, were refused: "(1) Unless the mind of such person is wholly incapable of any reflection or deliberate act, so that in fact he was unaware of the nature and effect of the particular transaction, such person in the eye of the law has sufficient mental capacity to make a contract. (2) Upon all of the evidence the jury is instructed that the defendant Wellborn did not have notice of any mental incapacity of Nancy E. Sprinkle, if any such existed. (3) The jury will answer the third issue 'No.'"

The court then charged the jury generally as follows: "Those who allege insanity, idiocy, imbecility, and incapacity must prove it by the greater weight of the evidence; must overcome the legal presumption of soundness of mind. Has the plaintiff overcome this presumption of law? If so, you will answer the first issue 'No,' and thereby declare that, when she made the deed, Elvira Sprinkle did not have that mental capacity which the law requires of those who dispose of their property. The law does not require that a person be able to dispose of his or her property with judgment and discretion, or be able to get the best of a trade. It is sufficient in law if he or she understands what he or she is doing and what they are about. The law does not require a high degree of intelligence, but it does require sufficient mind to know and comprehend the character of the act and to know what one is doing. Did Elvira Sprinkle, when she made the deed to the river farm, know what she was about; know the effect of the instrument she was signing; know that she was parting with her land and getting the land in Ashe county and the cattle and the payment of the mortgage in return? If she did not fully comprehend this, you will answer the issue 'No'; otherwise, you will answer it 'Yes.' You understand, of course, that you are inquiring into the contract of Elvira Sprinkle on October 19, 1886. Was she sound, then, and of sufficient mental capacity to make the deed on that day? Where one has sufficient mental capacity at the time he signs the deed to understand the nature and extent of the property disposed of, and the force and effect of his act in signing the deed, then he is capable of executing a deed. If you find that Nancy Sprinkle, at the time she signed the deed on the 19th October, 1886, had mind and intelligence sufficient to enable her to have a reasonable judgment of the kind and value of the property embraced in the deed, and to understand the effect of her act in making the deed, you should answer the first issue 'Yes'; but, if you shall find that she did not have such mind and intelligence as stated, you will answer the first issue 'No.'" The court instructed the jury on the law applicable to the other issues, recapitulating the evidence by grouping the same as applicable to the different issues, and explained the law arising thereon. The court instructed the

jury as to the difference between substantive evidence and corroborating and impeaching evidence, and then instructed them further, as follows: "The evidence of statements made in this case, by witnesses other than the parties to this suit, different from and inconsistent with the testimony given by such witnesses on this trial, was allowed only for the purpose of impeaching such witnesses, and is not to be considered as substantive evidence. Evidence of the statements of witnesses which accord with their evidence on the trial is only allowed for the purpose of corroborating such witnesses, and is not to be considered by the jury as substantive evidence."

After the verdict was returned the court found that the answer of the jury to the third issue was against the weight of the evidence, and set it aside, and that, upon the responses to the other issues, there was fraud in law. The court thereupon answered the third issue "Yes." The defendant excepted. During the trial the plaintiff introduced in evidence the record entitled "In the Matter of the Inquiry into the Mental Condition of Nancy E. Sprinkle," which was a proceeding instituted in 1893 under the statute; the record showing the appointment of W. R. Sprinkle as her guardian. In the said proceeding the jury found that she was "incompetent to manage her own business." The plaintiff then introduced the record in the case of Nancy E. Sims, by her guardian, v. W. M. Sims (N. C.) 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665, in which her marriage to the defendant was annulled by a judgment of the court based upon the verdict of a jury that she did not have sufficient mental capacity to enter into the contract of marriage. The records were each duly objected to by the defendant. The objections were overruled, and the defendant excepted. The records were offered solely for the consideration of the court, and in respect to them the following facts are stated: "The court held that these records were admitted only for the purpose of consideration by the court upon the question whether or not the defendant Wellborn was competent to testify as to the conversations and transactions between himself and the plaintiff, the objection to his competency being that she was now a lunatic, and the court so stated in the presence of the jury." The defendant then introduced the record of the second inquiry into the sanity of Nancy Sims, dated August, 1895, in which the jury found that she was sane and "competent to transact the ordinary business of life." The plaintiffs contended that the records they introduced should be admitted as evidence for the jury to consider, and the defendant insisted that the record they introduced should be admitted in the same way. The judge excluded all the records as evidence for the jury, but stated that, if he should decide later to admit the records as evi-

dence, he would so announce. The court did not decide to admit them as evidence. The defendant then read the deposition of Governor Glenn. After the close of the evidence, and while one of the counsel was addressing the jury, an attorney for the plaintiff came up to the bench and said to the judge that, as Governor Glenn's deposition had been introduced, he thought the court ought to allow the records to go to the jury as evidence, and wanted to know if the court would let him argue to the jury that they were evidence. The court said, "No," that those records were not in evidence, and that he must not refer to them in argument. The judge was engaged, during the arguments, in preparing instructions and considering the prayers for instruction handed up to him just before the argument commenced, and did not pay any attention to the arguments of counsel, and did not know, until after the verdict had been rendered, that counsel in their arguments had referred to the said records as evidence; but the court finds, after hearing the evidence of the attorneys, that one of the four attorneys for the plaintiff who addressed the jury (but not the one referred to above) in his argument did refer to the said records as evidence, and that the attorneys for the defendant also in their reply referred to the said records as evidence and discussed the same. The attention of the court was not called to this, nor any objection made to it during the argument; but the defendant, after verdict, called the court's attention to it, and moved to set aside the verdict on that ground. The counsel for the plaintiff, who referred to the records as evidence, had not been advised of what the court had said to his associate, neither had the counsel for the defendant.

There was a motion for a new trial based upon errors during the progress of the trial and objections to argument of counsel, as appears in the finding by the court, which motion was overruled. Judgment for plaintiff, and defendant appealed.

W. W. Barber, R. A. Doughton, and Manly & Hendren, for appellant. Shepherd & Shepherd and T. B. Finley, for appellee.

WALKER, J. (after stating the case). The jury found in this case, by consent, in their answers to the tenth and eleventh issues, that the defendant T. J. Greenwood had purchased the land in controversy for value and without notice of the mental incapacity of Nancy Elvira Sprinkle, and also without notice of any fraud of Wellborn, if there was any, in procuring the deed. Counsel for the plaintiff properly admitted that, under this finding, they could not proceed further against Greenwood, and the cause was therefore continued against Wellborn on the theory that, upon the verdict, he is liable for the value of the land, less the amount paid by him therefor; and for the difference between

these two amounts judgment was rendered in the court below. There is no serious contention, as we understand, that the defendant is not so liable, if the rulings of the court as to all issues, except the third, and consequently the verdict and the judgment, are free from error and can be sustained, though it was suggested that the liability was not so clearly apparent as to be conceded or taken for granted, without any good reason given or any authority cited to establish it. We will therefore consider this question before passing to the discussion of the other matters. The first essential element of a contract is consent, and there can be no true agreement without the capacity to understand it and freedom to accept or to reject the terms proposed. The parties must be able and willing to contract. If, therefore, one person induces another who lacks this capacity or this freedom to enter into an apparent contract, equity will not recognize the transaction, however, as one author says, it may be fenced by formal observances; but, deeming it fraudulent, will in proper cases afford relief against it at the suit of the party imposed upon. *Fetter on Equity*, 143. On this ground the contracts of idiots, lunatics, and other persons non compos mentis are generally regarded, in a certain sense, as invalid. It has been said by many courts that the contracts of a lunatic, made after the fact of insanity has been judicially ascertained, are absolutely void, and that he can have no power to contract at all until there is a reversal of the finding and he is permitted to resume control of his property. *Id.* 143; *Odom v. Riddick*, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686. We need not now decide what is the law in this respect, as there had been no inquisition of lunacy at the time the deed in this case was executed. We will have occasion, though, to advert to the nature and effect of such an inquisition hereafter in discussing another question.

In regard to a contract entered into by a person apparently sane, before the fact of insanity has been judicially established, the law is well settled, we believe, that such contracts are at most only voidable, and will not be set aside when the other party to be affected by the decree of the court had no notice of the fact of insanity, has derived no inequitable advantage, and the parties cannot be placed in statu quo. The reason for this distinction between contracts made when there has been office found and those when there has not is said by the authorities to be plain. "Insanity is one of the most mysterious diseases to which humanity is subject. The ripest professional skill and the keenest observation sometimes fail to detect it in its incipient stages. Sound law and good morals, therefore, alike forbid the rescission of a contract on the ground of insanity by one who is unable or unwilling to restore the property acquired thereunder

to the other party, who entered into it in good faith, in entire ignorance of the insanity, and without taking any advantage by reason thereof." Fetter on Equity, pp. 143, 144; Eaton on Equity, 316. "The mere fact that a man is of weak understanding, or is below the average of mankind in intellectual capacity, is not of itself an adequate ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance. But where mental weakness is accompanied by other inequitable incidents, such as undue influence, great ignorance, and want of advice, or inadequacy of consideration, equity will interfere and grant either affirmative or defensive relief." Eaton on Equity, p. 317. In the case of an insane person, one wholly incompetent to contract, the law presumes fraud from the condition of the parties, the same as it does in the case of a contract of a person under duress or undue influence, or of contracts between persons occupying a fiduciary relation. The presumption is stronger or weaker according to the position or condition of the parties with respect to each other. Fraud vitiates all contracts, but as a general rule it is not presumed, but must be proved. Proof is not dispensed with, but there are certain well-defined relations, as there are certain facts, when established, from which the law presumes fraud, and which, though not necessarily binding upon the jury, may answer as plenary proof of the fraud, unless the innocence of the party charged with its commission in some way appears. *Lee v. Pearce*, 68 N. C. 76.

In the classification of frauds of which a court of equity takes cognizance the kind which is said to be presumed from a transaction with a lunatic is to be referred to the well-known head of constructive frauds. Eaton's Equity, 314. Lord Hardwicke, for the purpose of convenient consideration, divided the subject of fraud into four classes: "(1) Fraud arising from the facts and circumstances of imposition. (2) Fraud arising from the intrinsic matter of the bargain itself. (3) Fraud presumed from the circumstances and condition of the parties contracting. (4) Fraud affecting third persons not parties to the transaction." Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125. This classification has generally been adopted. Our case falls under the third head, as does also a contract with a person so far drunk that he is substantially non compos mentis and not capable of apprehending the effect of what he does. The presumption is raised without the aid of any evidence of actual imposition, from the very nature of the transaction. Adams' Eq. (5th Ed.) § 182, pp. 364, 365; Bispham (3d Ed.) § 230; Eaton and Fetter, supra; Odom v. Riddick, supra; Cameron v. Power Co., 138 N. C. 365, 50 S. E. 695. Lord Hardwicke, in the case from Vesey we have cited, says: "A third kind of fraud is that which may be presumed

from the circumstances and conditions of the parties contracting, and this goes further than the rule of law, which is that it must be proved, and not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another which knowingly to do is equally against conscience as to take advantage of his ignorance." It results from these authorities, if we bring the facts of this case to the test of the principles stated in them, that the finding of the jury upon the first and second issues was quite sufficient to invest the court with the power and to induce it to set aside the deed to Wellborn, if no real injustice is thereby done to him and no superior equity has intervened in favor of a third party, for the plaintiff is not entitled to rescission and cancellation as matter of right, because the granting of that relief rests in the sound discretion of the court, and it will not decree such relief if it will work any injustice in the particular case. Bispham's Eq. § 475. The equity will not always be enforced, for instance in a case where the status quo ante, as stated and illustrated in *Odom v. Riddick*, supra, cannot be fully restored.

No such consideration, though, is present in this case, as the very nature of the particular relief which is sought will permit the administration of such equitable relief with even and exact justice to all parties. Greenwood is found to be a purchaser for value and without notice, and is entitled to the special favor and protection of a court of equity. The deed to him must be upheld as effectual to vest a good and indefeasible title, not only as against his vendor, but also as against the plaintiffs; for his equity is superior to theirs. But this does not deprive the plaintiffs of all relief. It is a familiar principle that when a fraudulent vendee has conveyed the property in question to a third party, who, by reason of his innocence, acquires a good and valid title as against the equity of the original vendor, the latter has a remedy against the substituted property, in this case the purchase money received from Greenwood, and the defendant will be held liable for the amount thereof, subject to any deductions for sums paid to the plaintiff at the time the deed was made and to any other payments rightfully made by him to protect the title, such as the one made in this case to disincumber the land. Upon this principle was the judgment of the court rendered, and we think that it works out the equity of the plaintiff and at the same time does full justice to the defendant. In this respect this case is unlike that of *Odom v. Riddick*. That the plaintiff was entitled to proceed against the defendant for a personal judgment is settled by the highest authority. Smith, in his admirable Treatise on the Equitable Remedies of Creditors, at pages 28 and 29, when speaking of a fraudulent conveyance, says: "(1) The remedy of

a creditor is not defeated where the fraudulent grantee has sold the property to an innocent purchaser; for in such case the proceeds of the sale are as available as the property itself. The fraudulent grantee becomes chargeable with the proceeds derived from the innocent purchaser, but the property itself is not. (2) It is not essential that the precise property fraudulently conveyed shall remain in the hands of the fraudulent grantee to entitle the plaintiff to a recovery. Thus the grantee may have exchanged the fraudulently conveyed property for other property still held by him, in which case the fraud will be impressed upon the latter property in lieu of the former. (3) Where it is sought to follow property fraudulently conveyed and procure a decree against the property, which is subsequently reversed, complainants are not precluded from taking a different course and procuring a different decree based on the evidence on final hearing, such as a personal decree against the fraudulent grantee." See, also, 1 Pom. Eq. Jur. (1905) §§ 237, 240. In *Texas v. Hardenburg*, 77 U. S. (10 Wall.) 68, 19 L. Ed. 839, Chase, C. J., for the court, says: "It may be admitted that these allegations and interrogatories do not assert the right of the complainant to the proceeds with absolute directness and distinctness. The bill might have been drawn better. But we think it would savor of extreme technicality to refuse to see in the bill enough in relation to the proceeds of the bonds to warrant relief in this respect under the general prayer. Willing to allow this defendant the benefit of any defense consistent with the rules which govern proceedings in equity, we have looked into the question as if it were still open. Having thus looked into it, we find no sufficient ground for altering the conclusion embodied in the decree." The last expression of the court refers to a clause in the decree awarding a recovery of the proceeds of the bonds which had been sold. *Jones v. Van Doren*, 130 U. S. 684, 9 Sup. Ct. 685, 32 L. Ed. 1077. The rule and the reason for it are clearly and tersely stated by Earl, J., in *Murtha v. Curley*, 90 N. Y. 378: "A court of equity adapts its relief to the exigencies of the case in hand. It may restrain or compel the defendant, it may appoint a receiver, or order an accounting, it may decree specific performance, or order the delivery to the plaintiff of specific real or personal property, or it may order a sum of money to be paid to the plaintiff, and give him a personal judgment therefor."

When the property has been converted, as in this case, there is no longer any need for a decree vacating the fraudulent deed, but the court will simply declare that the deed is void as between the plaintiff (Nancy Sprinkle) and her fraudulent grantee, and award such relief as is proper in the premises. Wellborn having sold the land to a bona fide purchaser, and thereby deprived his vendor of

the land itself, and having received the price, he must, by reason of his fraudulent disposition of property which he is considered to have held in trust and of its conversion into money, be held responsible to the amount of the consideration paid to him. The money in his hands stands for the land. *Wait, Fraud. Conv.* (8d Ed.) § 178; *Holland v. Anderson*, 38 Mo. 55; *Lawrence v. Bank*, 35 N. Y. 320; *Dilworth v. Curts*, 139 Ill. 508, 29 N. E. 861; *Hazen v. Bank*, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680. But the administration of this relief is eminently proper under the reformed procedure, where the rights of parties are settled and determined in one action, the distinction between actions at law and suits in equity having been abolished. 1 Pom. Eq. Jur. § 242. Our conclusion, therefore, is that by the verdict of the jury upon the issues, excluding altogether the third issue, the plaintiffs were entitled to the relief which was adjudged to them. The third issue was submitted only to ascertain whether there had been any actual fraud or undue influence used to obtain the deed, should the jury have found that Nancy Sprinkle was not insane—that is, devoid of all mental capacity—but merely weak-minded and an easy prey to the domination and overruling influence of the defendant, who availed himself of her weakness and of his power over her to secure the execution of the deed to himself by undue means; thus presenting an alternative equity for the rescission and cancellation of the deed. The issue was in no way essential to the relief granted, as the jury found, not only that there was want of sufficient mental capacity, but that the defendant knew of it, at the time he got the deed, and in addition thereto, that he obtained the land at an undervalue. It seems to us it would be a reproach to the law and to the administration of justice under its forms, if such a transaction were permitted to stand. But we do not think there can be found in the books any principle which would cause us to hesitate in the least, so far as this objection is concerned, to pronounce its condemnation and to sustain the judgment of the court, which requires the defendant to surrender any gain or benefit he has derived from it.

It follows from what we have already determined that the action of his honor in striking out the answer of the jury to the third issue and substituting one of his own has resulted in no legal wrong to the defendant which requires a reversal or even a modification of the judgment. There was error in doing so, but not reversible error. The court had the power to set aside the verdict, as to that issue—that is, pro tanto—but none to reverse the answer of the jury. This was an invasion of their province, but the defendant cannot complain of it, as it worked no material injury in law to him. The order setting aside the verdict upon that issue is sustained, as the court merely exercised its discretion to that extent, but

In other respects it is reversed, and the answer of the court to that issue will be expunged. That is but just to the defendant. The court, as it appears in the record, was induced to take the course it did under the belief that, as the answers to other issues showed "fraud in law," the proper answer to the third issue should be an affirmative one. In this there was error, as we have said, but the judgment is not affected by it, and the case is left as if that issue had not been submitted at all.

The objection to the records of the inquisition of lunacy is untenable. The case shows that they were introduced for the consideration of the court alone, in order to decide upon the competency of a witness, and this was fully explained to the jury. If counsel of plaintiff commented upon them, no objection was made at the time, and, not having been made then, it cannot be made now. *State v. Tyson*, 133 N. C. 692, 45 S. E. 838; *Horah v. Knox*, 87 N. C. 483. Besides, the defendant's counsel, instead of calling the court's attention to those comments, replied to them himself, and it must be taken, therefore, that any objection to them as being improper was thereby waived. The defendant cannot be permitted to take two chances. He should have acted promptly if he intended to avail himself of any objection to what plaintiff's counsel said to the jury about the records. It may well be doubted if the recent rule of this court, rule 27 (135 N. C. 600, 46 S. E. v.), is not also a full answer to this objection. Those records, of course, were not and could not have been considered as evidence for the jury. They were made after the date when the deed was executed, and the proceedings in which they were made were *ex parte*. If made before that time, they would have been competent, but not conclusive as to the insanity of Nancy Sprinkle. The presumption arising from them in such a case could be rebutted and the very truth be made to appear; that is, that while they showed insanity it did not in fact exist at the time the deed was executed. This is at least true as to all persons not parties or privies to the inquisition, as, for example, a grantee of the lunatic, who, being a stranger to the inquisition, could not traverse it, which was formally done by *scire facias*. *Rippy v. Grant*, 39 N. C. 443; *Arrington v. Short*, 10 N. C. 71; *Christmas v. Mitchell*, 38 N. C. 535; *Parker v. Davis*, 53 N. C. 460. The doctrine is fully discussed and the reasons for the same fully and clearly stated by Taylor, C. J., in *Armstrong v. Short*, 8 N. C. 11. But it is useless to discuss the matter any further, as the records were not admitted as evidence generally, and the court has done nothing, nor has it failed to do anything with respect thereto of which the defendant has any right to complain. The record in the case of *Sims v. Sims* (N. C.) 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665,

was clearly incompetent as substantive testimony. It was properly excluded.

The defendant's third prayer for instructions was properly refused. The substance of it had been given by the court in its response to his first and second prayers, and afterwards, in its general charge to the jury, the defendant was given the full benefit of the principle stated in his third prayer. A judge is not obliged to repeat his instructions already given, even when specially asked to do so in a prayer. The instructions, as given, were quite sufficient to cover the case. *Bost v. Bost*, 87 N. C. 478; *Morris v. Osborne*, 104 N. C. 609, 10 S. E. 476. We have said in *Cameron v. Power Co.*, 138 N. C. 365, 50 S. E. 695, which sustains the charge of the court, that this court has adopted Coke's definition, that a person has mental capacity sufficient to contract if he knows what he is about (*Moffit v. Witherspoon*, 32 N. C. 185; *Paine v. Roberts*, 82 N. C. 451), and that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly. There is no particular formula to be used in such cases, as said by the court in *Morris v. Osborne*, *supra*, but the law in this respect should be explained to the jury with reference to the special and peculiar facts of the case being tried, and under the guidance of such general principles as have been settled and declared by the courts.

The remaining exceptions to be noticed were taken to the refusal of the court to instruct the jury as requested by the defendant in his thirteenth and fourteenth prayers, and to the giving of the instruction requested in the fourth prayer of the plaintiff. The last two relate to the third issue, and, as that issue has practically been eliminated from the case by the view we have taken of the law in respect to the verdict upon the other issues, there is no need of giving them further consideration, as they have become immaterial, and any error committed as to them, if error there be, was harmless. So that we come finally to the question raised by the refusal to give the instruction contained in the defendant's thirteenth prayer: Was there any evidence that the defendant had notice of the incapacity of Nancy Sprinkle at the time she made the deed to him? We think there was not only some, but ample, evidence to sustain the finding of the jury. We forbear to discuss the evidence at length or in detail for the purpose of showing that it was sufficient to support the verdict of the jury. It appears that the defendant was a kinsman and neighbor of Nancy Sprinkle and had known her all his life, with the exception of a few years when

he was in the West. He knew the condition of her mind. It is true, he says, he did not know she was insane, but the jury were not bound by this statement, and might well conclude, in view of his knowledge of her, when considered in connection with the overwhelming proof as to her mental imbecility, and especially when coupled with other facts and circumstances tending to show his guilty knowledge, that he must have been aware of her true mental condition. Other circumstances are that at the time she made the trade with him her mind was so unbalanced that, in the language of one of the witnesses, "she was wild, and hardly seemed to know her whereabouts." The manner in which he procured the deed, taking her away from those who could have advised her in so important a transaction, and stating that he would not trade with her unless Fletcher Harris, her friend, was present, and that he was only going to the upper part of the county to get some evidence for her in her pension matter, when it turned out he was then preparing to carry her to Wilkesboro for the purpose of taking advantage of her mental weakness by inducing her to make the deed, and this he easily accomplished, her sudden change of mind when she had just told Parks that she would not make the deed—all this, and more, was evidence for the jury upon the question of her mental capacity. So weak was she that she was completely subjected to the power and dictation of the defendant, and he must have known it if the testimony introduced by the plaintiff was credible, and the jury have said that it was. If there was any mental operation required in the transaction, it was all on his side. It seems that he could, at pleasure, mould her will to suit his own, so like was she to clay in the hands of the potter. It is needless to prolong the discussion. To be sure there was evidence in conflict with that offered by the plaintiff, but we are considering the version of the facts relating to the first and second issue, which was apparently accepted by the jury as the true one, and, besides, we are only required to decide whether there was any evidence of the facts to be proved, namely, the insanity and the defendant's knowledge of it. Whether there is any difference, in moral quality, between the act of obtaining a deed for land from a woman known to be totally bereft of reason and the act of procuring one from a woman merely of weak understanding, who is unable to guard herself against imposition or to resist importunity, it does not lie within our province to decide, but in law, and in so far as the validity of such transactions may be involved, we know that there is not and should not be any difference, and that either is sufficient to induce a court of equity to rescind the contract and cancel the deed,

or to require the vendee to give up what he has unfairly and unjustly received, with proper deductions for any sums paid out by him, if the specific remedy of rescission and cancellation cannot equitably be administered.

There being no error in any of the rulings of the court to which exception has been taken, the verdict must stand undisturbed, and, excluding from consideration the third issue, what is left of it is certainly sufficient to warrant the judgment. 1 *Bigelow on Fraud*, 374; *Pomeroy's Eq. Jur.* (1905) § 947. As suggested by counsel, a court of equity would abdicate one of its most important and characteristic functions if it were to give effect to a transaction conducted under such circumstances as those established by the issues left standing by the court.

No error.

(140 N. C. 201)

DIXON v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 12, 1905.)

Appeal from Superior Court, Buncombe County; McNeill, Judge.

Action by Anderson Dixon, as administrator, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

There was evidence of the plaintiff tending to show that on the night of the 28th of August, 1904, in the town of Black Mountain, N. C., an engine of the defendant was backing towards the crossing near the depot, and ran over and killed the intestate; that at the time of the killing the intestate was lawfully and rightfully upon the defendant's track, endeavoring to cross it, going to his home immediately south of the railroad; that the engine was running backward at the time without lights or signal warnings, and without any one being stationed so as to keep a proper lookout. There was evidence of the defendant tending to contradict the plaintiff's testimony. Verdict and judgment for the plaintiff. Defendant excepted and appealed.

Moore & Rollins, for appellant. Tucker & Murphy, for appellee.

PER CURIAM. The jury have accepted the plaintiff's version of the occurrence, and these facts fix the defendant with the legal responsibility for intestate's death. The case is governed by the decision in *Reid v. Railway* (at this term) 52 S. E. 307. We find no error which entitles the defendant to a new trial.

Affirmed.

(73 S. C. 43)

REVOLUTION COTTON MILLS v. UNION COTTON MILLS.

(Supreme Court of South Carolina. Nov. 20, 1905.)

1. SALE — RECOVERY FOR SHORTAGE IN WEIGHTS—EVIDENCE.

Where a buyer sued to recover for loss of weights in cotton sold under written contracts made under the rules of the Interior Cotton Buyers' Association, which provide that the seller shall have the right to reweigh, if the buyer is dissatisfied with the weights, and it is shown that the broker of the seller consented to the buyer using the cotton before notice to the seller of the objection to the weights, so that it could not be reweighed, plaintiff can show that such broker had no authority to grant such permission.

2. NEW TRIAL—CONFLICTING EVIDENCE.

Where the evidence is conflicting, a new trial was properly refused; the credibility of the witness and the inferences to be drawn from the evidence being questions for the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 144, 145.]

Appeal from Common Pleas Circuit Court of Union County; Gary, Judge.

Action by the Revolution Cotton Mills against the Union Cotton Mills. From judgment for plaintiff for less than its claim, it appeals. Affirmed.

Simpson & Bomar, for appellant. Hydrick & Sawyer, for respondent.

POPE, C. J. By this action the plaintiff sought to recover the sum of \$626.16, with interest from the 15th of June, 1903. The case came on to be heard before Judge Ernest Gary and a jury at the October term, 1903, of the court of common pleas for Union county. The verdict was for the plaintiff for \$86.96. After entry of judgment thereon, the plaintiff appealed to this court upon the following grounds:

"(1) Because, as it is respectfully submitted, the presiding judge erred in allowing the witness Beale, on behalf of the defendant, to testify, in answer to a question by the defendant's counsel, that Ralli Bros., for whom Beale was working, did not know Crabtree in the transaction at all, when the matter inquired about was *res inter alios acta*, and could not affect the plaintiff's rights or interests in this controversy; the error being that such testimony was incompetent and irrelevant to the issue here under the circumstances.

"(2) Because the presiding judge erred as a matter of law in not setting aside the verdict and granting a new trial on when the evidence of the plaintiffs' witnesses showed, and the evidence of the defendant's witness Beale tended to show, that all of the 300 bales sold by the defendant to the plaintiff had lost in weight in an amount considerably more than the sum found by the jury; there being absolutely no testimony in contradiction of this.

"(3) Because the presiding judge erred as a matter of law in not setting aside the ver-

dict and granting a new trial on the ground that there was absolutely no testimony to support the verdict for the amount found, and that the uncontradicted testimony showed that the verdict should have been for a larger amount, to wit, at least for an additional amount equal to the value of the cotton which the 166 bales, not weighed by defendant's witness, had lost according to the testimony of plaintiff's witnesses; their testimony as to such weights being absolutely uncontradicted, and the witnesses themselves being unimpeached.

"(4) Because the presiding judge erred as a matter of law in not setting aside the verdict and granting a new trial on the ground that such verdict was unsupported by the evidence, when the testimony of plaintiff's witnesses, none of whom were impeached, showed, and the testimony of Beale the defendant's witness tended to show, that all of the cotton had lost in weight; the testimony of the said Beale being that every one of the 134 bales weighed by him, with two exceptions, had lost in weight, and that the average loss of the said bales was $5\frac{25}{100}$ pounds per bale, over and above the 8 pounds allowed by the contract.

"(5) Because the presiding judge erred as a matter of law in not setting aside the verdict and granting a new trial on the ground that when the plaintiff's witnesses had testified to a much larger loss than that for which the verdict was rendered, and the defendant's witness Beale had testified that the 134 bales weighed by him had lost in weight to the amount found by the jury, and that he did not weigh the remaining bales, the verdict for only the amount of loss testified to by Beale was not supported by the evidence, but was absolutely in conflict with it, and therefore should be set aside.

"(6) Because the presiding judge erred as a matter of law in not setting aside the verdict and granting a new trial on the ground that, taking the whole testimony together, the verdict of the jury could not be sustained in any possible view of such testimony, and should have been set aside.

"(7) Because the presiding judge, in considering the motion to set aside the verdict of the jury and grant a new trial, was bound under the law at least to exercise a sound, legal discretion, and that the testimony in this case was so overwhelmingly and uncontradictedly in favor of the plaintiff that his refusal to grant such new trial was, we respectfully submit, an abuse of discretion, for which a new trial should now be granted."

We will now examine this matter. As the appellant in his argument states, the appeal raises two questions: (1) whether certain testimony admitted over plaintiff's objection was competent; (2) whether it was error to refuse the motion for a new trial.

1. It would be well in leading up to the first question to give a brief statement of the facts. On the 28th of May, 1903, the defendant, acting through W. D. Nesbitt & Co., which last named was represented by Thomas Crabtree, of Greensboro, N. C., sold to the plaintiff 300 bales of cotton, represented to weigh 149,719 pounds, at $12\frac{1}{16}$ cents per pound. A regular agreement in writing was signed by the plaintiff and the defendant themselves touching this sale and its terms. The defendant did not himself handle this cotton, but had it shipped to the plaintiff by Ralli Bros., of Montgomery, Ala. On June 3, 1903, 200 bales, stated to be the aggregate weight of 98,377 pounds, and on June 13, 1903, 100 bales, stated to be of the aggregate weight of 51,342 pounds. The plaintiff paid the defendant, on June 3, 1903, \$11,866.73, and on June 13, 1903, \$6,193.13, in payment of said 300 bales of cotton. For some cause the plaintiff became dissatisfied with the alleged weights of said cotton, and he caused the same to be reweighed between June 15 and July 1, 1903, by Thomas Crabtree, without any notice or direction from the defendant until the 30th day of June, when a notice was served upon the defendant of the loss in weight to the extent of 5,191 pounds, which after an allowance of three pounds on each bale, to be made on account of difference in scales, made the net shortage 4,291 pounds. When this information reached the defendant, it promptly gave notice that Ralli Bros. would be notified, and would send their agent to reweigh all said cotton. W. M. Beale was sent by said firm on the day it received the notice and reweighed 134 bales of the 300 bales sold and delivered to the plaintiff. Mr. Beale found that there was a lossage of $5\frac{3}{100}$ pounds per bale. When Mr. Beale sought the other 166 bales to be weighed, he was informed by the plaintiff that, with Thomas Crabtree's assent, the plaintiff had already used the same. When the defendant was notified of the result of Mr. Beale's weighing the cotton, it sent to the plaintiff its check for \$56.96 to settle the lossage per Mr. Beale's statement. The plaintiff refused to accept this check, and returned the same to the defendant. Both the plaintiff and defendant admit that the contract between them was to be governed by the Interior Cotton Buyers' Association. Thomas Crabtree was examined by the plaintiff as its witness, and admitted that he consented for them to use the 161 bales. W. M. Beale was examined by the defendant as its witness. During his examination he was asked: "Did Mr. Crabtree have any authority

from the shippers of this cotton to violate the rules?" After objection, the witness said: "We don't know Mr. Crabtree in the transaction at all." Now, the question for this court is, was this testimony competent? It must be remembered that Mr. Crabtree had been allowed to testify at length as to the weights of the 300 bales of cotton after it was received by the plaintiff, and also as to the permission he gave to the plaintiff to use the 166 bales. It became necessary to know if Mr. Crabtree's authority was admitted, and this witness answered this question in the negative. It seems to us that this testimony was admissible, because by the rules of the Interior Cotton Buyers' Association, by which the plaintiff had agreed to be bound, it was agreed that the defendant should have the right to reweigh, if not satisfied. This exception, being the first, is overruled.

2. The second question, relating to the refusal of the circuit judge of the plaintiff's motion for a new trial, will now be considered. This motion for a new trial was made on the minutes of the court. It is admitted that, if the circuit judge finds that there is testimony on each side, relating to the issue, a question of the sufficiency of the testimony to support the verdict of the jury is entirely within the discretion of the circuit judge, and will not be reviewed by this court; but, if there is no testimony offered on certain issues, a question of law will be made, which will be the subject-matter of an appeal to this court. All questions relating to the credibility of witnesses and the inferences to be drawn from testimony are questions for the jury. There were such issues in this case. Besides, the plaintiff introduced in testimony the invoices of the weights of these bales of cotton and attacked the weight of each bale. The plaintiff, by its conduct, in using the 166 bales, deprived the defendant of any right to investigate the weight of said 166 bales, which right the defendant sought to exercise.

We must state that we do not see how Mr. Crabtree could interfere with this right of the defendant. The only agency of his in the defendant's matters was that relating to the sale. The defendant had asserted its right to contract for itself with the plaintiff, and the plaintiff ratified such assertion. Under these circumstances, we do not see that the plaintiff has suffered any injury which this court can repair.

It is the judgment of this court, therefore, that exceptions 2, 3, 4, 5, and 6 should be overruled. It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

(72 S. C. 553)

Ex parte POSTAL TELEGRAPH CABLE CO.

(Supreme Court of South Carolina. Nov. 2, 1905.)

CERTIORARI—WHEN LIES—JUDGMENT IN CONDEMNATION.

After judgment entered by the clerk in the circuit court on condemnation proceedings, and motion in such court to set aside the judgment for want of proper notice, the remedy on refusal of an order to vacate the judgment is not certiorari, but appeal.

Petition by the Postal Telegraph Company for writ of certiorari to the clerk of the court of common pleas of Spartanburg county to certify the record in certain condemnation proceedings of Mary T. Beacham against the petitioner. Motion to quash writ granted.

R. K. Karson and Ravenel & Gantt, for petitioner. J. W. Nash, for Mrs. Beacham.

WOODS, J. On the petition of Postal Telegraph Cable Company, his honor, the Chief Justice, issued a writ of certiorari requiring the clerk of the court of common pleas for Spartanburg county to certify to this court all the proceedings concerning the assessment of damages for a right of way to be paid by the telegraph company to Mrs. Mary T. Beacham; the allegation of the petition being that the judgment entered in those proceedings is absolutely null and void for lack of the written notice of the proceedings to the telegraph company required by law. From the return of the clerk, these facts appear: Mrs. Mary T. Beacham, on March 12, 1903, filed her petition with the clerk to have compensation assessed by a jury for land appropriated by the telegraph company for a right of way. Notice of the proceeding was served on Messrs. Ravenel & Gantt, attorneys for the company, but not on an officer of the corporation. His honor, Judge Aldrich, made an order on March 13, 1903, directing the clerk to impanel a jury to ascertain the compensation to be paid for the land required. The petitioner, the telegraph company, appearing only for the purpose of objecting to the jurisdiction of the court, moved before Judge Aldrich on March 20, 1903, at his chambers, in Aiken, for an order rescinding his order to the clerk, on the ground that he was without jurisdiction to make that order. This motion was dismissed on the ground that, under subdivision 4, § 402, of the Code of Procedure of 1902, it could not be heard in Aiken. The petitioner then renewed the motion before Judge Aldrich at Greenwood, on March 27, 1903, denying the jurisdiction of Judge Aldrich to make the original order providing for the impanelling of a jury on four different grounds, which it is not necessary to set out, as none of them are relied on in this petition. On March 28, 1903, Judge Aldrich made an order denying this motion. The telegraph company then served on the clerk and the attorneys for Mrs. Beacham a written protest against further proceeding with the organization of the

jury, on these grounds: "(1) Because due notice of the time and place of the organization of the jury herein has never been given to the defendant's attorneys; (2) because the jury herein, as now summoned, was drawn without due notice served upon the defendant or its attorneys; (3) because there is now pending in the court of common pleas of Spartanburg county an action to determine the petitioner's right to compensation herein." The clerk nevertheless proceeded, and the jury assessed the compensation to be made at \$150. On this assessment the clerk, on the motion of the attorneys for Mrs. Beacham, entered judgment in due form for the amount assessed and costs, aggregating \$203.30, as a judgment of the court of common pleas. Subsequently, on June 29, 1903, the telegraph company moved before his honor, Judge Dantzler, then presiding at the Spartanburg court, "for an order setting aside and vacating the verdict and judgment herein, and vacating the execution herein issued, and for such other relief as to the court may seem just, for the reason that the court has no jurisdiction in this proceeding." In his order Judge Dantzler says: "I find that a motion was made before Judge Aldrich in this same proceeding, at Greenwood, on March 27, 1903, for an order to rescind the original order of March 13, 1903, on the ground that he did not have jurisdiction to make said order. He overruled the motion in this order of March 28, 1903. His order stands. If for no other reason, I would have to refuse this motion because this order binds me. But, even if I were not so bound, I must refuse the motion because it does not raise any question fatal to the jurisdiction which the facts sustain. This is a special proceeding under a particular statute, and, so far as has been brought to my attention, the statutory requirements have been complied with. The motion is refused." From this order the telegraph company appealed, but the appeal was dismissed by the clerk of this court for want of prosecution, July 22, 1904. The telegraph company then instituted this proceeding in certiorari to have the record reviewed, alleging that the judgment entered by the clerk is void for want of jurisdiction, relying solely on the ground that notice of the proceeding under which it was entered was not served on the telegraph company as required by law.

At the hearing of the cause counsel for Mrs. Beacham moved to quash the writ on a number of grounds, one of which was that the decree of Judge Dantzler decided the precise point which the telegraph company now undertakes to make by certiorari, and, the appeal from that order having been dismissed, the objection to the jurisdiction on the ground of want of the notice of the condemnation proceedings required by statute has been finally adjudicated against the telegraph company. If the telegraph company had desired to have this court review the

condemnation proceedings, and the orders hereinbefore recited made by Judge Aldrich, on the ground that jurisdiction had not been acquired by due service of the notice required by the statute, it could have done so before the judgment was entered only by certiorari or some other similar proceeding, and not by appeal. This was decided in *Aull v. R. R. Co.*, 42 S. C. 431, 20 S. E. 302. But in the present case the telegraph company waited, after Judge Aldrich had refused to set aside his first order, until the clerk of the court of common pleas for Spartanburg county had entered a formal judgment for the amount of the condemnation verdict and costs, and then moved in that court to have this judgment and all the proceedings which led up to it annulled for lack of jurisdiction. In deciding this motion Judge Dantzler, in the circuit court, at the instance of the telegraph company, passed upon the question of law and fact affecting the adequacy of service of notice of the condemnation proceedings; and, if the circuit court had jurisdiction of the motion, then it is evident this court could not review its conclusions except by appeal. The authority of the clerk to enter a formal judgment in the court of common pleas on the verdict of a condemnation jury regularly obtained was not drawn in question before Judge Dantzler, and is not made in the petition for certiorari. For the purposes of this proceeding the judgment must, therefore, be considered regular in all respects, except for the alleged vice of lack of service of the original notice. There can be no question of the right of a defendant to move in the circuit court, as the telegraph company did here, to have declared void a judgment entered in that court by the clerk; and the court's decision on such motion as to the validity of the judgment is conclusive, at least as to the particular ground of attack covered by the motion. The case, therefore, stands just as if a defendant had moved in the circuit court to have what purported to be a judgment by default declared void for lack of service of the summons, as required by law, and on such motion the circuit court had adjudged the service sufficient and the judgment valid. In such case clearly the remedy of the defendant would not be by writ of certiorari, but by appeal to this court. So, in this case, Judge Dantzler, in the court of common pleas, certainly had jurisdiction to entertain the motion made by the telegraph company to relieve it from a judgment alleged to be void for want of anything requisite to the jurisdiction of the court; and, having adjudged on the motion to vacate the judgment that the facts failed to sustain the attack on it for want of jurisdiction based on alleged lack of service of the notice required by law of the condemnation proceedings, his decision is itself a final judgment of the court of com-

mon pleas on a matter within its jurisdiction, and can be reviewed only by appeal.

The motion to quash the writ of certiorari is granted.

The CHIEF JUSTICE did not participate in this opinion, because of illness.

(73 S. C. 9)

MAULDIN v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. Nov. 14, 1905.)

1. PLEADING—DEMURRER—SECOND TRIAL.

Where a case is tried on the merits, it sufficiently shows that the judge who tried it overruled a demurrer, on the ground that the complaint did not state a cause of action, so that a succeeding judge on a second trial cannot consider it.

2. PLEADING—OBJECTIONS—WAIVER.

Defendant cannot complain of evidence received in support of allegations in the complaint to which he did not object.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1433.]

3. EVIDENCE—BEST AND SECONDARY.

In an action for failure to furnish cars to plaintiff on which to ship goods ordered, evidence of verbal orders for the goods is not objectionable, because they were subsequently followed by written orders to the same effect.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 517.]

4. SAME—OPINION—DAMAGES.

In an action for failure to deliver cars to a manufacturer in which to ship special orders, the item of damage must be shown, and plaintiff cannot estimate the amount in a lump sum.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2289.]

5. CARRIERS—FAILURE TO DELIVER CARS—PUNITIVE DAMAGES.

Where a carrier is unable to furnish cars because of an unprecedented amount of business, such failure is no ground for punitive damages.

6. SAME—DEFENSES.

A shipper, in the absence of special contract, is not entitled to damage for failure to carry his freight, caused by a sudden press of business which could not have been reasonably anticipated.

Appeal from Common Pleas Circuit Court of Hampton County; Klugh, Judge.

Action by Joab Mauldin against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant appeals. Reversed.

Lyles & McMahan and Jas. W. Moore, for appellant. Lyles & McMahan, for respondent.

WOODS, J. The plaintiff alleged he was engaged in the manufacture of lumber at Duke's siding, on the line of defendant's railroad, "solely on bills and orders for special sizes, lengths, and quality, and to be delivered to plaintiff's customers and to markets aforesaid under contract, at and by special and stated times," and although the defendant was notified of the character of his business and of his contracts for lumber

being overdue, and although frequent demands were made for cars to ship lumber on these contracts, yet the defendant willfully, maliciously, wantonly, and negligently, failed and refused to furnish the cars required. The items of damage set up were: (1) Expense and inconvenience of piling the accumulating lumber; (2) depreciation of value of lumber; (3) cancellation of orders making sales necessary at reduced price; (4) loss of custom. On the first trial of the cause, plaintiff obtained a verdict for \$1,400, but a new trial was ordered by his honor, Judge Aldrich, unless the plaintiff would remit all the recovery above \$600, and plaintiff elected to take a new trial rather than remit \$800 of his verdict. On the second trial before Judge Klugh, the verdict was for \$850, and judgment was entered accordingly.

1. The first question made by the appeal is whether Judge Klugh was right in finding, as a matter of fact, that Judge Aldrich, at the former trial, had overruled the written demurrer submitted to him, on the ground that the complaint failed to state facts sufficient to constitute a cause of action; and as a matter of law that this decision of Judge Aldrich was binding on him, though not reduced to writing and signed. Inasmuch as it was admitted by counsel that the demurrer was presented to Judge Aldrich, and he subsequently proceeded with the trial of the cause, it necessarily follows he overruled the demurrer. It is true, the decision as to the demurrer should have been given in writing and signed, as required by section 289 of the Code of Procedure. But an order of this kind does not dispose of the cause, and no formal judgment is entered on it; and hence, if counsel do not request that it be reduced to writing, the requirement of the statute may well be deemed waived. After the demurrer had been overruled by Judge Aldrich, it could not again be considered by Judge Klugh. *Turner v. Association*, 51 S. C. 33, 27 S. E. 947.

2. The plaintiff having alleged in his complaint loss of custom as an item of damage arising out of defendant's failure to furnish cars, and no motion having been made to strike out this allegation, the defendant cannot be heard to complain that evidence was introduced on this subject. *Martin v. Railway Co.*, 70 S. C. 8, 48 S. E. 616.

3. There was no error in refusing the motion to strike out plaintiff's evidence as to the verbal orders for lumber received by him, made on the ground that the written orders following the verbal were the best evidence of the orders which plaintiff alleged he was prevented from filling. Most probably these verbal orders at the time they were received, became the main factors which influenced the conduct of plaintiff's business rather than the subsequent confirmatory written orders.

4. The sixth exception alleges error in allowing the plaintiff to give in a lump sum his estimate of the aggregate damages sus-

tained by reason of the failure of the railroad company to furnish cars. The general rule is that the opinions of witnesses as to the quantum of damages are not admissible. 8 Elliott on Evidence, § 2006. One recognized exception to this rule is thus stated in 1 Wharton on Evidence, § 511, quoted with approval in *Jones v. Fuller*, 19 S. C. 66, 69, 45 Am. Rep. 761: "When the thing damaged is one of every day use, whose depreciation an ordinary observer can estimate, then such an observer may be called to express his opinion of the extent of the damage sustained. If the facts which form the basis of such an opinion can be specified, then they must be stated; if the conclusion is one which the jury can draw, then to the jury must be left the drawing the conclusion. But when, as is often the case, these facts can be best expressed by the damage they cause, then this damage and its extent may be testified to by the witness." Under this exception it was competent for the witness to describe the condition of the lumber due to exposure to weather and give his estimate of the depreciation, and so with the other separate items of damage; but it was not quite competent to give a lump estimate of the total damage without indicating the items which entered into it, for the reason that it was impossible for the jury to separate the items of damage which, under the instructions of the court, could be considered the proximate result of defendant's alleged breach of duty, and for which it might be liable from those items of alleged damage which, under the instruction of the court, would be too remote to enter into the verdict.

5. The circuit judge refused to charge the request that there was no evidence to warrant a verdict for punitive damages. Not only was there no evidence offered of malicious, willful or reckless refusal to furnish cars for plaintiff's lumber, but it was stated by plaintiff himself that there was a "tie-up" of the cars." The uncontradicted testimony on behalf of the defendant was that this "tie-up" was due to an abnormal demand for cars of all kinds, especially flat cars, that it was impossible for defendant to get orders for cars filled or to get them from other roads, and frequently impossible to get defendant's own cars on other roads returned. Some cars were furnished for plaintiff's lumber, and there was no evidence whatever of any intentional discrimination against him. The local agent assured plaintiff he would get cars as soon as possible, and the mere failure in the circumstances to answer a telegram or a letter asking for cars is no evidence of willful disregard of plaintiff's rights. There was, therefore, no ground for refusing to charge that the defendant had not incurred liability for punitive damages.

6. Another request erroneously refused was as follows: "The obligation to furnish cars in this case is an obligation imposed

by law, and is not as binding as if the defendant railroad had contracted to furnish the cars. In this case the defendant is not liable if it has shown a reasonable excuse for failure to furnish the cars; heavy and unprecedented traffic, not reasonably to be expected and prepared for, would excuse the railroad for a deficiency of cars." If a common carrier assumes a contractual obligation outside of and beyond the duty imposed by public policy, it must perform the contract or pay the damages, unless it can show circumstances which relieve from the performance of contracts generally; and unexpected emergencies in its business would not be sufficient to excuse it. 4 Elliott on Railroads, § 1473. Here, however, the claim is not based on a contract, but on the ordinary public duty of the carrier to receive and transport promptly all freight offered. Promptness in transportation is of great and increasing importance, and hence common carriers should be required to use every reasonable means and to take every reasonable precaution to insure it. They should not only have ample rolling stock for the prompt dispatch of all passenger and freight business usually to be expected, but they should by all reasonable forethought and effort prepare for unusual demands for transportation. And such forethought requires not only a study of their own business, but of the industries, the development and the progress of the country whose carrying business they undertake. But this duty does not extend to the acceptance and immediate transportation of freight at all hazards and in all circumstances. The true rule is thus stated in 5 A. & E. Ency. Law, 168: "Where there is a sudden and unusual press of business, arising from exceptional causes, and which the company could not reasonably be expected to have anticipated, it is not liable for the delay thereby necessitated, unless it had specially contracted to furnish such transportation; it is bound to provide facilities for such transportation only as might reasonably have been anticipated." *Porcher v. Railroad Co.*, 14 Rich. Law, 181; *Ayres v. Railway Co.* (Wis.) 37 N. W. 432, 5 Am. St. Rep. 226; *Railway Co. v. Rae*, 68 Am. Dec. 574; 4 Elliott on Railroads, §§ 1470, 1473; 6 Cyc. 373.

The judgment of this court is that the judgment of the circuit court be reversed, and the case be remanded for a new trial.

POPE, C. J., did not participate in this opinion because of illness.

(124 Ga. 323)

CENTRAL OF GEORGIA RY. CO. v. HALL et al.

(Supreme Court of Georgia. Nov. 20, 1905.)

1. CARRIERS—LOSS OF FREIGHT — LIMITING LIABILITY.

A common carrier cannot limit his legal liability by any notice given, either by publication,

or by entry on receipts given or tickets sold. By special contract, he may relieve himself of his common-law liability as an insurer, and may contract against liability arising from certain losses which do not involve negligence of the carrier or his servants; but he cannot, even by special contract, exempt himself from liability for loss of goods intrusted to him, where the loss arises from his negligence or that of his servants.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 637, 675-687.]

2. SAME—LIVE STOCK SHIPMENT.

A common carrier of goods which transports live stock is as to the latter property also a common carrier. There are, however, certain inherent differences between live stock and inanimate property offered for transportation.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 462-469.]

3. SAME—LIABILITY FOR GROSS NEGLIGENCE.

A carrier of live stock may by special contract so limit its liability for loss or damages that it will be liable only in the event that it is guilty of gross negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 933-939.]

4. SAME—LIMITATION AS TO VALUE.

A railway company, in its capacity as a common carrier, may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment, embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage, or destruction occurs, will be bound by the agreed valuation. But a mere general limitation as to the value, expressed in a bill of lading, and amounting to no more than an arbitrary preadjustment of the measure of damages, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value.

5. SAME.

Where there is an issue of fact as to whether there was an actual bona fide valuation or a mere arbitrary effort to limit liability, the question is one for the jury; but where the written contract shows that it falls within the latter description, and there is no issue of fact on that subject, it is proper for the court to construe the contract.

6. SAME—FRAUD OF SHIPPER.

The evidence in this case was not sufficient to show the perpetration of any fraud by the shipper on the company.

7. SAME—ACT OF GOD.

Where the common-law rule applies, under which no excuse avails a common carrier in cases of loss unless it was occasioned by the act of God or the public enemies of the state, if a locomotive engineer desired to leave his train and proceed with the engine some distance to a water tank for the purpose of obtaining water, and thereupon caused the flagman to uncouple the engine from the cars, which were left standing on the track while the engineer, in company with the conductor (who had authority to control him) and the fireman, proceeded on the engine to the water tank, obtained the water, and returned to where the cars were, but the engineer caused the engine to run at such a rate of speed as to be evidently dangerous, and to result in wrecking one of the cars, and causing the loss of property being transported, even if he were insane at the time, the loss could not be attributed to the act of God, within the meaning of the rule of law referred to, so as to excuse the carrier.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 523-525.]

8. SAME.

The meaning of "the act of God" falling within the rule discussed.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 523-530.]

9. SAME—BURDEN OF PROOF.

In this state it is the general rule that, in order to avail himself of the act of God as an excuse, the burden is upon the common carrier to establish not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 578, 578½.]

10. SAME—DILIGENCE OF CARRIER—EVIDENCE.

Where, under a special contract for the shipment of live stock, the common-law liability of the common carrier was so modified that the carrier was liable for injuries arising only from fraud or gross negligence, it was admissible to defend by pleading and proving that its engineer upon the train on which the goods were shipped suddenly became insane at the time of the transaction complained of; and it would be for the jury to say whether the carrier did not know, or could not by the exercise of proper care have known of it, and whether it exercised due diligence in view of the situation and circumstances disclosed by the evidence.

11. TRIAL—ARGUMENT OF COUNSEL.

Where an action was brought against a railroad company for loss alleged to have arisen from negligence, and the defendant in its answer denied the negligence, and some two years thereafter, pending the trial of the case, amended its pleadings by setting up that the engineer in charge of its engine became suddenly insane at the time of the transaction complained of, and that it was thereby relieved from liability, counsel for the plaintiff could legitimately comment upon the time when this amendment was made and this defense set up.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Trial, § 280.]

12. DAMAGES—ELEMENTS—INTEREST.

Where a suit is brought for damages arising from the destruction of property, and there is a basis of calculation as to the value, interest is not recoverable *eo nomine*. But the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may in their discretion increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value; the entire sum found being returned as damages, and not exceeding the amount sued for.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by J. S. Hall and others against the Central of Georgia Railway Company. From the judgment defendant brings error, and plaintiffs assign cross-error. Judgment on main bill of exceptions affirmed, and on cross-bill dismissed.

Hall and Crawford brought suit against the Central of Georgia Railway Company to recover damages for the killing of a mare. There was no conflict in the evidence as to the following facts: One White, acting for the plaintiffs, who were the owners of the mare, shipped her from Augusta to Bishop, Ga., along with several other horses, over the defendant's railroad. The train came to

a standstill, and was divided into two sections, with one of which the engineer proceeded. At a point on the road the engineer said that the engine was out of water, and that he must go on to the water tank. The engine was cut loose from the cars, and went on to the tank, where water was obtained. The conductor and fireman accompanied the engineer. On the return the speed at which the engineer ran the engine was 20 or 25 miles an hour. The conductor warned him three or four times that he should reduce the speed, or the engine would run into the cars. He replied that he knew where the train was. There was a collision. The car containing the mare was wrecked, and she was killed. The defendant denied negligence, and pleaded that the engineer was stricken with sudden insanity at the time and while the transaction was in progress, that his acts were due thereto, and that there was no negligence on the part of the defendant. The plaintiff demurred to the plea, but the demurrer was overruled. Evidence was introduced as to the market value of the horse. The jury found for the plaintiff \$800. The defendant moved for a new trial, which was denied, and it excepted. Plaintiff filed a cross-bill of exceptions, complaining of the allowance of the plea setting up a sudden access of insanity, and the refusal to sustain the demurrer thereto. The other facts, so far as necessary, are stated in the opinion.

Dessan, Harris & Harris, for plaintiffs in error. Saml. H. Sibley, for defendant in error.

LUMPKIN, J. 1-3. In cases of loss the presumption of law is against a common carrier, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state. "A common carrier cannot limit his legal liability by any notice given, either by publication, or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby. Civ. Code 1895, §§ 2264, 2276. Construing these two sections together, the latter does not intend to permit a common carrier to relieve himself of the duty of exercising diligence, but by special contract to relieve himself of his common-law liability as an insurer, and to contract against liability arising from certain losses which do not involve negligence of the carrier or his servants. The requirement of diligence on the part of a common carrier is one involving public policy, and it would be contrary to such policy to allow him to relieve himself from his duty in this regard by contract. A common carrier cannot, therefore, by special contract exempt himself from liability for loss of goods intrusted to him, where the loss arises from his own negligence. *Berry v. Cooper*, 28 Ga. 543; *Purcell v. Southern Exp. Co.*, 34 Ga. 315; *Southern Exp. Co. v.*

Purcell, 37 Ga. 108 (2), 92 Am. Dec. 53; Western & Atlantic R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Georgia R. Co. v. Gann & Reaves, 68 Ga. 350; Central R. Co. v. Pickett & Blair, 87 Ga. 734, 13 S. E. 750. In Savannah, F. & W. Ry. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219, it was said that the question as to how far a shipper might, by express agreement signed by him, contract against liability on the part of a common carrier for injuries arising from negligence, was still an open question. But in the next case reported in the same volume it was said: "But carriers cannot by any special contract exempt themselves from liability for loss occasioned by their negligence." Georgia R. Co. v. Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197. The carrier referred to was a common carrier. See, also, Wood v. Southern Exp. Co., 95 Ga. 451, 452, 22 S. E. 535; Central Ry. Co. v. Murphey & Hunt, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720. This ruling is not dependent upon our statute, but accords with the decisions of other courts, though it is not universally so held. 6 Cyc. 387, 388. A common carrier of goods which transports live stock is as to the latter property also a common carrier. Hutchinson on Carriers (2d Ed.) § 221; 5 Am. & Eng. Enc. Law (2d Ed.) 428. It has nevertheless been held that a carrier of live stock may by special contract so limit its liability for loss or damage that it will be liable only in the event it is guilty of gross negligence. Cooper v. Raleigh & G. R. Co., 110 Ga. 859, 36 S. E. 240; Georgia Railroad v. Spears, 66 Ga. 485, 42 Am. Rep. 81; Central R. Co. v. Bryant, 73 Ga. 722; Cincinnati Ry. Co. v. Disbrow, 76 Ga. 253. If it were an original question, it might well be argued that it is somewhat anomalous to hold that such a carrier is a common carrier of live stock, that extraordinary diligence is required of it, now so declared in the statutes of this state, and that it is contrary to public policy to allow a common carrier to contract against liability resulting from its own negligence, and yet to say that in regard to live stock it may contract against such liability except as to gross negligence. See 6 Cyc. 391, 392, and citations; New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; E. T. Y. & G. R. Co. v. Johnston, 75 Ala. 596-605, 51 Am. Rep. 489. But the ruling seems to be established in this state. Perhaps the difference between live stock and inanimate freight may furnish the basis for this holding. In the case at bar the contract provided that the owner or shipper assumed and released the railroad from "all other damages incident to railroad transportation which shall not have been caused by fraud or gross negligence of said company." This became the measure of the negligence which would render it liable. The presiding judge, in effect, so charged, and we do not think

his charge, taken as a whole, was subject to the criticisms made upon it as to this point.

4. It was contended that under the contract the defendant was not liable for the value of the horse beyond the sum of \$125. Was the contract relied on by the defendant an actual bona fide agreement as to the value of the property lost, or was it a mere general limitation as to the value, amounting to an arbitrary preadjustment of damages? The former would be valid; the latter not. Central Ry. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; Georgia R. Co. v. Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; Georgia Southern Ry. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807. The contract, which was included in the bill of affreightment and signed by the agent of the owner and the agent of the company, contained the following provisions: "And it is further agreed that should any damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, \$200, for a horse or mule, \$125, cattle \$40, other animals, \$20." This was upon a printed blank containing these amounts already prepared. It did not purport to put a valuation upon the particular horse or horses shipped, but limited the amount to be claimed for any horse, regardless of its real or estimated value, to \$125. It had a prearranged amount to which its liability should be limited as to various animals. If this could be treated as a bona fide estimate or valuation as to the horse which was killed, it might equally be said to be a valuation of every possible horse which might be shipped, before it was ever seen or heard of by the company's agent. The expression "other animals \$20" would thus be treated as being a bona fide valuation of any other animal, regardless of what was its nature, character, or actual value. A rabbit, a hog, or an elephant might equally fall under the designation of "other animals," and the arbitrary limitation of \$20 would apply equally to each of them. Moreover, it will be noticed that, in case of loss, the company does not agree that the value of the horse shall be fixed at \$125, but the agreement is that "the amount claimed shall not exceed" that sum. This was clearly an attempt to limit the liability, not to determine value. As was said in the opinion in Central Ry. Co. v. Murphey: "Could any fair and reasonable mind ever reach the conclusion that there was between the plaintiffs and the defendant any agreement at all respecting the value of this particular car load of grapes, or that there was even a remote intention to make such an agreement?"

5. Should the presiding judge have submitted the question to the jury to decide as to whether this contract amounted to an actual bona fide valuation? On its face, it did not do so. Outside of the paper, there was no

evidence of any actual valuation of this particular horse. It, with several others, was delivered to the railroad company together with certain sulkies, which seemed to have indicated that the horses were to be used otherwise than as common draft animals. Eight horses were also shipped in two cars, and an attendant went with them. No inquiry was made as to their nature or value. The company had two kinds of blanks, one for use where live stock was shipped "released, the other where it was not. An agent of the defendant asked the plaintiff's agent if he wished to ship the horses "released," and, upon receiving an affirmative answer, filled one of the blanks, except as to the rate, which was filled in by the rate clerk. There is only one "release rate" for horses. The rate clerk has the classification of the state railroad commission, and fills in the rate that belongs to that agreement. A witness for the defendant testified that the rate was fixed at \$27 per car between the points included in the transportation, "based on the valuation of \$125," but he admitted that nothing was said to the shipper as to valuation. This was the entire transaction. True, the shipper admitted that he knew that if he had named a higher valuation on the horses he would have had to have paid a higher rate, and that if he had not shipped "released" the rate would have been much higher. But there was nothing in what transpired between the parties to show a bona fide effort to fix a value on the horse which was killed, or on any or all of the horses. Every shipper who is asked whether he will ship "released" probably knows that if he does not do so the rate will be higher. But this does not change an effort to limit liability into an actual valuation of property.

The construction of the contract made in this case is controlled by the decisions in *Georgia R. Co. v. Keener*, supra, and *Central Ry. Co. v. Murphey*, supra. The decision in *Southern Railway Co. v. Horner*, 115 Ga. 381, 41 S. E. 649, is cited to sustain the contention that the case should have been submitted to the jury. In that case it is stated, in the report of facts, that "the testimony was in direct conflict as to the making of a special contract of shipment, * * * and that Lee [the defendant's agent] gave him a rate based on a valuation of \$100 for the horse, and explained to him that the tariff required an addition of fifty per cent. for each additional \$100 of valuation." The contract contained the following terms: "The said shipper or the consignee is to pay freight thereon to the said carrier at the rate of — per —, which is the lowest published tariff rate, based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event. * * *

If horses or mules, not exceeding 100, \$100 each." It was held that, under the terms of this contract and the evidence introduced, an issue was made as to whether in fact there was a valuation or an arbitrary preadjustment of damages, and that this was properly submitted to the jury. The difference between submitting to the jury to determine, under the evidence, whether terms of this character inserted in a contract of affreightment constituted a bona fide and actual valuation or a mere preadjustment of damages, and, on the other hand, submitting to the jury the construction of the contract alone, which plainly on its face was not a valuation, but an effort to limit damages, is clear. The case of *Central Ry. Co. v. Glascock*, 117 Ga. 938, 43 S. E. 981, is also cited as authority to show that the present case should have been submitted to the jury. On a casual inspection, it might appear to be so, but an examination of the record in that case shows that the contract contained language somewhat similar to that considered in the case of *Southern Ry. Co. v. Horner*, supra. After stating that, if the carrier should be liable, the value at the place and date of shipment should govern the settlement, in which the amount claimed should not exceed certain specified sums, it was added: "Which amounts, it is agreed, are as much as such animals as are herein agreed to be transported are reasonably worth," and stamped across the face of the contract was the statement: "The attention of shippers has been called to the terms, conditions, values, etc., herein named." These facts do not appear as fully in the printed report as in the record of file in this court. This made a question for submission to the jury. In the case at bar there was nothing to show that there had been an actual valuation.

6. It was contended that the evidence in this case was sufficient to show fraud on the part of the shipper, and that the question of its existence should have been submitted to the jury. We cannot concur in this view. There is nothing to show that there was any misrepresentation, concealment, or artifice which would deceive the agent of the carrier as to the nature or character of the property. It appears to have been openly shipped, and, as already mentioned, in such a way as to indicate that the horses were not mere common animals shipped in car load lots. They were open to the inspection of the agent. He took no precaution, and asked no questions as to their value. He asked alone as to whether they should be shipped "released." He relied on the making of the contract, which, as to this point, was not binding under the law. The Civil Code of 1895 (section 2290) reads as follows: "The carrier may require the nature and value of the goods delivered to him to be made known, and any fraudulent acts, sayings, or concealment by his customers will release him from liability." In *Southern*

Express Co. v. Everett, 37 Ga. 683, it was held that if a shipper at the time of the delivery of the goods for shipment practices any fraudulent acts, sayings, or concealment upon the carrier as to the value of the parcel, or resorts to any artifice to give a box containing a valuable diamond breastpin a mean appearance, and thereby induces the carrier to think it of trifling value, and so prevent him from making inquiries, this would operate as a fraud, and relieve him from liability. In *Green v. Southern Exp. Co.*, 45 Ga. 305, the evidence for the defendant was to the effect that the plaintiff valued the property involved in the controversy at \$100. He testified that he shipped a trunk, and was asked its value, but failed to give it. In *Savannah, F. & W. Ry. Co. v. Collins*, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87, the property was shipped as a bundle of bedding, nothing being said about wearing apparel, and after loss the shipper sought to recover the value of certain wearing apparel claimed to have been wrapped up in the bedding. In *Southern Exp. Co. v. Wood*, 98 Ga. 268, 25 S. E. 436, the conduct of the shipper was calculated to mislead the agent of the railroad, and conceal the true character of the contents of the package delivered for transportation. In *Georgia Southern Ry. Co. v. Johnson*, 121 Ga. 231, 48 S. E. 807, the shippers sent candy to a railroad for transportation. It was in boxes, and the contents of the packages were unknown to the company. Candy could be shipped in either of two classes, having different freight rates. The shipper classified the candy as of the lower grade, and thus prepared shipping tickets, using a form containing the words, "candy released, six cts. per pound valuation," and obtained a lower rate of freight. On this the railroad received the goods. It was held that, upon damage or loss occurring, the shippers could not recover at a higher valuation than that so fixed. In the case under consideration there was nothing to mislead the carrier, or prevent its agents from making inquiries as to its value.

7, 8. The defendant pleaded that its engineer in charge of its train became suddenly insane, and lost his power of mental control and discretion; that this was unknown to the defendant, or any of its agents or employees, until after said transaction, and could not have been known to it by the exercise of all the diligence required of it by law; and that all the acts of the engineer complained of were due to the sudden insanity, which developed at the time and while the transaction was going on, unmixed with any negligence of the defendant. The plaintiff demurred to this plea, and the demurrer was overruled. The court charged, in effect, that if the engineer suddenly became insane, and thereby became demented to such an extent as to lose his reason, and render him

totally irresponsible for his act, such insanity, and acts growing out of it, would, in a legal sense, be the act of God. To this charge the defendant excepted. The determination of the defendant's liability in the present case does not rest upon the common-law liability of common carriers as insurers, but upon a special contract; but as the judge charged as above stated, and the question has been argued before us, the writer deems it not improper to discuss the case as it would stand at common law, in the absence of a limiting contract.

Much learning and ability has been expended on the subject of what constitutes an "act of God" which will relieve a common carrier. Lord Coke made frequent use of the expression, applying it to death, sudden tempests, and the like. In *Forward v. Pittard*, 1 Term. R. 27-33, Lord Mansfield used the following oft-quoted language: "Now what is the act of God? I consider it to mean something in opposition to the act of man, for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests." Some courts have held that the terms "act of God" and "inevitable accident" are synonymous, but others have held that there was a distinction. For interesting discussions and illustration of acts which fall within the designation "acts of God" see *Pandorf v. Hamilton*, L. R. 17 Q. B. 670; *Nugent v. Smith*, L. R. 1 Com. Pl. Div. 423 et seq.; *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627. In an elaborate and able note to *Coggs v. Bernard*, 1 Smith's L. C. (8th Ed.) 422 et seq., the cases are reviewed, and it is said: "Upon the whole, it would seem that an act of God signifies the extraordinary violence of nature, * * * and these cases now express the more commonly recognized law, that the act of God which excuses the carrier must be a direct and violent act of nature." In these authorities are also discussed the terms "unavoidable accident," "inevitable accident," "perils of the sea," and similar expressions, frequently used in bills of affreightment. See, also, *Stroud's Jud. Dict.*; *Bouvier's Law Dict.*; *Black's Law Dict.*; *Anderson's Law Dict.*; words "acts of God," "common carrier," and citations; 3 *Wood's Ry. Law*, 1574; 2 *Kent's Com.* 598; 5 *Thomp. Neg.* 6456; *Story, Bailm.* (9th Ed.) § 25. In *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, the liability of common carriers and their right of defense on the ground that the injury was occasioned by the "act of God" was considered. *Nisbet, J.*, in the opinion used the following language: "Unavoidable accidents are, in our opinion, the acts of God.

The latter words express the same acts, and no more than the former; the two phrases mean the same thing. See *Story on Bailm.* §§ 25, 511; 2 *Kent's Com.* 597. What, then, are acts of God or unavoidable accidents? For it is from these only that this party is protected. By the act of God is meant any accident produced by physical causes which are irresistible, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. *Story, Bailm.* § 25; 2 *Kent's Com.* 597. The act of God excludes all idea of human agency. *McArthur & Hurlbut v. Sears*, 21 *Wend.* 190. In this case it is said: 'No matter what degree of prudence may be exercised by the carrier or his servants, although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet if it be the result of human means the carrier is responsible.' See, also, *Backhouse v. Sneed*, 1 *Murphy*, 173; *Ewart v. Street*, 2 *Bailey*, 157, 23 *Am. Dec.* 131; *Smyri v. Nolon*, 2 *Bailey*, 421, 23 *Am. Dec.* 148." In *Central Line of Boats v. Lowe*, 50 *Ga.* 509, Judge *McCay*, delivering the opinion, said: "There is, doubtless, a distinction between an 'act of God' and an 'unavoidable accident.' The former covers only natural accidents, such as lightning, earthquakes, tempests, and the like, and not accidents arising from the negligence or act of man." In *Doster v. Brown*, 25 *Ga.* 24-26, 71 *Am. Dec.* 153, *McDonald, J.*, delivering the opinion, said: "While every shower of rain that falls upon the earth is the act of God in contradistinction to the act of man, yet an ordinary freshet is not the act of God, in the legal sense which protects a man against responsibility for the nonperformance of a contract like that made by this plaintiff." See, also, *Cannon v. Hunt*, 113 *Ga.* 501-509, 38 *S. E.* 983; *Young v. Waldrip*, 91 *Ga.* 765, 18 *S. E.* 23; *Richmond R. Co. v. White*, 88 *Ga.* 805, 15 *S. E.* 802; *Carr v. Houston Warehouse Co.*, 105 *Ga.* 268, 31 *S. E.* 178. In the case of *McArthur v. Sears*, 21 *Wend.* 190, which is cited as authority in the case of *Fish v. Chapman*, *supra*, a steamboat had been driven on shore by a previous gale. As a second steamboat later approached the harbor at night, the weather was hazy and snow was falling. Those in charge were misled by the light of the boat on shore, and the second boat struck the shoal. It was held not to excuse the carrier. In *Merritt v. Earle*, 29 *N. Y.* 115, 86 *Am. Dec.* 292, it is said: "By the 'act of God' is meant something which operates without any aid or interference from man. When the loss is occasioned or is the result in any degree of human aid or interference, the case does not fall within the exceptions of the carrier's liability." See, also, *New Brunswick Steamboat, etc., Co. v. Tiers*, 24 *N. J. Law*, 697, 64 *Am. Dec.* 394. The maxim that "the act of God is so treated by the law as to affect no one injuriously" (*actus Dei nemini facit*

injuriam) has a general application, and is not limited to cases affecting common carriers. *Broom's Legal Maxims* (8th Ed.) 229, 230. Nevertheless, in 16 *Am. & Eng. Enc. Law* (2d Ed.) 622, it is said: "A lunatic is not responsible for crime, because he is not a free agent, capable of intelligent voluntary action, and therefore is incapable of a guilty intent; but in a civil action for an injury done to the person or property of another, the intent is generally immaterial, and the rule is that an insane person is liable for his torts the same as a sane person, except for those torts in which malice, and therefore intention, is a necessary ingredient. * * * In respect to this liability, there is no distinction between torts of nonfeasance and of misfeasance, and consequently an insane person is liable for injuries caused by his tortious negligence. Insane persons are held to this liability on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. This position is sustained by a number of authorities. *Cooley on Torts* (2d Ed.) 115, m. p. 99 et seq.; *Cross v. Kent*, 32 *Md.* 581; *White v. Farley*, 81 *Ala.* 563, 8 *South.* 215; *Behrens v. McKenzie*, 23 *Iowa*, 338, 92 *Am. Dec.* 428; *Avery v. Wilson* (C. C.) 20 *Fed.* 856; *Krom v. Schoonmaker*, 3 *Barb.* 647; *Jewell v. Colby*, 66 *N. H.* 399, 24 *Atl.* 902 (holding that the damages recoverable are limited to compensation for actual loss sustained by the injured party); *Morse v. Crawford*, 17 *Vt.* 499, 44 *Am. Dec.* 349; *Williams v. Hays*, 143 *N. Y.* 442, 38 *N. E.* 449, 26 *L. R. A.* 153, 42 *Am. St. Rep.* 743; *Id.*, 157 *N. Y.* 541, 52 *N. E.* 589, 43 *L. R. A.* 253, 68 *Am. St. Rep.* 797.

When the case of *Williams v. Hays* was first before the Court of Appeals of New York, it was decided that: "If one of several owners of a ship is in charge thereof under a contract with the others as lessee or bailee, and on his attention being called to its peril refuses to believe in such peril, though apparent, or to take any measures to avert it, and thereby the ship is lost, he is answerable to his co-owners for his negligence, though it was induced by his insanity at the time." *Earle, J.*, delivered a learned opinion, citing many authorities on the subject. In the course of it he made use of this expression: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with." "When the case was before the Court of Appeals for the second time, it was held that this question should be submitted to the jury; *Bartlett, J.*, dissenting. Indeed, a little reflection will suffice to show that the injury in this case could not fairly be considered as arising from the act of God. For this defense to be available as an excuse to a common carrier, the act of God must be proximate cause of the loss or injury. *Hutchin-*

son on Carriers (2d Ed.) §§ 179, 180 (a). If insanity were to be analogized to sudden or overpowering illness, which renders it impossible for a person to perform an act or discharge a duty, nevertheless in this case the act of God was not the immediate or proximate cause of the loss, unaffected by human agency. If insanity be treated as an act of God, it was not insanity alone which killed the horse. The engineer, conductor, and the flagman were all concerned in separating the engine from the cars, and leaving them apparently without light or warning signal upon the track. The engineer, the fireman, and the conductor all went together to the water tank. The engineer set the engine in motion at a rapid speed while returning to the cars. It is not pretended that he was stricken with illness or even insanity after he did this, so as to prevent his stopping the engine; but the contention is that, because of unsoundness of mind, he did careless or reckless acts. Suppose that, instead of having killed the horse by the collision, the engineer had stolen the horse, would it be contended that, by showing insanity on his part, the taking became the act of God? Or, if the agent of the company had made a mistake, and delivered the plaintiff's horse to some other person, whereby it was lost to the plaintiff, would it be urged that, if the agent were insane, the delivery of the horse to the wrong person was an act of God? Surely not. Sudden death or sickness of such character as to render action impossible may sometimes excuse nonaction; but tortious action does not become the act of God because the person acting may be sick.

9. There is a further reason why, under the evidence in this case, this defense could not avail the defendant. In *Richmond R. Co. v. White*, 88 Ga. 805, 15 S. E. 802, it was said: "And generally, in order for the carrier to avail himself of the act of God as an excuse, the burden of proof is upon him to establish, not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto, for 'in cases of loss the presumption of law is against him.'" *Central R. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838 (3), 44 Am. St. Rep. 37; Civ. Code 1895, § 2265. Here the presiding judge charged that gross negligence took the place of negligence in stating the rule.

10. The present case, however, does not rest on the common-law liability of common carriers. A special contract in regard to the shipment of live stock was made, which exempted the carrier from all liability incidental to railroad transportation, except for fraud or gross negligence on its part. Under such facts, does the rule that a tortfeasor is not generally excused from liability for actual damages by reason of insanity apply also to an insane agent, so that the principal is liable for an injury committed by such an agent if the latter becomes suddenly and totally insane, and the principal

and his other agents are without fault? The reasoning that if the loss must be borne by one of two innocent parties, it should be borne by him who occasioned it, is not to be carried to the extreme of holding that the mere fact of the occurrence of loss necessitates a recovery in all cases, regardless of whether there was negligence or any violation of legal duty. On the general subject see *Brown v. Collins*, 53 N. E. 443, 16 Am. Rep. 372.

This is not a case of a physical injury to the person, and does not fall within the principle of law codified in Civ. Code 1895, § 3826, which declares as follows: "A physical injury done to another gives a right of action, whatever may be the intention of the actor, unless he is justified under some rule of the law. The intention should be considered in the assessment of damages." But even this was held not to create liability for a personal injury resulting from falling into an elevator shaft, in the absence of negligence of the owner. *Whatley v. Block*, 95 Ga. 15, 21 S. E. 985. Nor is the present action for conversion. It is a suit for damages claimed to have resulted from gross negligence. Aside from the common-law liability of carriers, or any statutory provision, the general rule is stated in *Angell & Ames on Corp.* (11th Ed.) § 310, thus: "As natural persons are liable for the wrongful acts and neglect of their servants and agents, done in the course and within the scope of their employment, so are corporations, upon the same grounds, in the same manner, and to the same extent." See, also, sections 382, 383; *Morawetz, Priv. Corp.* §§ 725, 780. Suppose that the agent of an individual should become suddenly and wholly insane without the knowledge of the principal, would the latter be responsible for all his acts, both of omission and commission, in the absence of any wrongful act or failure of duty on his own part or that of his other agents? In such examination as I have been able to make, I have found no case which extends the doctrine of liability of a person for his own torts, regardless of his insanity, to liability of a principal for the negligent torts of an insane agent, unless the principal commanded or assented to the act, or knew of the insanity, or he or his other agents failed in some respect in their duty. In *Buswell on Insanity*, §§ 355, 356, the author recognizes the rule that, "although a lunatic may not be punishable criminally, he is liable in a civil action for any tort he may commit." Yet he says (section 357): "It would seem that if one knowingly employs an insane person as his servant or agent, he will be liable for damages to third parties resulting from acts done by the insane person in the scope of his employment." By analogy to this principle, it was held in *Cole v. Nashville*, 4 Sneed (Tenn.) 162, that if a municipal corporation, "knowing a person to be a lunatic, commission him by its license

to follow within its limits a dangerous avocation, the exercise whereof requires great caution and circumspection, and while such person is so engaged under said license any injury be done to an individual by the act of such person in the pursuit of his business, the corporation is liable in damages to the injured party." In *Christian v. Columbus & R. Ry. Co.*, 79 Ga. 460, 7 S. E. 216, the declaration alleged that the railroad company knowingly employed an insane agent, who committed a homicide while in charge of its office. In the opinion it was said: "We think, also, that if the homicide was the result of insanity, and the railroad company was faultless in regard to employing the agent, anything that would excuse the agent criminally for the act would excuse the railroad company civilly." As it was alleged that the company employed the agent knowing of his insanity, the point now being considered was not directly involved, nor was this a conclusive holding that the test of criminal and civil liability is the same (see discussion in *Berkner v. Dannenberg*, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559); but it is cited to show that this court did not treat the principal as at all events liable for the conduct of an insane agent. Insane persons are generally declared incompetent to be agents. *Story on Agency*, § 7; 1 Am. & Eng. Enc. Law (2d Ed.) 945. The Civil Code of 1896 (section 3001) says: "Any person may be appointed an agent who is of sound mind." If a principal selects a sane agent, he takes the risk of the possible negligence or tortious conduct of such agent acting within the scope of his agency; but becoming insane is an abnormal condition, and is not ordinarily one of the risks in contemplation. Of course, if the principal knowingly appoints an insane person as his agent, or permits such a one to act for him after knowledge of the insanity, he will not be excused by reason of it.

We concur with the trial judge in holding that to be an excuse the insanity must be so sudden that the principal was not charged with notice of it, or with want of proper care after its discovery, and total in character, so as to practically make the agent incapable of committing a voluntary act. So long as it is merely a partial derangement, he remains to some extent a sentient agent, acting for his principal; and it would involve a maze of uncertainty to undertake to hold the principal partially liable and partially not. Indeed, Prof. Wharton contends that an irresponsible man is not to be considered as a juridical cause, but rather like a weapon of wood or stone, incapable of intelligent choice, and acting only as it is employed or compelled. *Whart. Neg.* (2d Ed.) § 88. Under the law of this state, on proof of the loss a presumption of

negligence arose against the railroad company, and the burden was on it to show, not only the insanity of the engineer, but also that it or its agents were not chargeable with gross negligence contributing to the injury. If they were so, the defense would fail.

From a careful examination of the evidence, we are of the opinion that it failed to show a sufficient defense. There was no evidence of any sudden insanity coming on the engineer in the midst of this transaction. So far as the evidence tended to show insanity at all at that time, it indicated that certain symptoms, such as irritability, moodiness at times, etc., had been observed before the occurrence. The engineer was not discharged because he was insane, but because he was at fault. He continued to run an engine for months after this transaction, and a considerable time had elapsed before a physician advised that he was insane, and should be sent to the asylum. Moreover, the conductor was on the engine with him, and had authority to compel him to obey orders, and spoke to him of the danger, but permitted him to proceed, when he said that he knew where the other cars were. The presiding judge submitted the issue to the jury, and they found the defendant liable.

11. Complaint is made that the court permitted counsel for the plaintiff to comment upon the fact that no defense of insanity was set up when the action was originally brought in 1902, but was brought in by way of amendment to the defendant's answer pending the trial of the case in September, 1904. While an amendment, when allowed, generally relates back to the filing of the pleading amended, it is nevertheless legitimate for counsel to comment on the occurrences during the trial of the case, including the setting up of the defense of insanity, which was not originally referred to in the pleadings. *Inman v. State*, 72 Ga. 269; *McBride v. Macon Tel. Pub. Co.*, 102 Ga. 422, 30 S. E. 999.

12. The headnote sufficiently states our ruling on the subject of adding interest to the value of the property destroyed. *Western & A. R. Co. v. McCauley*, 68 Ga. 818; *Central R. Co. v. Sears*, 66 Ga. 499; *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130. Where the damages found are discretionary or punitive, this rule does not apply. *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; *Batteree v. Chapman*, 79 Ga. 574, 4 S. E. 684.

A consideration of all the grounds of the motion for a new trial satisfies us that there were no errors requiring a reversal. Judgment on the main bill of exceptions affirmed; cross-bill dismissed.

All the Justices concur, except BECK, J., not presiding.

(124 Ga. 714)

FLANDERS v. DALEY.

(Supreme Court of Georgia. Jan. 13, 1906.)

LIBEL AND SLANDER — DAMAGES — INSTRUCTIONS.

Where, under the allegations of the petition and the evidence submitted on the trial, a verdict for general damages could have been legally found, it was error to instruct the jury in a way calculated to impress them that plaintiff could not recover unless special damages were proved.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 369.]

(Syllabus by the Court.)

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by W. F. Flanders against A. F. Daley. Judgment for defendant, and plaintiff brings error. Reversed.

In an action brought by W. F. Flanders against A. F. Daley the petition alleged that during a quarterly conference of the Methodist Episcopal Church South, held at a stated time and place, the defendant, in the presence of named persons, maliciously used of and concerning the plaintiff certain false and defamatory words, set out in the petition, and that on a subsequent designated occasion, in the presence of other named persons, defendant maliciously used of and concerning plaintiff other false and defamatory words, also set forth, and that such words were so spoken of plaintiff "in reference to his office and profession of a minister of the gospel," he "being then and there a local preacher of the Methodist Episcopal Church South," and were calculated to injure him and did injure him in his said office and profession, and were so intended by defendant when spoken. General damages were alleged. The petition also alleged that the use of the words set forth caused plaintiff to be deprived of his license as a local preacher, and to lose certain scholarships, of a given value, in a named college, for his daughters. The defendant demurred to the petition, on various grounds. The demurrer was sustained and the plaintiff excepted. In reviewing that ruling (120 Ga. 885, 48 S. E. 327), this court held: "(2) A minister of the gospel is one following a profession, within the meaning of the law, which makes a person liable without proof of special damage for words spoken of another with reference to his 'profession, calculated to injure him therein.' It is not necessary that such a minister should, at the time the words are spoken, be receiving compensation for his services. (3) An allegation that the words were spoken in reference to plaintiff's office and profession of a minister of the gospel, [he] being 'then and there a local preacher of the Methodist Episcopal Church South,' is a sufficient averment, as against a demurrer raising the objection that the plaintiff was not following a profession. (4) Whether or not words alleged to be slanderous were privileged would depend upon the circumstances under which and the intention

with which they were spoken. If spoken in good faith and in the performance of a private or public duty, either legal or moral, the speaker would not ordinarily be liable. In view of the allegations of the petition, the question of privilege is one which must be raised by plea and submitted to the jury as an issue of fact. (5) The petition set forth a cause of action, and it was error to dismiss the same on demurrer." When the case got back in the superior court for trial, the defendant filed an answer which is summarized by his counsel as follows: "(1) Denied the words as charged; alleged (2) the words really used were true; (3) that the words used were privileged, having been spoken (a) in a quarterly conference of the Methodist Episcopal Church South, which had jurisdiction of plaintiff's character as a local preacher of said church, and (b) at a duly organized and legally constituted church trial of the plaintiff, defendant being a witness thereat, and which trial had been held legal and proper by the highest authority of the church, the annual conference, to which plaintiff had appealed; (4) that the words were induced (a) by plaintiff's interrogation directed to defendant and others at the quarterly conference, of which body defendant was a member, and (b) by a question propounded by plaintiff's counsel at the church trial; (5) that the position of a local preacher in the Methodist Episcopal Church South was not a profession within the legal meaning of the term profession, and that under the laws of said church a local preacher is a layman; and (6) that plaintiff was under suspension at the time of the use of the words really used." Under all these pleas the case was tried. In the absence of objection, so far as the record discloses, the court allowed both sides great latitude in the introduction of evidence. There was a general verdict for the defendant, and, the plaintiff's motion for a new trial having been overruled, he excepted.

Jos. K. Hines and J. L. Kent, for plaintiff in error. R. L. Gamble, W. R. Daley, and A. S. Bussey, for defendant in error.

FISH, C. J. (after stating the foregoing facts). The court instructed the jury as follows: "The plaintiff alleges by the use of said words he was turned out of the church, and dismissed as a local preacher and deprived of his license. The defendant denies this allegation, and contends that the words used were not the cause of his expulsion, dismissal, and the loss of his license. If you find from the evidence in favor of the defendant's contention, and that plaintiff's expulsion from the church and loss of his license was the result of other causes than the words used, then the plaintiff can not recover." The error assigned upon this charge was that it precluded the jury from finding in favor of the plaintiff in the event they believed he was expelled from the church and deprived of his license from a cause other

than the words alleged, although they might believe from the evidence that the defendant used the language set out in the petition, that it was false and defamatory, and not justified as a privileged communication. Another charge excepted to was: "If you believe the language was used as set out in the declaration and that language was false and maliciously used, and you believe that at the time the plaintiff was a local Methodist preacher of the Methodist Church, and you believe damages flowed from the use of the words by reason of his position and used in the presence of the people laid in the declaration, then the plaintiff would be entitled to recover." The error assigned was that, if the language was used as set forth in the petition, it was actionable per se, and plaintiff was entitled to recover without proof that he sustained damages by reason of the use of such language, and that the charge was calculated to mislead the jury and to impress them with the idea that plaintiff would have to prove special damages before he could recover. It is quite clear, we think, that the exceptions to both of the charges above set out were well taken. "One licensed by an evangelical church to preach the gospel is a minister of the gospel, and, as such, is engaged in the work of a profession. * * * One who speaks words in reference to a minister of the gospel, calculated to injure him in the profession which he follows, is liable to be called to account for slander, even though it does not appear that any special damage resulted from the use of such words." *Flanders v. Daley*, 120 Ga. 885, 48 S. E. 327, and citations; Civ. Code 1895, § 3837.

The plaintiff put in evidence what purport-

ed to be a license issued February 28, 1888, by a presiding elder of the Methodist Episcopal Church South, and in behalf of a quarterly conference of that church, authorizing the plaintiff "to preach the gospel"; also what purported to be a certificate of the ordination of plaintiff as a deacon in such church by a bishop thereof, dated December 13, 1896, authorizing plaintiff "to administer the ordinances of baptism, marriage, and the burial of the dead, in the absence of an elder, and to feed the flock of Christ * * * according to the established doctrines of the gospel." From the evidence the jury could have found that the plaintiff had been "licensed by an evangelical church to preach the gospel," and was, therefore, a minister of the gospel. There was also evidence from which the jury could have found that the plaintiff was such a minister and performing the duties of the office on August 25, 1902, when the petition alleges the defendant used of and concerning him the language set out therein. This being true, and the alleged language being actionable per se, the plaintiff could recover upon proof of its use by defendant as set out in the petition, without showing that any special damage was caused thereby. Indeed, there was no evidence that the plaintiff suffered any special damage, and, as the charges under consideration strongly indicated to the jury that the plaintiff could not recover unless special damages were proved, a verdict for the defendant logically followed. Some other instructions excepted to were not entirely accurate, but they will doubtless be corrected by his honor on another trial.

Judgment reversed. All the Justices concurring.

(106 Va. 1)

FEWELL v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. Feb. 2, 1906.)

MASTER AND SERVANT—INJURIES TO SERVANT
—DEFECTIVE APPLIANCES—SELECTION BY
SERVANT.

A gang of men engaged in loading and unloading freight cars were furnished with a sufficient supply of boards to be used as a gangway for their trucks. The men were authorized, and it was their duty, to select for themselves and to place in proper position the boards to be used by them. Plaintiff, who was a member of the gang, or one of his companions, selected a board having a large piece chipped out of one corner to use as a gang plank from a car to the platform. The truck which plaintiff was pushing struck the board at the defective corner, knocking it from its position, and causing the truck and plaintiff to fall, thereby injuring plaintiff. *Held*, that the injury was attributable to the negligence of plaintiff or of one of his fellow servants in selecting an obviously defective plank, and the railroad was not liable therefor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 712-718.]

Error from Corporation Court of Alexandria.

Action by D. Fewell against the Southern Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

John M. Johnson, for plaintiff in error. C. C. Carlin, for defendant in error.

HARRISON, J. This action was brought to recover damages for an injury alleged to have been received by the plaintiff in consequence of the negligence of the defendant company. Judgment was given in favor of the defendant upon its demurrer to the evidence, and this action of the corporation court is alone called in question by this writ of error.

The evidence tends to show that the plaintiff was one of a crew or gang of truckmen in the employment of the defendant, whose duty it was to load and unload freight cars; that at the Alexandria station of the defendant company there are several tracks lying parallel with each other, upon which the cars stand about three feet apart; that the nearest car is within three feet of the platform, and that the method of unloading the cars is by means of boards, about four feet long and three feet wide, covering the space from one car to the other, for the trucks to pass over, the space between the last car and the platform being covered by a similar board; that, when a car contains freight which can be passed over, the custom is to bridge such freight with the boards already mentioned and pull the trucks over the bridge thus constructed; that on the morning of the accident in question the plaintiff was engaged in unloading cars; that in the car next to the platform there was a pile of long, heavy iron pipes, about two feet high; that this pile of pipes was bridged, as already indicated, which made an ascent on one side and a descent on the other. The evidence further

tends to show that the board extending from the car to the platform was defective in having a piece about six inches square "chipped" out of one corner of the end resting upon the car; that the construction of the bridge over the pile of pipes in the car gave the truck such momentum in coming down the incline of the bridge that the plaintiff could not properly control or direct it; and that the truck struck the board at the defective corner, knocking it from its position, and causing the truck to fall to the ground and the plaintiff to fall on the platform, receiving in some way the injury complained of. The evidence further tends to show that there was a large number of these boards scattered about in different places over the platform for the use of the truckmen in loading and unloading cars; that it was the duty of the truckmen to select the boards they were about to use, and to place the same in proper position; and that it was the right and duty of the truckmen, if they found a defective board in use, to discard it and substitute one that was sound. The evidence further tends to show that sound boards were easily accessible to the truckmen, and that immediately after this accident, before the work was proceeded with further, a sound board was put in the place of the one that was defective.

This is the plaintiff's case, as made by his own evidence, and there are no reasonable inferences that could be drawn from any evidence in the case which would add anything to its strength.

The contention of the plaintiff is that the accident which caused his injury was due to the defective board over which his truck had to run from the car to the platform, which defect caused the board to give way when struck by the truck, which was accelerated in speed by the momentum received in coming down the incline of the bridge over the iron pipes.

Admitting the theory of the plaintiff to be true, and that the defective board caused the accident, the question then arises, who is responsible for the use of this defective board?

The accident occurred since the adoption of the present Constitution, but it is conceded, both in the petition for a writ of error and in oral argument at bar, that the plaintiff does not come within any of the provisions, with respect to fellow servants, to be found in section 162 of that instrument.

The evidence does not show which one of the crew to which the plaintiff belonged selected and placed the defective board in position, but it does abundantly show that it was the duty of the plaintiff and his fellow servants to select the board and put it in position for use. The evidence shows that the defendant company always kept a supply of good boards on hand, readily accessible to the truckmen for whose use they were intended, and that there was a supply at hand on the morning of the accident. The injury complained of was, there-

fore, due to the negligence of the plaintiff or of his fellow servants in selecting for their use a defective board.

In the case of smaller appliances, which are ordinarily kept in considerable quantities, and are in their nature intended to be transported from place to place, when the master keeps an adequate and accessible stock of such appliances in good condition, contributory negligence is predicable of the act of the servant who selects an appliance which he knows, or ought to have known, to be defective and dangerous. *Labatt v. Master & Servant*, vol. 1, p. 880; *White v. Newport News Shipbuilding Co.*, 95 Va. 355, 28 S. E. 577.

If the plaintiff, or his co-employees, had exercised ordinary care and prudence in selecting the board, he would have escaped injury. His own negligence, or that of his fellow servants, contributed to his misfortune, and therefore, upon well-settled principles, the defendant company cannot be held responsible.

For these reasons, the judgment complained of must be affirmed.

(104 Va. 388)

ROBINSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Feb. 2, 1906.)

1. EMBEZZLEMENT—BY PUBLIC OFFICER.

Code 1904, § 723, requires a justice to pay over fines within 30 days after collecting the same, and imposes a penalty for his failure so to do. Section 3717 makes it a criminal offense for any state or municipal officer having custody of public funds to knowingly misuse or misappropriate the same. *Held*, that where a justice of the peace imposes and collects a fine, and not only fails to pay the same over, but feloniously misuses and misappropriates the same, he is indictable under section 3717.

2. JURY—DISQUALIFICATION OF JURORS—EXPRESSIONS AS TO GUILT.

That a juror has stated in effect that he would convict defendant if he sat on any jury which tried him does not disqualify the juror, where the statement was made with reference to a previous indictment against defendant preferred by a grand jury of which the juror was a member, but which was not connected with the indictment on the trial of which the juror was examined, and the juror further stated that he could give defendant a fair and impartial trial without reference to what he had heard on the grand jury or otherwise.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 440, 461.]

3. EMBEZZLEMENT—BY PUBLIC OFFICER—EVIDENCE—PRACTICE IN SIMILAR CASES.

In a prosecution of a justice under Code 1904, § 3717, for embezzling money collected by him as a fine, evidence as to the practice of defendant and other magistrates with reference to paying over fines was properly excluded.

4. SAME—DEFENSE—RESTITUTION.

In a prosecution of a justice, under Code 1904, § 3717, for embezzling money collected by him as a fine, the fact that defendant made restitution of the fruits of his crime after the completion of the offense was no defense.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 32-34.]

5. SAME—VENUE—SUFFICIENCY OF EVIDENCE.

In a prosecution of a justice, under Code 1904, § 3717, for embezzling money collected by him as a fine, it is only necessary to show that the offense was committed in a county over which the court has jurisdiction, and it is unnecessary to show the magisterial district for which the justice acted in collecting the fine.

6. SAME—INDICTMENT—VARIANCE.

In a prosecution of a justice, under Code 1904, § 3717, for embezzling money collected by him as a fine, a conviction may be had on showing the misappropriation of a part of the sum charged in the indictment.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 55, 56.]

7. CRIMINAL LAW — INSTRUCTIONS — SUFFICIENCY OF INSTRUCTIONS GIVEN.

An instruction requested by accused, which is the same in legal effect as an instruction given by the court, may be refused.

8. SAME—APPEAL—HARMLESS ERROR — ARGUMENT OF COUNSEL.

A remark of the prosecuting attorney in arguing to the jury, the effect of which, standing alone and segregated from its context, was to incorrectly state the law, was not ground for reversal, where the jury was properly instructed by the court, and the court certified that accused was not prejudiced by the language used.

9. EMBEZZLEMENT — SUFFICIENCY OF EVIDENCE.

In a prosecution of a justice, under Code 1904, § 3717, for embezzling money collected by him as a fine, evidence held sufficient to authorize a conviction.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 8127.]

Error to Circuit Court, Warwick County.

Charles H. Robinson was convicted of embezzlement of public funds, and brings error. Affirmed.

C. C. Berkeley and F. S. Collier, for plaintiff in error. The Attorney General, Wm. A. Anderson, and Ashby & Read, for the Commonwealth.

KEITH, P. An indictment was found in the circuit court of Warwick county against Charles H. Robinson, which charges that he, being a justice of the peace of Newport magisterial district, in said county, by virtue of his office aforesaid, had the custody of a certain sum of money, public funds of the state of Virginia, to wit, the sum of \$5, which he was required by law to pay to the clerk of the circuit court of the county aforesaid, and which he "feloniously and knowingly did misuse and misappropriate, * * * and did then and there feloniously and knowingly dispose of the said money and public funds otherwise than by paying the same to the clerk of the circuit court of Warwick county, Virginia, in accordance with law, and so the jurors aforesaid, upon their oath aforesaid, do say that the said Charles H. Robinson then and there in manner and form aforesaid feloniously and knowingly did steal, take, embezzle, and carry away, the said money and public funds aforesaid, to wit, the sum of five dollars, currency of the United States, of the value of five dollars, the money and public funds of the state of Virginia. Against the peace

and dignity of the commonwealth of Virginia."

There was a motion to quash and a demurrer interposed to this indictment. We deem it necessary to consider only the demurrer.

The plaintiff in error contends that the indictment is based upon section 723 of the Code of 1904, which provides:

"If any fine is received by the justice imposing it, he shall pay the same, with the cost, within thirty days thereafter, to the clerk of the circuit court of his county or corporation court of his city. For failure to make such payment within said time, without good cause, he shall forfeit twenty dollars, which, together with the money so received, may be recovered by motion."

This statute fixes the duty of the justice. When he imposes and collects the fine, he must, by its terms, pay the same, together with the costs, within 30 days to the clerk of the court of his county or corporation; and for failure to make such payment he forfeits \$20, which may be recovered from him by motion, together with the money so received. But that is not the offense with which plaintiff in error was charged. He was prosecuted under section 3717, which is as follows:

"If any officer, agent, or employé of the state or of the city, town or county or the deputy of any such officer having custody of public funds knowingly misuse or misappropriate the same or knowingly dispose thereof otherwise than in accordance with law, he shall be confined in the penitentiary not less than one nor more than ten years, and if any default of such officer, agent, employé, or deputy in paying over said funds to the proper authorities when required by law to do so shall be deemed *prima facie* evidence of his guilt."

The two sections are wholly dissimilar. The first refers to the failure to pay over; the second to the knowing misuse or misappropriation of the funds of the state. It is true that the detention of the money is one of the elements constituting the offense punished under section 3717, but it does not constitute the offense itself; for money may be detained without being misappropriated, which is the evil for which section 723 was designed as a remedy. But it may also be detained with fraudulent and felonious intent to misuse and misappropriate, which brings the case within the terms of section 3717.

We are of opinion that the indictment is sufficient, and that the demurrer was properly overruled.

While the jury were being selected for the trial of this case, plaintiff in error challenged one of the veniremen who had been sworn upon his *voir dire*, and asked him if he had not, at a time and place named in the question, said, "Charley Robinson don't want me to sit on any jury that tries him, and

would know that he is a goner if I sit on any jury that tries him." To which the juror replied that he had made such a statement, and meant that, if the evidence was as strong in this case as it was in the one before the grand jury on which he sat when Robinson was indicted on a former occasion, he would convict him. The grand jury here alluded to was not connected at all with this prosecution. The court then asked the juror if there was any impression on his mind made by what he had heard about the accused, or by what he had heard on the grand jury in the case referred to, that would require evidence to remove it, to which he replied that there was not, but that he could give the accused a fair and impartial trial without reference to what he had heard about the accused, either on the grand jury or otherwise. Thereupon the juror was received by the court, and the plaintiff in error excepted.

This subject was recently considered by this court in the case of *McCue v. Commonwealth*, 103 Va. 870, 49 S. E. 623, and the conclusions reached are thus stated in the syllabus: "The trend of recent decisions is in the direction of limiting, rather than extending, the disqualification of jurors by reason of mere opinion, hence the courts inquire into the character of that opinion. If it is a decided or substantial opinion as to the guilt or innocence of the accused, no matter upon what ground formed, the juror is incompetent; but if the opinion is merely hypothetical, and the court is satisfied from an examination of the juror on his *voir dire*, or otherwise, that he is not biased or prejudiced, and that he can give the prisoner a fair and impartial trial according to the law and the evidence, he should be accepted. No fixed and invariable rule can be laid down whereby to test the competency of jurors, but each case should be determined by its own facts and circumstances, and great weight should be attached by an appellate court to the opinion of the trial judge."

Applying this principle to the case before us, we are of opinion that there was no error in the ruling of the circuit court.

The third assignment of error is to the exclusion of certain evidence offered by the accused.

The bill of exceptions is as follows: "That at the trial of this cause, after the accused had been arraigned and the jury impaneled to try the issue, and while the accused was testifying in his behalf, relative to the reasons why he had not paid the fine and the costs, shown in the evidence, to the clerk of the court, he started to state that it was his practice, and that of other magistrates and police officers down there. To further testimony along this line the commonwealth here objected, by counsel, which objection the court sustained, to which ruling and opinion of the court in sustaining the said

objection the accused by his counsel excepted, and tenders this bill of exception, which he prays may be signed," etc.

If the prisoner's conduct was in accordance with the law, it did not need to be supported by the practice of others. If it was not in accordance with the law, the fact that others violated the law would furnish no justification or excuse to him. We see no merit in this assignment of error.

After the evidence was introduced, the court, at the instance of the commonwealth, gave the jury two instructions. The first instruction is as follows:

"The court instructs the jury that a payment made to the clerk 30 days after the receipt by a justice of public funds does not excuse a crime, if any, committed because of the failure of an earlier payment."

If the crime was complete, if the prisoner had knowingly misused or misappropriated the funds of the state, his subsequent restitution of the fruits of his crime could not relate back, so as to efface the wrong.

The second instruction is "that the law requires that a justice of the peace, within 30 days after the receipt of any fine imposed by him, do pay such fine, with the cost, to the clerk of the circuit court of his county; and if the jury shall believe from the evidence that C. H. Robinson, while a justice of the peace for this county, received a fine of \$5 of Charlie Sacrience, imposed by him as such justice, and instead of paying the same within 30 days after such receipt by him [Robinson] to Mr. Burnham, clerk, knowingly misused or misappropriated the same, or knowingly disposed thereof otherwise than in accordance with the law, it is the duty of the jury to find him guilty, and to fix his confinement in the penitentiary at not less than 1 nor more than 10 years."

This instruction raises again the question considered with respect to the demurrer to the indictment. It is a correct statement of the law as set out in sections 723 and 3717, in the first of which it is made the duty of officers to pay over the fine within 30 days after its receipt, and in the last of which the knowing misuse or misappropriation of public funds is made a felony, punishable by confinement in the penitentiary for not less than 1 nor more than 10 years.

The plaintiff in error offered certain instructions, numbered 1, 2, 3, 4, and 5, the second of which was given without objection. The fourth, as offered, is in the following words:

"The court instructs the jury, that unless they believe from the evidence that the accused knowingly misused or misappropriated, or knowingly disposed of otherwise than in accordance with law, a fine of \$5, collected by him as justice of the peace of Newport magisterial district in the county of Warwick, which \$5 were funds of the state of Virginia, as alleged in the indictment, then they must find him not guilty."

The court struck out the words "Newport magisterial district in," and to this action plaintiff in error excepted.

It is true that the words stricken from this instruction are found in the indictment, but they were not material, may be regarded as surplusage, and their rejection was not harmful. To bring the crime within the jurisdiction of the court it is only necessary to show the county in which it occurred; that county being one over which the court has jurisdiction.

Instructions 1, 3, and 5 were refused.

Instruction No. 1 made the guilt of the accused to depend upon his having misappropriated the full amount of \$5, and would have required an acquittal, although the evidence had shown the misappropriation of a part of it.

The third instruction directed the jury to acquit, unless they found from the evidence that the accused was a justice of the peace for Newport magisterial district, in the county of Warwick, on the 15th day of August, 1904, as alleged in the indictment, and presents the question already considered in disposing of the modification of instruction No. 4.

The fifth instruction is as follows: "The court instructs the jury that, before they can find the accused guilty of the charge alleged in the indictment, they must believe that he knowingly, feloniously, and with an intent to defraud the state of Virginia, misused, misappropriated, or disposed of otherwise than in accordance with law the \$5, or funds of the state of Virginia, as in the indictment alleged."

In legal effect, the instruction, as offered by plaintiff in error, is the equivalent of that given by the court, in which the jury were told that, to constitute the crime with which the plaintiff in error was charged, they must believe from the evidence that he, while a justice of the peace of Warwick county, had knowingly misused or misappropriated a fine imposed by him as such justice.

The next assignment of error is that the attorney for the commonwealth, in the course of his argument before the jury, used the following language: "That if the accused knowingly disposed of the fine or any part of the same, like keeping it and putting it in bank, otherwise than by paying it to the clerk of the court within 30 days, it is a violation of the law, and the accused should be convicted as charged in the indictment"—to which the accused, by counsel, objected, which objection the court, being of the opinion that the accused was not prejudiced by the words objected to, they being simply a detached part of the argument, overruled, to which ruling of the court the accused, by counsel, excepted.

As we have said in discussing another branch of the case, the detention of the money is a part, and a necessary part, of its misappropriation. Detention does not necessarily constitute misappropriation, but there

could be no misuse or misappropriation without detention, though it is true that detention that continues for 30 days, standing alone, would not complete the offense under section 8717. We have found that the jury was properly directed by the court, and we cannot think that in the face of proper instructions the jury could have been misled to the prejudice of the prisoner by a remark made by the prosecuting attorney, which the court certifies was "a detached part of the argument." That is to say, we are asked to reverse the judgment of the court because a sentence, separated and segregated from its context, is an incorrect statement of the law, when the court, which heard the whole address of counsel and was in a position to consider it, not in its disjointed parts, but as a whole, certifies to us that the accused was not prejudiced by the language used. We are of opinion that this assignment of error should be overruled.

The last assignment of error is to the refusal of the court to set aside the verdict as being contrary to the evidence, and in arrest of judgment.

The facts show that the plaintiff in error was a justice of the peace for Warwick county; that he issued a warrant charging Charles Sacriensce with a misdemeanor; that on August 15, 1904, he entered judgment of conviction; that the fine imposed was \$5; and that this fine had been paid to him in his capacity as a justice of the peace. These facts appear from the testimony of the clerk of the circuit court of Warwick county, and the report sheet furnished him by the accused. Plaintiff in error, who was sworn in his own behalf, testifies that on Sunday, the 14th of August, Charles Sacriensce was arrested on a warrant issued by him, and brought to the station house, where he bailed him, charging him 60 cents for it, that the accused put up \$5 collateral for his appearance the next day; that he did not appear the next day, and witness had never seen or heard of him since; that witness took from the \$5 the fees of the constable, amounting to \$1.70, and his own fees amounting to \$1, the clerk's fees of \$1.25, and the \$1.05 due the state, and that he afterwards wrote up a mittimus for the man, and credited upon the back of the mittimus the \$5 collateral; and that he deposited in bank the \$1.05 due the state and the \$1.25 due the clerk. He then tendered the \$1.05 due the state, and stated that he was ready to pay to the clerk anything more due the state by him. He stated that he had always intended to pay what he had of this fine to the clerk, and certainly would not have made a report of it if he had intended to steal it; that he knew better than that; that he wanted to collect the balance of the fine, but Charlie Sacriensce never was found; that he never did try and convict the defendant; and that his report was wrong in

showing that he fined him \$5. At this point in the examination of Robinson, the attorney for the commonwealth handed him a warrant, which was in the following words and figures:

"Whereas, John A. Williamson, acting chief of police of the said county, has this day made complaint and information on oath before me, C. H. Robinson, a justice of the peace of the said county, that Charlie Sacriensce of the said county, on the 14th day of August, 1904, in the said county did unlawfully create a nuisance by indecently exposing his person by bathing in a nude condition in the James river between Dawson City and Klondike, of said county, in the presence of divers persons, both ladies and gentlemen, against the statutes made and provided in such cases.

"These are, therefore, in the name of the commonwealth, to command you forthwith to apprehend and bring before me, a justice of the peace of said county, the body of the said Charlie Sacriensce to answer to said complaint, and to be further dealt with according to law.

"Given under my hand and seal this 14th day of August in the year 1904.

"C. H. Robinson, J. P."

Indorsed:

"Commonwealth v. Charlie Sacriensce."

"Warrant of arrest. Executed this 14th August, 1904, by John A. Williamson.

"After hearing the evidence in the case the defendant Charlie Sacriensce was found guilty as charged in the warrant and his punishment ascertained to pay a fine of \$5.00 and pay costs of the prosecution. Costs \$3.95.

"This the 15th day of August, 1904.

"C. H. Robinson, J. P."

After showing these papers to the witness, the attorney for the commonwealth then said to him: "You said you did not try or fine this man, and this warrant and indorsement thereon show differently. How do you account for that?" And the witness replied: "I did not mean to say I did not fine him. I said he was not found. That he was tried in his absence, and a mittimus was issued for him, but he was never found." The witness further said that the warrant was his warrant, and he entered the judgment on the back of it that he had fined Sacriensce \$5 and \$3.95 as costs, as appeared on the warrant.

Upon this evidence, after being instructed as we have seen, the jury returned a verdict finding the plaintiff in error guilty as charged in the indictment, and fixing his punishment at one year in the penitentiary. Upon that verdict the circuit court overruled a motion for a new trial and in arrest of judgment, sentenced the prisoner; and we are of opinion that the record discloses no error.

The judgment is affirmed.

(105 Va. 6)

SOUTHERN RY. CO. v. PATTERSON.
(Supreme Court of Appeals of Virginia. Feb. 2, 1906.)

1. RAILROADS — OPERATION — FIRES—NEGLIGENCE—QUESTIONS FOR JURY.

In an action against a railroad for the destruction of property situated along the right of way by fire communicated from an engine, evidence authorizing an inference that the fire was caused by a red-hot clinker of unusually large size being thrown from the tender by the fireman of the engine, or suffered to fall from the footboard and to roll down the right of way, was sufficient, as against a demurrer to the evidence and in the absence of any explanation or denial by the fireman, to establish defendant's negligence.

2. SAME — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.

In an action against a railroad for destruction of property by fire communicated from a locomotive, the burden of proving contributory negligence rests upon defendant, unless such negligence appears by plaintiff's own evidence or may be fairly inferred from the circumstances.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1715.]

3. SAME—LOCATION OF PROPERTY DESTROYED —CONTRIBUTORY NEGLIGENCE— QUESTIONS FOR JURY.

It is not negligence per se for one to build a warehouse used for storing barrels of kerosene oil within a few inches of a railroad's right of way, and the construction of the warehouse in such position does not as a matter of law preclude a recovery, for the destruction of the warehouse by a fire resulting, not from accident, but from the negligence of the operatives of a passing train.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1679, 1745.]

Error to Circuit Court, Pittsylvania County.

Action by T. J. Patterson against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Harrison & Leigh, for plaintiff in error.
George T. Rison, for defendant in error.

WHITTLE, J. The object of this action is to recover damages from the plaintiff in error, the defendant in the court below, for the destruction by fire of a wooden warehouse and adjacent buildings, and other property of the plaintiff; the origin of the fire being ascribed to the negligence of the defendant.

The company demurred to the evidence, and the case is before us upon a writ of error to the judgment of the trial court overruling the demurrer and awarding to the plaintiff the damages conditionally assessed by the jury.

The warehouse in question was located upon the land of the plaintiff in the vicinity of one of the defendant's stations, and within a few inches of the right of way, and had been used for years as a depository for storing kerosene oil in barrels. The source of the fire was a red-hot clinker of unusually large size, which the jury would have been justly warranted by the evidence in inferring was withdrawn by the fireman from the

fire box of the engine, and either negligently thrown off the tender by him or suffered to fall from the footboard and roll down the embankment to a point from which it communicated fire to the building.

We therefore quite agree with the conclusion reached by the learned judge of the circuit court that from the standpoint of a demurrer to the evidence, and in the absence of any explanation or denial by the fireman, the initial negligence of the defendant was clearly established.

But the company denies liability upon the further ground that, even if it be conceded that the fire was primarily caused by the negligence of its employé, the plaintiff was, nevertheless, guilty of such contributory negligence in locating his warehouse immediately along the company's right of way as to bar a recovery.

The burden of proving contributory negligence rests upon the defendant, unless it be disclosed by the plaintiff's own evidence, or may be fairly inferred from all the circumstances, and (inasmuch as this case does not come within the exception, and there is no evidence to sustain the allegation) the question having been withdrawn from the consideration of the jury by the demurrer to the evidence, it must be resolved in favor of the plaintiff, unless this court shall declare as matter of law that the bare location of the warehouse, in such proximity to the right of way, or the manner of its use, constituted negligence per se.

Such contention would seem to be opposed both by experience and observation, for the warehouse had for years escaped the ordinary dangers incident to passing trains, and it is matter of common knowledge that similar structures, devoted to like purposes, are erected along the route of railroads throughout the country.

It is true that the owner of land who elects to establish buildings, or place combustible material, near the track of a railroad, assumes the increased risk from accidental fires, and cannot thereby abridge the right of the company in the lawful use of its property. *Pierce on Railroads*, 436. But that principle is not to be so interpreted or applied as to exonerate a railroad company from liability for an injury proximately caused by its own negligence.

The case of *Chicago & N. W. R. Co. v. Simonson* (Ill.) 5 Am. Rep. 155, was cited to maintain the rule that the owner who suffers combustible material to accumulate upon his land contiguous to the railroad is guilty of contributory negligence, and cannot recover damages for a fire negligently ignited on the right of way.

That decision is opposed to the great weight of authority on the subject in this country, and contravenes the settled doctrine in this jurisdiction. *Railway Co. v. Medley*, 75 Va. 507, 40 Am. Rep. 738; *Kimball v. Borden*, 97

Va. 477, 34 S. E. 45; *White v. Railway Co.*, 99 Va. 357, 38 S. E. 180.

In a note to the principal case numerous authorities are cited to the contrary, and with respect to it the reporter observes: "The latest decision on the subject is that in *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223, 7 Am. Rep. 69, wherein, after a most elaborate and powerful argument, the doctrine of contributory negligence by the adjacent landowner was repudiated."

The ultimate limit to which the doctrine seems to have been carried, in connection with the erection and use of buildings, is that the question of the contributory negligence of the owner ought to be submitted to the jury, upon the facts and circumstances of the particular case, a course which was not followed in this instance. 2 *Thompson's Com. on Neg.* § 2326; *Murphy v. Chicago, etc., R. Co.*, 45 Wis. 222, 30 Am. Rep. 721; *Kesee v. Railway Co.*, 30 Iowa, 78, 6 Am. Rep. 643.

Upon the whole case we are of opinion that the judgment is without error, and it must be affirmed.

(106 Va. 16)

FRENCH v. VRADENBURG'S EX'RS et al.
(Supreme Court of Appeals of Virginia. Feb. 2, 1906.)

WILLS—RIGHTS OF DEVISEE—DISCHARGE OF INCUMBRANCES.

Where a will expressly directs the payment of debts from the personal property, a devisee of real property, incumbered by testator subsequent to the execution of the will, is entitled to have the incumbrance discharged from the personal estate, to the detriment of pecuniary and specific legatees.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 2149.]

Appeal from Circuit Court, Mathews County.

Bill for the construction of a will by L. S. French and another, executors of James Vradenburg, deceased, against A. V. French, an infant, etc., and others. From the decree rendered, the defendant named appeals. Reversed.

Wm. W. Old & Son, for appellant. C. B. Garnett and J. Boyd Sears, for appellee.

WHITTLE, J. The essential question presented by this record for decision involves the right of a devisee of real estate, incumbered by the testator subsequently to the execution of his will, to disappoint legatees, pecuniary and specific, by having the incumbrance discharged out of the personal estate, where the will directs the payment of all the debts of the testator and funeral expenses from any ready money or other personal property that he may have at the time of his death.

From an adverse decree, in a suit by the executors to construe the will and administer the estate, the devisee appealed.

The doctrine touching the order of liability of the assets of a testator's estate for the payment of debts has, in its various aspects,

proved a fruitful source of discussion, and in the argument of the present case our attention has been drawn to numerous decisions of the courts, both in England and the United States, bearing upon the question. But, whatever may be the weight of authority elsewhere, we are of opinion that the case comes within the influence and control of a line of precedents in this state so well established and universally followed in determining the order or liability of the assets of the estate of a testator as to have attained the dignity of canons of construction and the sanctity of rules of property.

Since the opinion of Judge Lee, in *Elliott v. Carter*, 9 Grat. 541, which was delivered more than half a century ago, wills have been written and estates administered on the faith of that decision throughout the commonwealth; and if it, and the decisions of this court which have followed it, are to be overruled, it should be done by act of the Legislature, and not by the courts. That course was pursued in England by Lock King's Act (St. 17 & 18 Vict. c. 113, amended by St. 30 & 31 Vict. c. 69, p. 706), which in effect declares that when a testator shall die seised of mortgaged property, and shall not by his will or deed have signified a contrary or other intention, lands devised subject to a mortgage or other equitable charge, including a vendor's lien, are primarily chargeable therewith, and such devisee is not entitled to have the mortgage debt discharged or satisfied out of the personal estate.

In *Elliott v. Carter*, supra, it was held that, in the absence of an express charge, the personal estate constitutes the natural primary fund for the payment of debts. But where, as in that case, both personal property and real property were equally and expressly charged, they stand on the same footing, and each contributes ratably to the discharge of the common burden. The learned judge in the course of his opinion formulates the following rule, determining the order in which the different funds or subjects of property constituting the estate of a deceased testator shall be applied to the payment of debts:

(1) The personal estate at large, not exempted by the terms of the will or necessary implication.

(2) Real estate, or an interest therein, expressly set apart by the will for the payment of the debts.

(3) Real estate descended to the heir.

(4) Real or personal property expressly charged with payment of debts, and then, subject to such charge, specifically devised or bequeathed.

(5) General pecuniary legacies.

(6) Specific legacies.

(7) Real estate devised by the will.

The main case has been since followed and cited in numerous decisions of this court. *Crouch v. Davis' Ex'r*, 23 Grat. 62; *Murphy's Adm'r v. Carter*, 23 Grat. 477, 489; *Cocker-*

Ille v. Dale's Adm'r, 33 Grat. 45, 49; Edmunds' Adm'r v. Scott, 78 Va. 720, 729; Allen v. Patton, 83 Va. 265, 2 S. E. 143; New's Ex'r v. Bass, 92 Va. 383, 389, 23 S. E. 747; Todd v. McFall, 96 Va. 754, 32 S. E. 472; Frasier v. Littleton's Ex'rs, 100 Va. 9, 40 S. E. 108.

The precise question decided in Todd v. McFall, supra, was that a pecuniary legatee, whose legacy had been diminished by the discharge of a vendor's lien resting upon real estate at the time of the testator's death, was not entitled to be subrogated to the right of the vendor against such real estate in the possession of a specific devisee. Replying to the contention that, as the legacies were expressly made a charge on the personal property and it was consumed in the payment of debts, Mrs. McFall was entitled to be paid her legacy out of the real estate, and especially to the extent that the personal property was applied to the relief of the vendor's lien, the court said: "The answer to this position is that, the will not having charged the real estate with the payment of the debts, nor made any other provision for their payment, the law makes the personal property the primary fund for their satisfaction; and if the testator was mistaken as to the value of his personal property, and it has proved inadequate to pay both debts and legacies, the latter must abate to the extent of the disappointment, and cannot be reimbursed out of the land for the loss. A legatee has no right to call upon the devisee to contribute to the payment of the legacy, unless the real estate be charged with its payment, not even when the personal property has been applied in exoneration of the land from a mortgage debt or vendor's lien, if the debt was contracted and the mortgage or lien on the land was created by the testator himself." Elliott v. Carter, supra, is relied on, among other authorities, to sustain the proposition.

In Frasier v. Littleton's Ex'rs, supra, the court held, that where there were several specific devises of real estate, not charged by the will with the payment of debts, one of which the testator in his lifetime, after the will was written, incumbered by mortgage, on a deficiency of personal assets to pay the mortgage the devisee took the devise cum onere, and was not entitled to call upon other devisees to contribute to the payment of the mortgage. The decision rests upon the familiar and well-settled principle that securities will never be marshaled to the injury of persons over whom the party invoking the doctrine has no superior equity. Lee v. Swepson, 76 Va. 173; Peery's Adm'r v. Elliott, 101 Va. 709, 44 S. E. 919; 3 Min. Inst. 612; 2 Jarman on Wills (6th Ed., Bigelow) 581.

The incidental remark of the judge who wrote the opinion in that case that real estate incumbered by subsequent mortgage

fell in the fourth class of Judge Lee's enumeration was inexact and merely by the way. It in no wise affected the result, which, as we have seen, rested upon the principle that the equitable doctrine of marshalling does not obtain among devisees of real estate under the facts of that case, and was not intended as a departure from or modification of the rule in Elliott v. Carter.

The reason for the rule established by Lock King's Act, and cognate authorities, which allows the legatee who has been disappointed of his legacy by the application of the personal property to disincumber real property specifically devised, to stand in the place of the incumbrancer, is to give effect to the will of the testator as a whole, which, it is said, can only be done by requiring the devisee to take cum onere. But it would seem that, under the facts of this case, to uphold the contention of the appellees would violate the principle which they invoke to sustain it; for in this instance, as we have seen, there is an express charge upon the personal estate for the payment of debts, subject to which charge the legacies were given.

It follows from these views that the decree of the circuit court, in so far as it exonerates the personal property from the payment of the liabilities set forth in the seventh paragraph of the decree, and charges that indebtedness primarily upon the real estate therein described, and directs the payment of pecuniary legacies and the delivery of specific legacies bequeathed by the will to the respective legatees, is erroneous, and must to that extent be reversed and annulled, and the cause remanded for further proceedings to be had therein not in conflict with this opinion.

CARDWELL, J., absent.

(105 Va. 10)

LEE v. PATILLO et al.

(Supreme Court of Appeals of Virginia. Feb. 2, 1906.)

1. BROKERS—DUTIES OF PRINCIPAL—EXERCISE OF GOOD FAITH.

One who seeks and obtains from another authority to sell timber belonging to the latter becomes a quasi agent of the latter, and assumes the duty of exercising the utmost good faith towards him.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 16-24; vol. 40, Cent. Dig. Principal and Agent, §§ 132-136.]

2. SAME—FRAUD OF AGENT—RIGHTS OF PRINCIPAL.

Where defendant obtained authority from plaintiff to sell timber for the latter, and procured purchasers at the price named by plaintiff, but represented to plaintiff that he made the sale at a much less price and could not get the price named by plaintiff, and thus induced plaintiff to convey the timber to the purchasers at the less price, and appropriated the balance paid for the timber by the purchasers to himself, under a secret agreement with them, the

transaction was a fraud on plaintiff, and he was entitled to equitable relief.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 146.]

3. SAME—ACTIONS FOR AGENT'S FRAUD—DECREE.

Where a principal authorized his agent to sell timber for \$2,000, and the agent procured purchasers at that price, but fraudulently represented to the principal that he could only secure \$1,250, of which he was to retain \$50 for his commissions, and induced the principal to convey the land to the purchasers for \$1,200, intending to appropriate the balance of the purchase price to himself under a secret agreement with the purchasers, and the principal discovered the fraud and sued for a rescission of the contract, and the purchasers offered to abide by their contract and to pay the full price of \$2,000 as the court might decree, the court would direct the payment of \$1,950 to the principal and of \$50 to the agent.

Appeal from Circuit Court, Nottoway County.

Bill by Henry E. Lee against S. J. Patillo and others. From a decree of dismissal, plaintiff appeals. Reversed.

W. H. Mann and J. T. Thompson, for appellant. Watkins & Brock, for appellees.

WHITTLE, J. This appeal is from a decree dismissing the bill in a suit in equity brought by the appellant against the appellee to rescind a contract on the ground of fraud in its procurement.

The contract bears date June 24, 1904, and by its terms the plaintiff conferred authority upon the defendant to "buy or sell" the standing timber upon a tract of 844 acres of land, situated in Nottoway county, for \$1,200, to be paid within 30 days from the date of the contract.

The circumstances which led up to and induced the plaintiff to execute the contract were as follows: In May, 1904, the defendant sought and obtained from the plaintiff authority to sell the timber for \$2,000 cash; but in a subsequent interview, after the defendant had inspected the timber, he represented to the plaintiff that he could not effect a sale at that price, and advised the execution of a 30-day option at \$1,500, at the same time assuring the plaintiff that he would put forth his best efforts to obtain the highest possible price for the timber.

On June 24, 1904, the defendant again approached the plaintiff on the subject, and declared that he had been unable to dispose of the timber for \$1,500; that the quantity was inconsiderable; that the pine trees had become infested with bugs, which in a few years would utterly destroy them; and that he could not then realize more than \$1,000 for the timber. As the result of these representations, the plaintiff, who seems to have reposed the utmost confidence in the judgment and integrity of the defendant, executed the contract in controversy, which was subsequently extended to August 1, 1904, upon the assertion of the defendant that he had obtained purchasers (Cobb and Robertson) for the timber at the price of \$1,250, of

which amount \$1,200 was to be paid to the plaintiff, and the residue to the defendant, as compensation for his services.

Relying and acting upon the asseveration of the defendant that \$1,250 was the actual price at which he had sold the timber, the plaintiff, on July 22, 1904, conveyed the same to the purchasers, Cobb and Robertson. On the day following the defendant unintentionally delivered to the plaintiff a secret agreement between himself and Cobb and Robertson, by which they obligated themselves to pay him \$800, in addition to the \$1,200 which they had stipulated to pay the plaintiff for the timber. Discovering his mistake, the defendant seized and recovered possession of the paper, but not until after the plaintiff had become apprised of its purport.

From the foregoing narration of the facts disclosed by the record, it is obvious that the plaintiff was not dealing with the defendant as with a stranger, but that the quasi relation of principal and agent existed between them—a relation of trust and confidence, which, upon familiar principles, imposed upon the defendant the positive duty of exercising the utmost good faith towards his principal. Story on Agency, §§ 207, 214; Mechem on Agency, §§ 454, 455, 456, 459; Moseley's Adm'r v. Buck, 3 Munf. 232, 5 Am. Dec. 508; Halsey v. Montelero, 92 Va. 581, 588, 24 S. E. 258; Central Land Co. v. Obenchain, 92 Va. 130, 22 S. E. 876; Jackson v. Pleasanton, 95 Va. 654, 29 S. E. 680.

Yet the evidence clearly discloses a premeditated and systematically pursued purpose on the part of the agent to overreach and defraud his principal. Thus, with respect to the first two contracts, the witness Cobb, who was introduced by the defendant, testified: "He (the defendant) said that he did not try to sell under the \$2,000 option, hoping to get a better one at the expiration of it. He said, at the expiration of the \$2,000 option, that he could not handle it at that price. Mr. Lee then gave him an option at \$1,500, which he kept and handled as he did the \$2,000 option. At the expiration of the \$1,500 option, Mr. Lee gave him the \$1,200 option." Continuing, the witness says: "He asked me not to mention what I had paid for the timber, as it would have a tendency to make all of us have to pay more for standing timber; and suggested that I might say \$1,200 was the purchase price."

For the purpose of securing a renewal and extension of the contract of June 24, 1904, the defendant told the plaintiff that \$1,200 was the price agreed to be paid for the timber (making a similar statement to three other persons), when at that time he had made the sale to Cobb and Robertson for \$2,000, and had in his possession the secret agreement that he was to receive \$800 of that amount.

So that, in every aspect of the case, the bad faith of the defendant is palpable and flagrant, and cannot receive countenance in

a court of equity, which is always open to afford relief in such cases. *Wilson v. Carpenter's Adm'r*, 91 Va. 183, 189, 21 S. E. 243, 50 Am. St. Rep. 824, and authorities cited.

Since, however, it appears that the defendants Cobb and Robertson are still willing to abide by their contract for the purchase of the timber at the price of \$2,000, and to pay the same as the court may decree, the decree of the circuit court will be reversed, and this court will make such order as that court ought to have made, and direct the payment by Cobb and Robertson of \$1,950 to the appellant, and \$50, the residue of the \$2,000, to the appellee.

(104 Va. 843)

BELLENOT v. LAUBE'S EX'R et al.

(Supreme Court of Appeals of Virginia. Feb. 2, 1906.)

1. PARTY WALLS—CREATION—CONVEYANCES.

Where the owner of a lot upon which a double brick building was erected conveyed one half of the lot to one person and the other half to another person on the same day and by separate deeds, each of which described the lot conveyed as having a brick tenement thereon and as bounded by the property that day conveyed to the grantee in the other deed, the dividing wall between the two tenements became a party wall, in which each grantee had the rights incident to that kind of a dividing wall.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Party Walls, § 10.]

2. PARTITION—SALE—TITLE OF PURCHASER—RESTRICTION BY DECREE.

Where a suit is brought to partition premises bounded by a party wall, and the deed under which the parties to the suit claim, as well as the decree of sale and the decree confirming the sale, describe the property as beginning "at the center of the partition wall between it and the adjoining tenement on the east," a deed of the commissioner, omitting the quoted reference to the point of beginning, did not enlarge the estate of the purchaser, so as to entitle her to the whole wall, in accordance with a call of the deed designating the beginning point as a certain distance from a street.

3. SAME—NOTICE.

The records of the court and the papers in partition proceedings are notice to the purchaser at partition sale of a variance between the description of the property actually subject to the proceedings and the description contained in the commissioner's deed.

4. PARTY WALLS—PRESUMPTIONS.

Every wall and separation between two buildings is presumed to be a common or party wall, if the contrary be not shown.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Party Walls, §§ 2, 60.]

5. SAME—RIGHTS OF PROPRIETORS—INCREASE OF HEIGHT OF WALL.

One owner of a party wall may erect a new building on his lot and carry the party wall up to a height sufficient for his purposes.

6. SAME—REBUILDING OF WALL—DIVISION OF COSTS.

Where a party wall is in a state of ruin, so that rebuilding is necessary, one party may compel the other by action to contribute to the expense of rebuilding the wall, but if the new wall is made wider or higher, or if the old wall was sufficient for the purposes for which it was used, the expense of the increased height or

width of the wall in the first case, or of the rebuilding of the wall in the second, must be borne by the party at whose instance the work is done.

Appeal from Chancery Court of Richmond.

Bill for injunction and other relief by Frances Bellenot against Joseph W. Laube. Defendant died pending suit, and the Virginia Trust Company, as executor, and his legatees and devisees, were substituted in his place. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Hill Montague, for appellant. Smith, Moncure & Gordon, for appellees.

HARRISON, J. In November, 1862, Robert Ellett owned a lot fronting 132 feet on the southwest corner of Broad and Monroe streets, then in the county of Henrico, now in the city of Richmond. On the 5th of that month he conveyed 72 feet fronting on the southwest corner of Broad and Monroe streets to one Creed Thomas, leaving 60 feet, upon which was erected a double brick tenement. On the same day that the deed to Thomas was made Ellett conveyed this remaining 60 feet by separate deeds as follows: To M. Nenzel, 29 feet front lying immediately on the west of and adjoining the Thomas lot, described as follows: "All that certain lot of land, with a granite-front brick tenement thereon, beginning 72 feet from the west side of Monroe street, running thence westwardly on the south side of Broad street and fronting thereon 29 feet, running back southwardly at right angles," etc., "bounded on the west by the property this day conveyed by the parties of the first part to S. D. Abernathy." The deed to S. D. Abernathy contains the following description of the property conveyed thereby: "That certain lot of land, with a granite-front brick tenement thereon, beginning at a distance of 101 feet from the west line of Monroe street, running thence westwardly on the south side of Broad street and fronting thereon 31 feet, running back southwardly at right angles, between parallel lines," etc., "bounded on the east by the property this day conveyed by the parties of the first part to M. Nenzel."

It is clear that the sole ownership by Robert Ellett of the double brick tenement on this 60-foot lot was by these two deeds severed, and one tenement, known as "No. 409 West Broad street," became the property of M. Nenzel, and the other tenement became the property of S. D. Abernathy.

These two tenements were alike in every respect. They were brick buildings divided by a brick wall nine inches or more in thickness. The deed to Nenzel describes his house and lot as bounded on the west by the property that day conveyed to Abernathy, and the deed to Abernathy describes her property as bounded on the east by the property that day conveyed to M. Nenzel. While the deeds do not speak of the dividing wall

between the two tenements as a party wall, it is manifest from the description in each conveyance that such was the intention of the grantor and the respective vendees. By no other construction of these deeds could the manifest rights of each vendee be effectuated. It is further clear from the record, as shown by the subsequent alienations of these two tenements, that the successive owners regarded and treated the centre of the division wall between the houses 409 and 411 as the division line between the two properties; that line being the eastern boundary of the Abernathy house and the western boundary of the Nenzel house.

In January, 1870, S. D. Abernathy sold her house and lot, No. 411, to John E. Jones, and described the same as beginning at the distance of about 101 feet from the west line of Monroe street, and at the centre of the partition wall between this and an adjoining tenement on the east. In November, 1886, Jones conveyed house and lot No. 411 to McGruder & Jones, in which deed the property was again described as beginning at the centre of the partition wall between it and the adjoining tenement on the east. In 1891 McGruder & Jones conveyed to Nannie M. Marshall and others, using the same language recognizing and describing the center of the division wall as the boundary line between the two houses and lots Nos. 409 and 411. This house and lot, No. 411, was next sold in a suit brought for partition by Nannie M. Marshall, and was bought by the appellant, Frances Bellenot.

The deed from the commissioner to the appellant describes the house and lot as beginning at a point distant 101 feet west from the southwest intersection of Broad and Monroe streets, running westwardly along the south line of Broad street, a distance of 81 feet, leaving out the description contained in the previous deeds, "and at the center of the partition wall between this and the adjoining tenement on the east."

It is this description in her deed from the commissioner that appellant relies on in support of her claim that the center of the partition wall is not the true dividing line between her property and that of the appellees; the contention being that "beginning at a point distant 101 feet west from the southwest corner of Broad and Monroe streets," as described in the deed from the commissioner, would entitle her to the whole of the wall dividing the two houses, Nos. 409 and 411 West Broad street.

The appellant bought the house and lot No. 411 at a judicial sale, and both the decree of sale and the decree confirming the sale to her and directing the commissioner to make her a deed describe the property as beginning at a point about 101 feet west of the west line of Monroe street, at the center of the partition wall between it and the adjoining tenement on the east. These decrees describe the property that appellant is entitled to, and

because the commissioner left out of the deed the description, "at the center of the partition wall between this and the adjoining tenement on the east," the rights of appellant cannot be thereby enlarged. The deed of the commissioner was in excess of his power, and the grantee took only such estate as the court had. *Scott v. Moore*, 98 Va. 688, 37 S. E. 342, 81 Am. St. Rep. 749. The court only sold the title of the parties to the suit.

Nor can the appellant claim want of notice that the deed from the commissioner varied the description of the lot actually purchased by her. It was a judicial sale, and the records of the court and the papers in the cause were the only reliable sources of information as to the property to be sold, the title, boundaries, etc. To these the purchaser should have looked. *Long v. Weller*, 29 Grat. 347; *Pillow v. S. W. Imp. Co.*, 92 Va. 145, 23 S. E. 32, 58 Am. St. Rep. 804.

Upon this branch of the case our conclusion is that by the deeds of Robert Ellett in 1862 the center of the division wall between the tenements Nos. 409 and 411 was established as the dividing line between the two properties; that this line was recognized by the grantees in those deeds as fixing their respective rights, and has been acquiesced in by subsequent alienees as the true dividing line up to the institution of this suit, a period of more than 40 years; and that no part of the building of the appellees rests upon the land of the appellant.

In December, 1891, house and lot No. 409 was purchased by Joseph W. Laube at a judicial sale. Since the institution of this suit Laube has died, and the cause has been revived in the names of his executor and his legatees and devisees. In 1902 Laube pulled down the old house and kitchen on his lot up to the partition wall between 409 and 411, leaving said partition wall intact, running it up somewhat higher in order to properly construct a two-story brick storehouse then erected by him.

The partition wall between these two properties was a party wall. Every wall of separation between two buildings is presumed to be a common or party wall, if the contrary be not shown, and this not only is a rule of positive ordinance, but is a principle of ancient law. *Washburn on Easements* (4th Ed.) p. 611.

A party wall is a dividing wall between two houses, to be used equally for all the purposes of an exterior wall by the respective owners of both houses. It is a substitute for a separate wall for each adjacent owner; and one owner may carry it up to a necessary height for his purposes, and an action will not lie by his adjacent owner to compel its removal. *Everett v. Edwards*, 149 Mass. 588, 22 N. E. 52, 5 L. R. A. 110, 14 Am. St. Rep. 462; *Graves v. Smith* (Ala.) 6 South. 308, 5 L. R. A. 298, 13 Am. St. Rep. 60; *Nalle v. Paggi* (Tex. Sup.) 9 S. W. 205, 1 L. R. A. 33; *Harber v. Evans*

(Mo.) 14 S. W. 750, 10 L. R. A. 41, 20 Am. St. Rep. 646.

In Jones on Easements, § 632, it is said: "A party wall is a dividing wall between two houses, to be used as an exterior wall for each. * * * The term 'party wall' may designate a wall divided longitudinally in two moieties; each moiety being subject to a cross-easement in favor of the owner of the other moiety." This he says is the sense in which the term is more frequently used in the United States.

In the light of these authorities, it is clear from the evidence that Laube in erecting the new building on his lot did not, in his use of the party wall, exceed his legal rights with respect thereto, and did not deprive appellant of any portion of her full rights and easements therein, or do her any damage of which she can complain.

About one year after Laube had erected his new building the appellant pulled down her house, No. 411, up to this party wall, for the purpose, as alleged in her bill, of erecting on the lot a new building, the ground floor of which was to be used as a store and the floor above as a public hall. The decree appealed from holds, among other things; that the old party wall is insufficient in strength to support a building such as the plaintiff in her bill alleges that she contemplates building on her lot; and therefore it is adjudged that appellant has the right, if she elects so to do, to pull down the old party wall and erect a new party wall, at her own risk and cost, of greater width and height, provided that the rights of the appellees in and to the new wall shall not be increased or diminished by such reconstruction, and provided, further, that no part of such new wall shall occupy a greater portion of the land of the appellees than the old party wall now occupies.

The appellant has no reasonable ground of objection to this provision of the decree. If the common wall be in a state of ruin, and requires to be rebuilt, one party can compel the other, by action, to contribute to the expense of rebuilding it. But the necessity of the rebuilding must be established by the judgment of men skilled in the business, and made on due previous notice; and, if the new wall be made wider or higher, etc., the party building must bear the extra expense. Washburn on Easements, pp. 611, 612.

It is manifest that the old party wall, 9 inches thick, is insufficient to support one side of a building 81 feet wide, the upper floor of which is to be used as an assembly hall, and that appellant cannot erect a building for the purposes contemplated by her without a thicker and stronger wall. The old party wall, as it now stands, is sufficient for the purposes of the appellees. If, therefore, appellant desires to erect a building which requires a thicker and stronger wall, she must erect such wall at her own expense.

In proper order the demurrer to the bill should have been disposed of first. It is, however, sufficient to say that it was properly overruled.

Upon the whole case we are of opinion that there is no error in the decree appealed from, and it must be affirmed.

(104 Va. 336)

NORFOLK & W. RY. CO. v. BELL.

(Supreme Court of Appeals of Virginia. Feb. 2, 1906.)

1. MASTER AND SERVANT—DUTIES OF MASTER—SAFE APPLIANCES.

The master, in selecting instrumentalities for his work, should keep reasonably abreast with improved methods, and should be reasonably prudent and careful to select appliances reasonably adequate and proper for their respective uses, but is not bound to furnish the best-known appliances or those used by some other employer in the same line of business.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 181-192.]

2. SAME—NEGLIGENCE OF MASTER—EVIDENCE.

On the issue of the failure of a master to exercise ordinary care to provide reasonably safe appliances, a witness having sufficient knowledge of the subject may testify to the general practice of masters with reference to similar appliances and the comparative safety of different appliances; but it is not competent to show that the appliances of another master are better than those used by the master whose conduct is being called in question.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 920-925.]

3. EVIDENCE—HEARSAY—RECITALS IN PAPERS.

A blue print showing a kind of water gauge, which has indorsed thereon a recital as to the use of the gauge by certain companies, and a paper illustrating another gauge and containing a manufacturer's statement detailing the advantages of the gauge, are hearsay on the issue of alleged negligence in failing to use gauges similar to those described.

4. MASTER AND SERVANT—ACTIONS—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for injuries to a fireman, there was evidence that defendant had placed a man on the engine to learn how to fire; that, while he was engaged in that work, plaintiff was on the engineer's side of the cab, running the engine in the presence of the engineer; that the engineer was required to instruct the fireman in his duties and to be present when the fireman was running the engine; and that the fireman was required to obey the orders of the engineer. Held, that the evidence authorized a charge that if plaintiff, as one of the inducements to his employment, was permitted to run the engine so as to learn to be an engineer, it was the duty of defendant to use ordinary care to provide and maintain a reasonably safe place in which plaintiff was to perform such work.

5. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Instructions should state, not abstract propositions of law, but the law as applicable to the particular facts of the case.

Error to Circuit Court, Campbell County.

Action by George L. Bell against the Norfolk & Western Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Instruction No. 1, given by the court and referred to in the opinion, is as follows:

"(1) The court instructs the jury that if they believe from the evidence that the plaintiff was, on the 21st day of October, 1902, in the employment of the defendant in the capacity of fireman on one of its engines, as alleged in the declaration, and that, as one of the inducements to said employment as fireman, he was permitted, in the presence of the engineer, to run the engine, and thereby learn to be an engineer, then it was the duty of the defendant to use ordinary care to provide and maintain a reasonably safe place in which he was to perform said work, including reasonably safe machinery, appliances and instrumentalities, taking into consideration the character of the work to be done and the difficulties and dangers attending it; and a failure on the part of the defendant to perform this duty would be negligence."

F. S. Kirkpatrick and W. H. Mann, for plaintiff in error. Lee & Howard and Whitehead & Whitehead, for defendant in error.

BUCHANAN, J. This action was brought by George L. Bell, a fireman of the Norfolk & Western Railway Company, to recover damages for injuries resulting from the bursting of a glass water gauge, which it was alleged the railway company had negligently constructed and maintained on its engine, upon which the plaintiff was at work when injured.

The first error assigned is to the action of the trial court in the admission of evidence.

The plaintiff put upon the stand a witness who testified that he was a locomotive engineer and had worked as such on the Seaboard Air Line, Atlantic Coast Line, and Southern Railways, and that he had also worked on the Norfolk & Western Railway as fireman and engine hostler. The witness was permitted to describe the kind of water gauge in use on the Seaboard Air Line Railway, and to identify and put in evidence a blue print or cut showing its character. Upon this blue print, which is made a part of the record, the original of which is before this court, there is indorsed: "This is the style of water gauge used by Pennsylvania R. R., and almost entirely by Richmond Locomotive Works on everything they construct. J. D. M."

Another witness, who testified that he had worked on the Norfolk & Western Railway and on the Southern Railway, was permitted to describe the water gauge in use on the Southern Railway, and the advantages which the gauge used by that company had over that used by the Norfolk & Western Railway. He also identified a cut or picture of the gauge in use on that road on a paper introduced in evidence, which contained the manufacturer's statement of the advantages of that gauge, among which were that it furnished "most effective protection against

explosions," and "absolute safety against injuries to workmen."

One of the objections made to the evidence is that the alleged failure of the defendant company to exercise ordinary care to provide and maintain a reasonably safe water gauge on its engine could not be shown by proving that another railway company provided a different and safer gauge on its engines.

In selecting between different instrumentalities for his purposes the master should keep reasonably abreast with improved methods, so as to lessen the danger to those in his service; but he is not bound, in the performance of his duty, to furnish the best-known instrumentalities, but such only as are reasonably safe. The test is, not whether he has omitted to do something he could have done, nor whether a better appliance could have been obtained or a better method adopted, but whether the selection made was reasonably prudent and careful, and the instrumentality selected reasonably adequate and proper for the use to which it was to be applied. *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869; *Norfolk & Western Railway Co. v. Cromer's Adm'r*, 99 Va. 763, 787, 40 S. E. 54.

It has been repeatedly held by this court that a witness having sufficient knowledge on the subject may testify as to the general practice of masters and the comparative safety of different methods or appliances, but it is not competent to show that the different methods or appliances of another master are better than those of the defendant. It is supposed that in such matters even the skillful and experienced will frequently differ in their choice of instrumentalities. A party should not be judged to be negligent for not conforming to some other method, or for not using some other appliance believed by some to be less perilous. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 640, 27 S. E. 509; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 694, 695, 37 S. E. 285; *Parlett v. Dunn*, 102 Va. 459, 463, 46 S. E. 467.

The blue print showing the kind of water gauge in use on the Seaboard Air Line Railway, and the paper containing the cut or picture of the water gauge used by the Southern Railway, were amenable to the further objection that the indorsement on the blue print as to the use of the gauge by other companies, and the statement in the other paper that the gauge described was most effective against explosions, and was absolutely safe against injuries to workmen, were mere hearsay statements and inadmissible.

The action of the court in refusing to give the instructions asked for by the defendant, and in giving its own instructions, is assigned as error.

The objection made to instruction No. 1, given by the court, is that there was no evidence upon which to base it.

The defendant claimed that the plaintiff

was not entitled to recover, because he had no right to be where he was when injured. The evidence tended to show that the defendant had placed a young man on the engine to learn how to fire, and that, while he was engaged in that work, the plaintiff, who was the regular fireman, was on the engineer's side of the cab, running the engine, in the presence of the engineer; that under the rules of the defendant the engineer was required to instruct the fireman in all his duties, and not to permit him to run the engine, except when the engineer himself was present, or upon the order of the superintendent or master mechanic, and the fireman was required to obey the orders of the engineer.

That evidence was sufficient to justify the court in giving the instruction in question.

It is not contended, as we understand the defendant's objections to the other instructions given by the court, that they do not state the law correctly, or that they do not cover all the questions involved in the case; but the contention is that they, especially the third, fourth, and fifth instructions, state it in such a general way, and with so little application to the facts of the case, that their effect was to mislead, rather than to aid, the jury.

There is some foundation for this contention. But as the judgment will have to be reversed because of the admission of illegal evidence, as hereinbefore pointed out, it will be unnecessary to consider the objections to the action of the court in giving and refusing instructions, as the evidence will not be the same on the next trial, further than to say that instructions should state, not abstract propositions of law, but the law as applicable to the particular facts which the evidence in the case tends to prove.

The plaintiff insists that there is sufficient evidence in the case, after rejecting that which was objected to, and which we have seen should have been excluded, not only to sustain the verdict of the jury, but to have compelled a verdict in his favor.

In this he is mistaken. The evidence introduced by the defendant to show that it had exercised ordinary care to provide and maintain a reasonably safe glass water gauge on its engine was sufficient to have sustained a verdict in its favor, if the jury had so found.

We are of opinion, therefore, to reverse the judgment complained of, set aside the verdict, and remand the case for a new trial, to be had not in conflict with the views expressed in this opinion.

(58 W. Va. 296)

PENCE et al. v. CARNEY et al.*

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1905.)

1. WATERS—WHAT ARE PERCOLATING WATERS.

All subterranean waters which do not exist in a known and well-defined channel are deemed percolating waters.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 108.]

2. SAME—SUBTERRANEAN WATERS.

All subterranean waters are presumed to be percolating waters, until it is shown that they exist in a known and well-defined channel.

3. SAME.

Under the facts and circumstances appearing in this case the waters in controversy are held to be percolating waters.

4. SAME—USE OF PERCOLATING WATERS.

The owner of land who explores for and produces subterranean percolating water within the boundary of his land is limited to a reasonable and beneficial use of such water, when to otherwise use it would deplete the water supply of a valuable natural spring of another on adjoining or neighboring land, and thereby materially injure or destroy such spring.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 113.]

5. SAME—DIVERSION—INJUNCTION.

The mere temporary pumping to a reasonable extent of percolating water from a well being sunk by the owner of land within his boundary in good faith for the purpose of completing the well for legitimate use, and the casting of such water upon the land of such owner, is not such unreasonable use or waste of the water as will sustain an injunction against such temporary pumping, notwithstanding such pumping may temporarily decrease the supply of water to a valuable natural spring of another on adjacent or neighboring land.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 113.]

6. INJUNCTION — IRREPARABLE INJURY—EVIDENCE.

In order to sustain an injunction against an act of trespass, on the ground that the injury occasioned thereby is irreparable, the facts constituting such irreparable injury must be alleged and proved.

7. APPEAL—REVIEW—DECREE IN EQUITY—REVERSAL.

A final decree in a suit in equity will not be reversed by this court at the instance of the plaintiffs because at the time of its entry a rule was pending and undetermined against the defendants for violating a temporary injunction awarded in the suit, when it appears that the hearing of the rule had, previous to the final hearing, been continued by an order entered by consent of both parties, and that the final hearing was on motion of the plaintiffs to perpetuate the injunction, and that no objection to such final hearing was made by them in the court below.

(Syllabus by the Court.)

Appeal from Circuit Court, Summers County.

Bill by A. P. Pence and George N. Davis against B. E. Carney and others. Decree for defendants, and plaintiffs appeal. Modified.

T. N. Read and Vinson & Thompson, for appellants. J. W. Kennedy, Brown, Jackson & Knight, and John Wehrle, for appellees.

COX, J. A. P. Pence and George N. Davis filed their bill in equity in the circuit court of Summers county against A. C. Blair and B. E. Carney to enjoin them and their agents from unreasonably and unusually abstracting and using the water from a well sunk by them on a tract of land owned by Blair and Carney, and from casting the same on their land, whence it flowed upon plaintiffs' land. Upon presentation of the bill a temporary injunction was awarded. Defendants demurred to the bill and filed their

*Rehearing denied January 9, 1906.

answer. Depositions were taken and the case submitted for final hearing on March 29, 1905, on the pleadings and depositions and upon the motion of defendants to dissolve the injunction and the motion of the plaintiffs to perpetuate the injunction, and the court entered a decree sustaining the demurrer to the bill dissolving the injunction and dismissing the bill. From this decree an appeal was allowed the plaintiffs by this court.

The errors assigned involve a consideration of the whole case. It appears from the record substantially as follows: Plaintiffs, Pence and Davis, are the owners of a tract of land of 283 acres, upon which there is a valuable spring called "Pence's Spring," and known as a flowing spring as far back as 1849. So long as known by witnesses, unless interfered with by some mechanical obstruction, and until the acts of defendants complained of, this spring has flowed continuously, unaffected by rainfall. The water of this spring is supposed to contain valuable curative and medicinal qualities, and has been widely advertised by sample. Some years ago certain improvements were made to this spring. At that time an excavation was made to a depth of about 14 feet, where the water supplying the spring was found to issue forth or flow in a constant and well-defined stream, or, as some of the witnesses say, to boil up through a well-defined crevice about 10 inches long and $1\frac{1}{2}$ inches wide, in a rock, with well-defined walls. Plaintiff Pence is the owner of one acre of land adjoining the 283 acres. Upon it he has erected and maintains a valuable hotel and hotel plant and has secured from his coplaintiff his interest in the 283 acres at a rental of \$1,000 a year for 25 years from November 28, 1901. The water from Pence's spring is used to supply the guests and patrons of the hotel, who frequent it for the purpose of using this water; and by reason of the use of this water the hotel plant and property are greatly increased in value. Plaintiff Pence also uses this water commercially, shipping it to various points in this and adjoining states. Defendants Blair and Carney, having purchased a tract of 19 acres adjoining the 283 acres, recently began to explore for the same kind of water as that flowing from Pence's spring, and after some unsuccessful efforts, sunk a well on their land and at a depth of 58 feet below the surface found water, which the evidence tends to show was in taste and effect like that flowing from Pence's spring. According to some of the evidence the water supplying the well came into it through a crevice in the rock, practically in the same manner that the water came into Pence's spring. Some of the evidence tends to show that the well was supplied by two such streams coming into it from different directions. After water was found in the well, defendants placed therein a steam pump of large capacity, producing, as some of the witnesses say, from 60 to 70 gallons of water per minute, which was

cast upon defendants' land, whence it flowed upon plaintiffs' land. About 24 hours after the pump was started, the flow at Pence's spring began to subside, and the pumping being continued, the flow at the spring ceased. Before the pumping there was no visible effect upon the spring by the sinking or the well and the finding of water therein. After the injunction was awarded the pumping was discontinued for a time, with the effect that the water at the spring began to rise in the receptacle placed over it, and continued to rise until the water flowed out from the receptacle, but not in as great quantities as before any pumping was done. Some time afterwards the pumping was resumed and was again discontinued with like effect upon Pence's spring, as in the first instance. The well, according to the evidence of plaintiffs, is from 1,000 to 1,100 feet, and according to the evidence of defendants, 1,350 feet from Pence's spring. The well is 25 feet higher than the spring according to surface elevation. The tracts of land mentioned are located along Sulphur Spring Branch of Greenbrier river in Summers county, in a narrow, irregular valley. Sulphur Spring Branch is a running surface stream of water with well-defined banks. Until the improvements were made to Pence's spring, its overflow ran in a stream with well-defined banks a distance of about 20 feet and there emptied into Sulphur Spring Branch. The 19-acre tract belonging to defendants is located farther up the valley than the lands of plaintiffs. On either side of this valley the mountains rise abruptly. By defendants' answer, it is substantially denied that the waters supplying their well were from a known subterranean stream with well-defined channel, or that their pumping was unreasonable, or that they acted otherwise than lawfully, or that they had any intent to injure plaintiffs' spring thereby; but they claimed that the pumping was necessary in order to complete the well, and make it useful to them in their contemplated business of running a hotel and furnishing water to the patrons thereof, and to the general public.

The subject of this controversy is subterranean water. Some of the questions involved are comparatively new in the courts of this state, and are of great importance. It has been truly said that the two fundamental principles underlying the consideration of the rights of adjacent or neighboring owners of land in subterranean waters are: First, that the owner of land owns from the surface upward to the sky and downward to the center of the earth; and, second, that the owner must so use his own as not to injure another. Some courts have emphasized one of these principles almost to the exclusion of the other, but the greater number have made an effort to apply both in harmony. Many authorities for the purpose of applying these principles have divided subterranean waters into two classes: First,

underground bodies or streams of water existing in a known and well-defined channel; and, second, underground waters, which ooze or percolate through the earth, or percolating waters, and have endeavored, as far as practicable, to apply the rules of law applicable to surface streams or bodies existing in well-defined channels, to the like streams or bodies existing underground. 30 Am. & Eng. Enc. of Law, 311; *Miller v. Black Rock Springs Co.*, 99 Va. 747, 40 S. E. 27; *Wheelock v. Jacobs* (Vt.) 40 Atl. 41, 43 L. R. A. 105, 67 Am. St. Rep. 659, and note; *Frazier v. Brown*, 12 Ohio St. 294. Underground waters are presumed to be percolating waters, until it is shown that they exist in known and well-defined channels. 30 Am. & Eng. Enc. of Law, 311; *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642; *Barclay v. Abraham*, 10 Am. & Eng. Dec. Eq. 716, note, and cases there cited.

The burden of proof, then, is upon the plaintiffs in this case to show that the waters in controversy exist in a known underground stream with well-defined channel, if they would have the law of a similar surface stream apply here. It appears that upon the pumping of defendants' well, the supply at Pence's spring was depleted, and upon the continuance of the pumping, that the flow at Pence's spring ceased, and that this operation was repeated with a like effect on the spring; and that at the points where the water came into the well and into the spring, there were well-defined crevices in the rock, but these facts do not show the existence of a stream with known and well-defined channel for the entire distance between the well and the spring, or that both do not receive their supply from a saturated area or stratum extending under the lands of both plaintiffs and defendants. *Taylor v. Welch*, 6 Or. 198; *Ocean Grove Ass'n v. Com'rs*, 40 N. J. Eq. 447, 3 Atl. 168; *Cole v. Bacon*, 63 Cal. 571; *Clark Co. v. Lumber Co.*, 80 Miss. 535, 31 South. 105; *Huber v. Merkel* (Wis.) 94 N. W. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933; *Barclay v. Abraham*, 10 Am. & Eng. Dec. Eq. 693, note. The underground waters which the law recognizes as existing in underground bodies or streams in well-defined channels are those, and those only, which are known to so exist, or that they do so exist is ascertainable or discoverable from surface indications or other means, without subsurface excavations for that purpose. *Black v. Billymena Com'rs*, 17 Ir. L. R. 459; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Haldeman v. Bruckhart*, 45 Pa. 519, 84 Am. Dec. 611. No surface indications other than the facts hereinbefore detailed are shown indicating a known and well-defined underground stream. We think the facts appearing, taken together, are insufficient to overcome the presumption that the waters in controversy are percolating waters, and tend rather to show that both the well and the spring receive their

supply from an underground saturated area or stratum extending under the lands of both plaintiffs and defendants. We shall therefore treat the waters in controversy as underground, percolating waters.

The early, and we may say the general rule, was that underground, percolating waters belong to the soil and the owner of the land may search and explore for and obtain them at will and use them at pleasure, though in so doing he may drain or entirely divert such waters from the lands of adjacent or neighboring owners to which they would otherwise necessarily pass. This seems to be the rule in England, and the rule followed in nearly all of the early and some of the later American cases. *Acton v. Blundell*, 12 Mees. & W. 324; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Eward v. Bellfast*, L. R. 9 Ir. 172; 10 Am. & Eng. Dec. Eq. 694, note, and cases there cited; 30 Am. & Eng. Enc. of Law, 310-312; *Miller v. Black Rock Springs Co.*, 99 Va. 747, 40 S. E. 27. Of the English cases, and of the common law on this subject, Mr. Farnham, in his late comprehensive work on "Waters and Water Rights" (volume 3, p. 2718), says: "When it is remembered that the first English case dealing with percolating water arose in 1840, and that it was not decided that the landowner might exhaust the water to furnish a municipal water supply until 1860, it will be at once seen that there was no English law on the subject at the time the common law was adopted by statute, in most of the American states, and that the opinion of the American courts as to what is the common law is as good as subsequent decisions in English courts. Therefore, in any case, the question can be decided on its merits, giving the English decisions the weight to which they are entitled, but without the necessity of regarding them as binding precedents."

Under the early rule, considered without limitation or qualification, there were no correlative rights between adjoining or neighboring owners of land in underground, percolating waters. Can it then be said in these days of powerful machinery and modern appliances, when it is possible for one landowner to drain the lands of a neighborhood, or section of country, of their underground water, and thus render them practically valueless, that underground, percolating waters are wholly without the protection of the law, that they, like the wild animal, belong alone to him who first obtains possession of them? Such an instance of draining a whole section of country was found and held to be unlawful in the case of *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666. While the early rule, both in England and this country, is as stated above, the weight and trend of the recent authorities and cases in America are to qualify the early rule by limiting the use by the owner

of the land who searches therein, and produces percolating water to a reasonable and beneficial use of such water, where to use it otherwise would deprive the owners of adjacent and neighboring lands of the enjoyment of the waters of their lands.

In 30 Am. & Eng. Enc. of Law (2d Ed.) 314, issued in 1905, after noting the general or early rule, it is said: "In the later cases the right of a landowner to intercept and divert percolating waters has been subjected to some qualifications, on the ground that such right relates to the beneficial use of the waters or of the land for some purpose connected with the ordinary operations of agricultural, mining, domestic use, or improvements, either public or private. Under this doctrine, it has been held that a landowner has no right, except for the benefit and improvement of his own premises, or for his beneficial use, to drain, collect, or divert percolating waters therein, where such act will destroy or materially injure the spring of another, the waters of which spring are used by the general public for domestic purposes; that he cannot drain, collect, or divert such waters for the sole purpose of wasting them." In Mr. Farnham's work on "Waters and Water Rights," issued in 1904 (volume 8, p. 2712), it is said: "It has been said that there are no correlative rights existing between proprietors of adjoining lands in reference to the use of waters in the earth or percolating under its surface. And many cases have been decided upon this principle. But the attempt to act upon that doctrine very soon forces the conclusion that percolating water is not an exception to the general rule that rights in organized society are not absolute, but correlative, and that one man cannot be permitted to exercise any right if the direct effect of his act would be an injury to his neighbor." This subject is treated extensively in the note to the case of *Barclay v. Abraham*, 10 Am. & Eng. Dec. Eq. 704, issued in 1905. "It may be said to be now the generally accepted doctrine, in the United States, that the rights of the owner of the soil to percolating waters are limited to the use for proper purposes, connected with the natural enjoyment of his property. Thus, while the early cases held that any one might abstract the percolating water from his land, and convey it to a neighboring town or village for sale to others * * * and this would seem to be still the rule in England * * * the modern cases have adopted the rule that the right of the landowner to divert or consume percolating water does not extend to authorizing the destruction of a stream, pond, spring, or well, by cutting off its natural source of supply, when the acts that produce that result are not done for the beneficial use and enjoyment of the land on which they are done, but for the sole purpose of gathering the water and conveying it to a distant place for the use

of strangers, who have no right thereto as against the owners of the neighboring lands; and this rule is applied with especial strictness when the percolating water is abstracted by artificial and powerful means, so as to create an unnatural and forced drainage, and a corresponding depletion of the natural water supply. Accordingly, when such abstraction of the percolating water affects a large extent of territory, and creates a permanent lowering of the underlying water table so as to cause serious and permanent injury to the land of others and unfit it for profitable cultivation, the landowner, whose acts cause the injury, will be liable in damages, and will be enjoined from continuing his unlawful acts. The rule applies to municipal corporations and water companies equally with individuals." See, also, the many cases cited at page 706. At page 706, it is said: "According to the best considered cases, the early doctrine must also be limited so as to permit only a reasonable use of the percolating water underlying the land; and it is accordingly held that if such water is drawn off, not in the bona fide enjoyment of the defendants' property, but for no beneficial purpose, and a fortiori if it be drawn off maliciously, he may be enjoined from so doing, especially if the interests of the public would otherwise suffer, though the water be used colorably for some purpose of benefit to himself." At page 721, it is said: "The modern doctrine applies with especial force to the case of mineral springs fed by percolating waters, on account of the great value of many of these springs, and the magnitude of the injury that may be caused by an interference with their source of supply." *St. Amand v. Lehman*, 120 Ga. 253, 47 S. E. 949. Mr. Freeman, who appended a comprehensive note to the case of *Wheelock v. Jacobs* (Vt.) 67 Am. St. Rep. 659, also appended a note on the same subject to the case of *Katz v. Walkinshaw* (Cal.) 99 Am. St. Rep. 66, issued in 1904. In the later note he says: "In our note to the case of *Wheelock v. Jacobs*, 67 Am. St. Rep. 659, we treated only the question of what waters are percolating, perhaps under the impression, which the later and best considered cases do not sustain, that when this question was solved and the answer reached, that the waters in question were percolating, no other inquiry need be made, except to ascertain on whose lands they were found when used, appropriated, or otherwise interfered with." At page 71, he says: "The very decided weight of authority supports the proposition that the landowner has no right by anything done on his land to waste, whether through malice or indifference, the percolating waters there found, or which he therein develops or brings to the surface by means of ditches or wells, with or without pumping apparatus, if by such waste the neighboring landowner is deprived of percolating waters which other-

wise would be within his land and which he there has a necessity for using." See authorities there cited. Tending to sustain the later doctrine of reasonable and beneficial use of underground percolating waters, see *Bassett v. Manufacturing Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Sweets v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; *Barclay v. Abraham*, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; *McClintic v. Hudson* (Cal.) 74 Pac. 849; *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; *Reisert v. New York* (N. Y.) 66 N. E. 731; *Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 684; *Willis v. Perry* (Iowa) 60 N. W. 727, 26 L. R. A. 124; *Stillwater Co. v. Farmer*, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541; *St. Amand v. Lehman*, 120 Ga. 253, 47 S. E. 949; *East v. Railroad Co.* (Tex. Civ. App.) 77 S. W. 646; *Gagnon v. French Lick Springs Co.* (Ind. Sup.) 72 N. E. 849, 64 L. R. A. 175; also note by Mr. Farnham published since his work on "Waters and Water Rights," 64 L. R. A. 336.

We must yield assent to the later doctrine of reasonable and beneficial use, which constitutes rather a qualification of the early rule than an announcement of a new rule. The later doctrine seems to us to be sustained by the weight of authority as well as by the weight of reason. What is a reasonable and beneficial use under this later doctrine must be determined in the light of the facts and circumstances appearing in each case as it arises. We do not desire to be understood as announcing any fixed rule applicable to all cases as to the question of what constitutes such reasonable and beneficial use. Such reasonable or beneficial use has often been understood and held to mean, use for any purpose for which the owner of the land upon which underground, percolating waters are found might legitimately use and enjoy his land. 30 Am. & Eng. Enc. of Law, 314; 10 Am. & Eng. Dec. Eq., supra. By the later doctrine is not much of the difference between the rules of law governing underground streams existing in well-defined channels, and the rules of law applicable to underground, percolating waters virtually extinguished? It may be so, but we do not decide here that it is so. We must keep in mind, however, in investigating the subject here involved, the fact that water in some form is necessary to the very existence of man and to the enjoyment of his land. Without it his land becomes a desert, of no value for agricultural purposes and unfit for habitation. In this respect, water may be unlike oil or gas, or other such subterranean substances, which, while useful to man, are not absolutely necessary to his existence or to the enjoyment of his land and may be abstracted therefrom

without destroying the value of the land. These substances may be termed merely commercial products, but we are not deciding any question in relation to these products termed commercial products.

Applying the law to this case, we believe that the facts alleged in the bill, if sustained by proof, are sufficient to entitle the plaintiffs to relief in equity, and the demurrer to the bill should have been overruled. The bill proceeds upon the theory that the waters tapped and abstracted from defendants' well were supplied from an underground stream existing in a known and well-defined channel, but the evidence does not support this theory; nor does it, in our judgment, sustain the theory of an unreasonable and nonbeneficial use by defendants of the water produced from their well. The defendants' contention that the pumping and wasting of the waters from their well, shown by the evidence, were merely temporary, and done in good faith, for the purpose of completing the well for legitimate use, seems to be sustained. The evidence of plaintiffs in a great measure sustained the contention of defendants, that the pumping was only temporary and without malice, and for the purpose of completing the well for use. On cross-examination plaintiff A. P. Pence testified as follows: "Q. In operating this well, do you know what pumping was or was not necessary in operating it as they were operating it? A. They pumped the water out so they could work down in there. Q. Wasn't it necessary to pump the water out so they could work down in there? A. It might have been necessary; I wasn't there. Q. Don't you know they could not work down in that well with that shaft with the water and without pumping it out? A. No, I don't see how they could have worked without pumping the water out." J. D. Pence, a son of plaintiff A. P. Pence, on cross-examination, testified as follows: "Q. The pumping that you have spoken of from this well was necessary in the operation of sinking the well, wasn't it? A. That depends upon how you have reference to sinking the well. Q. Is that as far as you can answer this question? A. It is, until I know further about how the well is to be sunk. Q. Don't you know how that well was being sunk? A. It was sunk by means of a steam drill, and also by means of pick and shovel. Q. Then you do know how this well was being sunk, do you? A. I do. Q. I will ask you again if this pumping was not necessary in the operation of sinking this well, as it was being sunk? A. As they were working at it, I should say it was." This evidence seems to be conclusive. We cannot say that the pumping and wasting of the water from defendants' well was such an unreasonable use of the water as to violate the rule of reasonable and beneficial use by defendants. We hold, therefore, that plaintiffs were not entitled to a perpetuation of the injunction against such tempo-

rary use of the water from defendants' well as is disclosed by the evidence.

Plaintiffs claim that under the allegations of the bill they were entitled to have the injunction perpetuated because defendants had cast the water upon the earth, and the same had flowed upon and over plaintiffs' land, by reason whereof the damage to plaintiffs was irreparable. There is no allegation that defendants were insolvent, and no facts constituting irreparable injury are alleged in the bill or shown by the evidence, in relation to the water which flowed upon plaintiffs' land, and plaintiffs were not entitled to a perpetuation of the injunction, on the ground that such trespass or injury was irreparable. See *Farland v. Wood*, 35 W. Va. 453, 14 S. E. 140; *Becker v. McGraw*, 43 W. Va. 539, 37 S. E. 532; *Merriner v. Merriner*, 54 W. Va. 169, 46 S. E. 118. It is claimed that the motion to dissolve the injunction should not have been considered at a time when a rule was pending and undetermined against defendants for violating the injunction. On the 13th day of January, 1905, an order was entered by consent of both parties, continuing the consideration of the rule. This cause was submitted for final hearing, among other things, upon motion of plaintiffs to perpetuate the injunction, without having the question of the rule determined. No objection to the final hearing was made in the court below because of the pendency of the rule, and we think, under these circumstances, that the decree cannot be reversed because of the pendency of the rule, at the instance of the plaintiffs. *Endicott v. Mathis*, 9 N. J. Eq. 110; *Crabtree v. Baker*, 51 Am. Rep. 424; *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676. It appears to us from the whole case that the lower court did not err in dissolving the injunction and dismissing the bill, but in our judgment the decree in this cause should be without prejudice, as hereinafter indicated.

For the reasons stated it is ordered that the decree of the circuit court entered in this cause on the 29th day of March, 1905, be modified so as to overrule the demurrer to the plaintiffs' bill, and, as modified, that the same be affirmed without prejudice to the right of the plaintiffs to proceed by a bill for an injunction, or otherwise, against the defendants for any future unlawful extraction, use, or waste of said underground water which may be found or obtained upon their lands, resulting in injury to the property or rights of the plaintiffs.

(58 W. Va. 572)

BARBOUR, STEDMAN & HEROD v.
TOMPKINS et al.

(Supreme Court of Appeals of West Virginia.
Jan. 16, 1906.)

1. EQUITY—DECREE—CONCLUSIVENESS.

A decree that is appealable under clause 7 of section 1 of chapter 135 of the Code of 1899 as one adjudicating the principles of a cause, or that is final in such sense as to make it reviewable by bill of review, is conclusive of every matter decided by it, and of every matter which, by the rules of equity practice, the parties were

bound to set up in reference to it, before submitting it for adjudication, and cannot be altered or disturbed, except by appeal or bill of review within the respective periods allowed therefor by the statutes.

2. SAME—ALTERATION AFTER TERM.

After the expiration of the term at which such a decree was made and entered it cannot be materially altered, by the court which pronounced it, as to anything so decided or deemed in law to be thereby concluded, except upon some proceeding instituted in said court for setting aside and annulling the same or correcting error therein.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 1025, 1038.]

3. SAME—REOPENING.

After the expiration of the term at which such a decree has been pronounced, the same cannot be reopened for the reception of pleadings setting up defenses as to any matter so decided or concluded. A defendant has no right of election to interpose his matters of defense singly and take separate successive trials and adjudications thereon. By allowing a cause to be decided without having set up a defense, or any one or more of his defenses, he is deemed to have waived all matters so withheld.

4. APPEAL—REVERSAL—REMAND WITH DIRECTIONS—CONCLUSIVENESS.

When this court reverses a decree as to a matter finally determined thereby, and remands the cause, with direction to enter a particular decree as upon the merits of the subject-matter thereof, the mandate of this court is final and conclusive upon all parties as to all matters and things so directed, and no new defenses, existing and known at the date of the decree so reversed, can be entertained or heard in opposition thereto.

5. EQUITY—DECREE—CONCLUSIVENESS.

A decree made in a suit brought to enforce the liens of judgments and a deed of trust, fixing the amounts and priorities of the liens, decreeing payment thereof, and directing a sale of the debtor's land on default of payment, is final and conclusive as to the amounts of the debts after the expiration of the term at which it is pronounced, and an answer praying the elimination of usury from one of the debts so adjudicated cannot be received thereafter.

6. DEED—DESCRIPTION—UNCERTAINTY.

When the other terms of the description in a deed are equivocal and uncertain as to the identity of the land, and the description by quantity, location, and ownership, viewed in the light of admissible extraneous evidence, makes clear the intent of the grantor to convey only the land so described by quantity, location, and ownership, the deed is not void for uncertainty, and will be given effect according to the manifest intent as gathered from the whole instrument.

7. JUDICIAL SALES—STAY—WHEN GRANTED.

If, after a decree of sale of real estate to satisfy liens thereon, a lease of part of the same for mining purposes be executed by consent of all interested parties, but under an agreement that the execution of such lease shall not prejudice the right of any creditor to ask for sale of the land subject to the lease, and by reason of development of the land under the lease its market and rental values are largely increased, sale thereof will not be delayed for an inquiry as to whether its rents and profits will be sufficient to discharge the liens thereon within five years.

(Syllabus by the Court.)

Appeal from Circuit Court, Kanawha County.

Bill by Barbour, Stedman & Herod against William H. Tompkins and others. Decree for

plaintiffs, and William H. Tompkins and H. P. Tompkins appeal. Affirmed.

Price, Smith & Spilman, for appellants. Mollohan, McClintic & Mathews, for appellees.

POFFENBARGER, J. By reference to 31 W. Va. 410, 7 S. E. 1, it will be seen that the cause of *Barbour, Stedman & Herod v. Wm. H. Tompkins* and others was in this court in the year 1888 on an appeal from a decree rendered in said cause on the 16th day of July, 1886, which said decree was reversed on account of errors specified in the opinion, and remanded to the circuit court of Kanawha county. Afterwards, on the 11th day of January, 1889, pursuant to the mandate of this court, a new decree was made. For the correction of manifest errors of that decree, another was entered on the 16th day of April, 1891. Afterwards two sales of the real estate of Wm. H. Tompkins were made under the decree as corrected. One of these, made April 12, 1894, for the sum of \$20,000, was subsequently set aside on account of inadequacy of price. The other, made on the 30th day of October, 1895, for the sum of \$17,000, was also set aside on the same ground. On the 16th day of June, 1899, under an order of the court, 400 acres of the land, situate on Kelly's creek, was leased to J. D. Harris, acting for the Cedar Grove Colliery Company, for coal mining purposes, at a minimum royalty or rent of \$2,500 per year after the first two years. On April 30, 1902, Wm. H. Tompkins tendered, and was permitted to file, an answer in the nature of a cross-bill, praying, among other things, relief as to usurious interest provided for in the debt due from him to A. F. Mathews. Upon this answer process was awarded and executed. Later H. P. Tompkins, J. G. W. Tompkins, and Ellen C. Tompkins also filed answers, praying affirmative relief. On the 19th day of November, 1902, A. F. Mathews, having excepted to the answer of Wm. H. Tompkins and given notice of a motion to strike out the same, moved the court to strike from the record said answer and also the papers filed as answers of H. P. Tompkins, J. G. W. Tompkins, and Ellen C. Tompkins. Upon these motions the court adjudged that said papers should not be treated or regarded as answers; but, as they brought to the attention of the court matter calling for judicial action in the cause, they should be permitted to remain in the record as affidavits. By these affidavits it was shown to the court that there was confusion and uncertainty as to what lands were subject to the lien for the debt due said A. F. Mathews; and to ascertain and determine this question the cause was referred to Joseph Ruffner as special commissioner. On the 20th day of September, 1904, said special commissioner having returned his report, a decree was pronounced declaring the lien for said debt to

be limited to a certain portion of the land of said Tompkins, appointing George E. Price a special commissioner to act in lieu of S. L. Flournoy, then deceased, with others who had been previously appointed, as special commissioner to make sale of the real estate, and directing such sale to be made unless the defendant Wm. H. Tompkins, or some one for him, should pay off and discharge the liens on the lands, with interest and cost of the suit, within a certain time named. From this decree the defendants Wm. H. Tompkins and H. P. Tompkins have appealed, assigning, as grounds of error, the refusal of the court to allow the Mathews debt to be purged of its usury, and to refer the cause to a commissioner to ascertain whether the rents and royalties in the hands of the court, together with the rents, issues, and profits of the lands, will discharge the liens thereon within five years. They also complain of a clause in the decree authorizing the commissioners to make a private sale of the land. Mathews has cross-assigned error because the court has held that his deed of trust does not include a certain tract of land upon which he claims a lien by virtue of it.

From the opinion delivered on the former appeal, as well as from the record, it appears that the debtor, Wm. H. Tompkins, did not prior to the rendition of the decree of July 16, 1886, object to the allowance of the usurious interest provided for by his contract in such manner as to enable the court to expunge it. No relief in that respect was subsequently asked by him until after the decrees of January 11, 1889, and April 16, 1891. His first attempt to object by way of answer or any pleading was made on April 30, 1902, long after these decrees had been entered. The question thus presented is whether usury is such a matter of defense as the defendant was bound to plead before final decree, and whether these decrees are final so as to bar all matters of defense that were not set up before they were pronounced. For the appellants it is said the right to have usury expunged is a defense exceptional in its nature, and will be indulged by a court of equity under circumstances which would preclude the entertainment of other defenses, and also that these decrees are interlocutory and not final in the true sense of the terms.

Failure to sustain the first proposition would necessarily class this defense with all others. If, to be available in a court of equity, it must be pleaded as promptly as any other defense, and may be lost by failure to so claim the benefit thereof, the position of the appellants cannot be sustained unless the decrees are wanting in finality. There are some cases which are said to show that courts have been indulgent as to this defense. In *Ellzey v. Lane's Ex's*, 4 Munf. 66, it was allowed after a decree by default foreclosing a mortgage, and after the Supreme Court had reversed a decree allowing a bill of review to be filed. The previous

history of the case will be found in 2 Hen. & M. 589, and 4 Hen. & M. 504. Judge Tucker said in 2 Hen. & M. p. 592, that the bill had been taken for confessed and a decree of foreclosure made, but not executed by sale. In 4 Hen. & M. the report of the decision of the superior court of chancery shows that, after the case went back, a *scire facias* was sued out to revive the suit, the plaintiff having died, and that the defendants set up usury in the contract as a defense on the *scire facias*, and the chancellor required as a condition to the granting of relief payment by the defendants of the cost on the bill of review, in addition to the payment of the debt with legal interest thereon. The disposition of the appeal from this decree is reported in 4 Munf. p. 68, and shows that the court held it erroneous to impose, as a condition of relief, the payment of the costs on the bill of review, and remanded the cause with directions to receive the plea. *Fulton Bank v. Beach*, 1 Paige (N. Y.) 429, imports that after a decree by default a case may be reopened for the purpose of allowing the defense of usury to be made. *Insurance Co. v. Sackett*, 11 Paige (N. Y.) 660, expressly so decides, but says it will not be done except upon the condition that the defendant waives forfeiture of the debt, and only insists upon the defense of usury to the extent of usurious premium paid, or agreed to be paid. But, in all these cases, it is expressly asserted that the applications for relief as to usury came before final decree. In 2 Hen. & M. the court expressly decided that the decree was not final, and for this Judge Tucker cited *Fairfax v. Muse's Ex's*, 2 Hen. & M. 557, and *Bowyer v. Lewis*, 1 Hen. & M. 553. His views are best set forth in his own language: "Considering the bill, in the present case, as a bill of review, properly so called, I am of opinion it was prematurely granted. A supplemental bill, in nature of a bill of review, is to be allowed only where new matter has been discovered since the decree. That is not the case here. The decree, not being final, might have been altered upon a rehearing, without the assistance of a bill of review, if there were sufficient matter to reverse it appearing upon the former proceedings." All the judges were of the same opinion. In *Ellzey v. Lane's Ex's*, 4 Munf. 66, on the second appeal in the case, Judge Roane said: "Although the statement made in the bill may possibly be explained so as to show the transaction not to have been usurious, yet, there being strong reasons from the statement to believe that the matter of the plea in the proceedings mentioned may be true, which defense, where it is probably correct, ought at all times to be received in a court of equity (so long as the case is within the power of that court) without annexing any unreasonable condition thereto (such as that imposed on the offering the plea in this cause), the said decree, as also that of the 20th day of February, 1810, are erroneous."

Just what he meant by saying "so long as the case is within the power of that court" would not be entirely clear without the aid of what the court had formerly held. It had formerly been decided that the decree was not final. He therefore clearly regarded it as an interlocutory decree, not precluding any proper defense which might be made before final decree. In *Insurance Co. v. Sackett* there had been no decree, but only an order closing the proofs in the case. The status of *Fulton Bank v. Beach*, at the time the application for leave to examine the witness to prove usury was made, was exactly the same. And in the reasoning of the court upon this application it was said: "The power of the court to allow amendments, in furtherance of justice, at any time before a final decree, is unquestionable. They are always in the discretion of the court; but the exercise of that discretion must be governed by those general principles of equity by which the proceedings in this court are regulated." These cases are no authority for the position that this defense can be made after final decree. On the contrary, they are precedents holding it proper to allow this defense to be interposed after a decree by default, but before final decree, and there is nothing in them to justify the assertion that the defense of usury is, in a court of equity, different from any other defense in respect to the time of its interposition.

As the law was deemed to be when *Lane v. Ellzey* was decided, these decrees would not have been considered final. But some years after the decision of that case a radical change occurred in the views of the Virginia court respecting the finality of decrees. In *Thornton v. Fitzhugh*, 4 Leigh, 209, Judge Tucker's views on that subject, which had previously been adhered to by the court, were departed from. Judges Carr and Brooke adopted a different view and decided the case accordingly, and Judge Tucker dissented. The decree appealed from was upon a bill by the daughter of a testator against a purchaser of his real estate and two sons of a deceased surety of the executor in his executorial bond, and the chancellor decreed that the sons should each pay to the plaintiff one-half of the annuities in arrear and the costs of the suit, reserving liberty to the plaintiff, if the decree should prove unavailing against either, to resort to the court for a further decree against the other, and ordering the cause to be retained in court for the purpose of taking further action as to the annuities to accrue in the future. The executor had sold the real estate, wasted the personal property, and died insolvent. The court held this decree to be final, notwithstanding the reservation in it. Judge Carr said: "It is well known that until 1798 there was no appeal from interlocutory decrees. The prior statutes gave them from final decrees only. These laws did not define what should be taken as final decrees. The phrase was perfectly familiar to every

student of the English law, and in the sense there settled it was no doubt used by our Legislature. We may then look to the English cases to ascertain that sense. In England no appeal could be taken except from final decrees. Yet do the books teem with cases where the chancellor having at the hearing decreed upon the matters in controversy, an appeal is immediately taken to the House of Lords, though various details are directed in execution of the decree, the cause retained, and leave given to the parties to apply to the court." Judge Brooke said: "It is the settled principle of this court that, if the whole matter put in controversy by the pleadings is decided, the decree is final, and not interlocutory, although there are reservations embracing matters in execution of the decree, and although there may be a controversy growing out of the execution of it, as in the case of *Harvey v. Branson*, 1 Leigh, 108. Nor is it of any consequence whether the whole matter in controversy is decided by the decree, negatively or affirmatively. Whether the errors, if any, are errors of omission or commission, they do not affect the character of the decree." In *Ruff v. Stark's Adm'x*, 3 Grat. 134, the court held as follows: "A decree which settles all matters in dispute in the cause, but omits to decree upon a claim set up in the bill, but which after circumstances had rendered unimportant, and the plaintiff did not insist upon, is a final decree." In *Fleming v. Bolling*, 8 Grat. 292, the court held as follows: "A decree which passes upon the whole subject in issue so as to be final in its nature is not converted into an interlocutory decree by the addition thereto of an order suspending the decree as to the amount of an item of the account involved in the cause, until the decision of another suit brought by another party against both the plaintiffs and defendants in the first suit in which the amount of the item is claimed by the plaintiff." In *Core v. Strickler*, 24 W. Va. 689, this court interpreted the decisions above referred to and others, and came to the conclusion that "a bill of review will lie to a decree in a creditor's suit which ascertains the amounts and priorities of all the debts sought to be established in the cause as liens on real estate, and which orders said debts to be paid and the sale of the real estate on which said debts are adjudged to be liens." There were two decrees in that case: one rendered in April, 1877, and another in May, 1880. One question was whether the decree of April, 1877, was final in the sense that a bill of review would lie to it. The decree fixed the amounts and priorities of the debts to be paid, adjudicated the payment of said debts and the cost of the suit, and ordered the real estate to be sold for that purpose, and the court held that it was final in that sense. After quoting our statute relating to appeals, Judge Snyder said: "In such cases it would, therefore, seem that a bill of review would lie as well as an appeal; but it is unnecessary to decide that question in this cause

further than the particular decree under consideration requires such decision, and to that extent only is it now intended to intimate an opinion; for certainly there are decrees from which an appeal would lie under the statute to which a bill of review would not lie." The court in that case seems to have fully approved and adopted the definition and rule given in Story's Eq. Pl. § 480a, which reads as follows: "A bill of review also lies only after a final decree; for the court may, if the decree be only interlocutory, afterwards and before a final decree, vary or rescind it. But a decree is final in the sense of the rule, which finally adjudicates upon all the merits of the controversy, and leaves nothing further to be done but the execution of it. Thus, for example, a decree for foreclosure and sale upon a bill brought by a mortgagee for a foreclosure and sale (according to the practice in many states in America), is final and the sale is but in the nature of an execution."

It seems to be the view of counsel for the appellant that a decree is not final as long as anything remains to be done by way of its execution, nor until the whole case is closed in every way and the cause dismissed from the docket. That was the view entertained by Judge Tucker, but which has been long since discarded. The uniform holdings of this court have been that a matter in any cause that is so far settled and determined by a decree as to make it appealable cannot be reviewed or altered by the lower court after the expiration of the term at which it was pronounced, except by a bill of review, for error apparent upon the face of the record, or for newly discovered evidence or matter set up in the bill of review. The statute provides that certain decrees are appealable, and that appeals therefrom must be taken within a certain time. This has been construed by the court as forbidding any alteration of the decree by an appeal after the expiration of the prescribed period. If we had no statute limiting the right of review by bill of review, errors in such decrees could be corrected in the court below by bill of review at any time; but a statute imposes a limit. The object is merely to correct errors. In *Buster v. Holland*, 27 W. Va. 510, this court held that an appealable decree cannot be altered, even for error apparent after the expiration of the time allowed by the statute for an appeal and for the filing of a bill of review. Point 1 of the syllabus reads as follows: "A decree ordering the sale of a defendant's land is an appealable decree under chapter 135, § 1, subd. 7, of the Code, and therefore no error in such decree can be reviewed, unless the petition for the appeal was presented within five years after such decree was rendered (reduced now to two years by Acts of 1882, p. 506, c. 157. § 3). Even though such decree was not a final decree, and a final decree was subsequently rendered, and an appeal was properly obtain-

ed from it, if the error in this final decree arose solely from errors in such, decree of sale followed in the final decree." *Core v. Strickler* is to the same effect. Upon ascertaining that the decree of April, 1887, in that case was an appealable decree, and such a decree as was cognizable upon a bill of review, the court determined that it was unalterable on appeal, because the time for an appeal had passed and also the time within which a bill of review might have been filed. Numerous other cases decided by this court declare the same principles. There is no exception to this rule. *Trail v. Trail* (W. Va.) 49 S. E. 431. Any decree which settles the principles of a cause is now appealable. But it must settle all the principles of the cause, leaving nothing to be done, except subsidiary and sequential matters necessary to the full execution of what is thereby decreed. *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560; *Hill v. Cronin*, 56 W. Va. 174, 49 S. E. 132; *Shirey v. Musgrave*, 29 W. Va. 131, 11 S. E. 914; *Hill v. Als*, 27 W. Va. 215; *Hogg's Eq. Proced.* 648. That portion of the seventh clause of section 1 of chapter 135 of the Code which allows an appeal from a decree adjudicating the principles of a cause seems to be little more than a declaration of what the courts had previously held. The purpose of this rule is to prevent frequent and successive appeals in the same case, to the end that delay and confusion may be avoided.

Under these decisions any appealable decree, whether final in all respects or not, is not subject to change after the expiration of the term at which it is entered, except by appeal or bill of review. As to all matters which have been carried into it by the pleadings in the cause, it is as irrevocable and inviolable, except in the manner aforesaid, as if it were the last decree made in the cause, and retiring it from the docket. *Trail v. Trail* (W. Va.) 49 S. E. 431; *Lehman v. Hinton*, 44 W. Va. 1, 29 S. E. 984. To be appealable, it must settle all the principles of the cause, all the main controversies therein as above shown. Does this mean only such matters as are shown by the pleadings, or every matter of defense which the nature of the demand asserted called upon the defendant to interpose? Has he a right of election as to the time at which his defenses are to be put in, or must he bring them forward when the cause is in such condition as to enable the plaintiff to call for a decree adjudicating the principles of the cause? If defenses may be withheld until after that time and then put in, and new issues made, the decree would not settle all the principles. It would always be in the power of the parties to reopen the decree by bringing forward new matter by additional pleadings. We have decisions which say this cannot be done. After a case has been made up and submitted, and a decree rendered in it, new pleadings

cannot be filed. *Building Association v. Westfall* (W. Va.) 47 S. E. 74; *Butler v. Thompson*, 52 W. Va. 311, 43 S. E. 174. A decree rendered upon a bill taken for confessed is not open to any defense. *Camden v. Ferrell*, 50 W. Va. 119, 40 S. E. 303. If such right of election existed, some cases would be drawn out to almost interminable length. Defenses to a single demand are often numerous, and, if they could be put in singly and successive adjudications taken upon them, great delay, confusion, and cost would result. It would be impossible to obtain a settlement of the principles of a cause by a single decree. There would be trial after trial and appeal after appeal as long as the list of defenses would hold out. No such practice has ever been tolerated by this or any other court. These decrees ascertained the amount of the Mathews debt. For that purpose there had been a reference. Upon that question there had been a special hearing before decree. It was one of the questions expressly decided, and the part of the decree which fixed the amount was the subject of the former appeal in this cause. To say it can be reopened and relitigated would be to ignore and set at defiance numerous decisions of this court. If not final as to that matter, the decree was not appealable. This court entertained an appeal from it, thereby deciding it to be final. Being final, it could not be reopened for new defenses.

The peculiarity and anomalous character of the rights of a debtor, respecting usury in a debt which he owes or usury which he has paid, are relied upon as important in determining the time at which it must be pleaded, and as warranting the reception of that defense after final decree, or until the cause is finally out of court in every way. Usury which has been paid may be recovered. A judgment for an usurious debt may be purged of the usurious interest in it upon a proper application to a court of equity for that purpose. In *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250, a doubt was expressed as to whether a judgment in an action at law could be purged of interest in the usurious contract, and *Hope v. Smith*, 10 Grat. 221, was cited in that connection. That case, however, does not seem to overrule the former cases so holding. It only decides that, after judgment in an action at law, it is too late to set up usury for the purpose of invalidating and defeating the whole judgment, under a statute declaring the whole debt forfeited as a penalty for having made the usurious contract. It does not touch the question whether, upon a proper application, the usurious interest included in the judgment may be eliminated. Assuming that a judgment at law does not preclude such elimination, what effect has that, or the right to recover back usurious interest which has been paid, upon the question now presented? What is the basis of

jurisdiction in such cases? Merely the oppression and fraud which are presumed to enter into every usurious transaction. *Harper v. Building Association*, 55 W. Va. 149, 157, 48 S. E. 817; *Building Association v. McKnight*, 85 Pa. 472; *Moseley v. Brown*, 76 Va. 419, 425. For this, equity opens its doors to the borrower, and to unearthen and overthrow the violation of law, and relieve from duress and oppression, it has power to uncover every shift, device, and scheme adopted by the parties for covering it up, including judgments of the law courts, suffered or acquired. Relief in equity as to the interest in excess of the legal rate is an independent right, not lost or waived by failure to plead it at law. But when the parties are in the equity court, the forum in which such right must be asserted, when not interposed at law, the forum which has power to enforce discovery, give full relief and adequately protect the borrower, is there any excuse for longer withholding his defense? It is not perceived how these exceptions can have any bearing upon this question. The appellant has allowed a decree to be entered in a court of equity without having set up this defense. By the pleadings in the cause and presentation of the Mathews debt, an opportunity was given him to make defense. He was called upon to produce and insist upon any matters of defense which he had. The usurious character of the contract was apparent on the very face of the papers. The note provided for the payment of 10 per cent. interest, payable annually. The proof was already in the record, and it was only necessary for him to say he desired the usury to be cut out. He did not do so. Instead of doing so, he asked that the debt be reported with legal interest, but the commissioner reported it with the interest stipulated for in the contract, together with an alternative statement of it with legal interest. To his action no exception was taken. This court said he did not rely upon usury as a defense, because he had neither pleaded it nor excepted to the commissioner's report which audited the claim against him at 10 per cent. Judge Johnson, delivering the opinion of the court, says: "If he had, in this instance, wished the defense interposed after the alternative statement had been made by the commissioner, and the commissioner ignored it, and reported the debt at 10 per cent., because, as he supposed, the defense of usury was not in, then, certainly, he would have excepted to the report on the ground of usury, and because the commissioner did not adopt the alternative statement. He clearly did not intend to do this, as he excepted to the report on other grounds, and not on this. There is nothing here that approaches an exception to the commissioner's report on the ground of usury." Not having then elected not to pay it, nor since, until after another decree under the mandate of

this court, can he still elect to do so? Though usurious interest which has been paid can be cut out, does this argue that a final decree made after an opportunity to set up the defense in that forum in which it is looked upon most favorably may be reopened for its reception? True it is only a matter of election, but, so is the statute of limitation and the statute of frauds, where the proof appears in the record, as it does in many cases, but the benefit of these statutes must be claimed in some form. It is not enough that the court may see that the party can make them available. He must move in the matter. These defenses may be less meritorious than that of usury. It is a hardship to apply the statute of limitations or the statute of frauds against an honest demand; but it is not, in the eye of a court of equity, a hardship to compel the usurer to relinquish what the law does not allow him. Yet, must not all meritorious defenses be asserted when the status of the case is such as calls for an election as to whether the party will or will not claim the benefit thereof? There is no authority for the position that the defense of usury stands, in this respect, different from any other defense, and the reason or ground of jurisdiction to relieve from usury is, as above shown, the same as underlies its jurisdiction in all cases of fraud, illegality, and duress.

Having thus reached the conclusion that usury, as a defense, is not distinguishable from others in respect to the time at which it must be made in a court of equity, it follows that the decisions in *Lehman v. Hinton*, 44 W. Va. 1, 29 S. E. 984, and *Snyder v. Construction Co.*, 52 W. Va. 635, 44 S. E. 250, holding it barred by a decree fixing the amount of the debt, are sound and must be approved and followed in this case. The defense of usury, therefore, is barred by the decree of this court on the former appeal, remanding the cause with directions to enter a particular decree, as well as by the later decrees made by the circuit court pursuant to the mandate of this court.

The descriptive clause of the Mathews deed of trust, which must be construed in determining whether a certain tract of land containing 625 acres is included, reads as follows: "Also one other tract containing five hundred acres lying on the waters of Campbell's creek; also one other tract containing about three hundred and fifty acres, lying near Kelley's creek, and adjoining the lands of H. P. Tompkins, the last two tracts being parts of the John Steele survey of twenty-seven thousand acres (27,000) and assigned to Wm. H. Tompkins in the partition deed of said 27,000-acre survey, reference being had to said partition deed recorded in the clerk's office of the county court of Kanawha county for a more particular description of said tracts." When a deed in describing the land conveyed refers to another deed or map for further de-

scription, such other deed or map is considered as incorporated in the deed. *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277; 2 Dev. Deeds, § 1020; *Davis v. Rainsford*, 17 Mass. 207; *Carpenter v. Millard*, 38 Vt. 9; *Bank v. Steward*, 93 Va. 447, 25 S. E. 543. The partition thus made part of the trust deed shows three lots were assigned to Wm. H. Tompkins out of the John Steele survey, one on Campbell's creek containing 500 acres, called lot P, one containing 1,675 acres, called lot E, but not described as lying on Kelley's creek; and one containing 2,280 acres called lot V, but not described as lying on Kelley's creek, though said creek is mentioned in one of the calls in connection with a monument. In both lot E and lot V, mention is made of Witchers' creek. Neither of these lots is there described as adjoining the lands of H. P. Tompkins; but they adjoin each other.

Extraneous evidence in the record discloses the following facts: Wm. H. Tompkins in 1881 applied to Mr. Alexander F. Mathews for a loan, and agreed to give a deed of trust on his lands. Here there seems to be some dispute; Mr. Mathews claiming that Tompkins was to give a trust deed on all of his lands and Mr. Tompkins denying this, saying that nothing was said as to all of his lands. At any rate, Mr. Tompkins took to Mr. Mathews from W. A. Quarrier a statement which purported to show the lands owned by Mr. Tompkins in Kanawha county, and among others was a tract of 350 acres on Kelley's creek. Mr. Mathews made the loan and Tompkins executed the deed of trust. (Mr. Quarrier, at the time, in the statement he made, said that Mr. Tompkins' title to the tract of land he knew to be good.) There had been assigned to Tompkins out of the Steel survey prior to this two tracts of land, one of 1,675 acres, lot E, and one of 2,280 acres, lot V, that these lots adjoined, and that Tompkins' interest in the Steel survey was put in two lots, because the boundaries of the Steel survey were in dispute. In other words, there were 1,675 acres, the title of which was known to be good, as the location of the Steel line did not affect this, and 2,280 acres was in dispute; it being uncertain whether Tompkins would get any part of this 2,280 acres or not when the Steel line was properly located. After this was so assigned to Tompkins, and before the trust deed was made, Tompkins sold and conveyed about 1,500 acres of lot E to Mr. Bowers; thus leaving Tompkins, at the time the trust deed was made, the residue of lot E, after taking out what he had sold Bowers and all of lot V. After he had sold part of lot E to Bowers, and before the trust deed was made, to wit, in 1877, Tompkins had Sylvester Chapman, surveyor, to run off and survey the lands that he had remaining in lot E, which had not been sold by him to Bowers, and Chapman found by an actual survey that he, Tompkins, still

owned of lot E 349 acres. The survey made by Chapman of this 349 acres is filed with Tompkins' affidavit. This 349 acres was all the land that Tompkins knew he owned lying on Kelley's creek in 1881, the time of the execution of the trust deed. After the execution of the trust deed, in the year 1888 or 1889, the line of the Steel survey was settled, and it was then ascertained that Tompkins out of lot V got, instead of 2,280 acres, 625 acres of land, which adjoined the 349 acres that had been surveyed by Chapman. Both lot E and lot V are on or near Kelley's creek and adjoin the lands of H. P. Tompkins.

By the aid of this evidence the circuit court reached the conclusion that the clause of the trust deed in question covers only the 349-acre tract, constituting the residue of lot E, and does not include the 625-acre tract, saved by Mr. Tompkins out of lot V. Mr. Jos. E. Chilton, acting as special judge, passed upon the question, and in so doing delivered an opinion which he reduced to writing, and which reads, in part, as follows: "In determining this question, the following principles for the construction of the deed must be recognized and applied: First. 'The deed is to be construed with reference to the actual state of the property at the time of its execution and the law assumes that the parties refer to this for a definition of the terms made use of in their deed.' Amer. Enc. of Law, vol. 4, p. 79; *Richardson v. City of Cambridge*, 79 Am. Dec. 767. Second. 'The description will be construed, if possible, so that no part of it will be rejected or rendered inoperative.' Amer. Enc. of Law, p. 798. Third. 'If there is any land wherein some of the demonstrations are true and some false, only those lands shall pass wherein the demonstrations are true, or, in other words, where the grantor in a deed owns lands which comply with all the particulars of the description, the deed passes title to those lands only, although it may appear that the grantor intended other premises to pass also, which were included within only a part of the description.' Amer. Enc. of Law, vol. 4, p. 794. Fourth. 'In describing land, quantity controls where other parts of the description are not sufficiently certain in defining the parcel of land intended to be conveyed.' Amer. Enc. of Law, vol. 4, p. 794. The actual condition of the property at the time the trust deed was made was that Tompkins had a tract of about 350 acres lying on Kelley's creek, which was shown by the Chapman survey in 1877, to which he then knew he had good title, and that to the 625 acres which he nows owns he did not at the time know that his title was good. Must we not then believe that in drafting this trust deed the draftsman, whoever he was, had in mind some tract of land of about 350 acres and intended to cover only this tract? Can we believe that the draftsman referred to the 2,280-acre tract as a 350-acre tract, or

even a 975-acre tract as about 350 acres? The actual condition of the property at the time the trust deed was made shows that the lands to which Tompkins had title then corresponds in acreage and description exactly with the tract of land mentioned in the trust deed. If we take every part of this description, the acreage, the location, and give every part its due weight, and treat the property as it then actually was, have we not a fixed tract of land that must have been contemplated in this trust deed, to wit, 349 acres as surveyed by Chapman and shown by the Chapman survey. To disregard this call for acreage and say that it was a mere guess, and that this call referred to Tompkins' entire holdings on Kelley's creek, which were then as liable to be 3,000 acres as it turned out afterwards to be 975 acres, would be to disregard a part of the description which corresponds with the condition of the land as it then actually existed. You will also have to render inoperative the call for acreage as given, and presume that the draftsman of the trust deed had no knowledge whatever of the condition of the property, and meant the number of acres as in no way descriptive of the property contained in the trust deed. When you apply the law to the undisputed facts in the case, it does not seem that there can be any question as to what tract of land was in the mind of the draftsman of the trust deed. The acreage that he gives corresponds with the only tract of land that Tompkins then knew he owned, and acreage controls where other parts of the description are insufficient to determine the parcel of land intended to be conveyed. It is not seen how this call in the trust deed can be extended so as to include any other than the 350 acres. The circumstances under which the deed was made and the condition of the property at that time, if any effect is to be given to the terms in the description, must fix this description to this tract of land, to wit, a tract of about 350 acres, situate on Kelley's creek, adjoining the lands of H. P. Tompkins, and which was assigned to him out of the Steel survey. The boundary of this tract of land was well known. It had been surveyed. Under what rule of law or what authority can you disregard this call of acreage, and say that the draftsman of the deed had any other land in view? It must be remembered in construing this call in the trust deed we are not determining what Mr. Tompkins would have done had Mr. Mathews known all the facts about these lands. The question is not whether Tompkins would have included such land as he might have owned in lot V in the trust deed had Mathews known about his claim and demanded it, but it is, 'did he so include it at the time the trust deed was executed?' And in looking at the call of the trust deed, in view of the actual condition of the property at that time, we must find that to include any land outside of the 350 acres would be to disregard the very terms of the

trust deed and would be taking parol evidence to contradict the very terms of the deed, instead of to explain it."

The strongest criticism made upon this position is that, so construed, the deed becomes void for uncertainty, unless saved by the adjudications of its validity already made, and courts will never so construe a deed if such result can be avoided. In this view we do not concur. Under the descriptions of two tracts, containing, respectively, 500 acres and 350 acres, assigned by partition out of the Steel survey, the partition deed is referred to for greater particularity of description. Reference to it discloses that there were three such tracts, not two. One of them corresponds with the 500-acre tract mentioned in the deed of trust in all respects. The position of counsel for appellee would make the other two pass under a call for one tract, because the trust deed says the land thereby conveyed had been assigned out of the John Steel survey. It does not say it conveys all the land so assigned. It does not describe the 350-acre tract by metes and bounds, nor, by the reference made, does it furnish means of description of any such tract otherwise than by the acreage thereof, and the location, namely, "near Kelley's creek and adjoining the lands of H. P. Tompkins." As the description by metes and bounds, found in the partition deed, when read into the trust deed, furnishes means of identifying two tracts, instead of one, thereby conflicting with antecedent terms of the trust deed, a doubt is created as to what the exact intention was, though the intent to pass something out of the land assigned from the Steel survey, and lying near Kelley's creek, is clearly and unequivocally disclosed. If there were nothing in the deed by which this doubt could be resolved and reasonable certainty attained, without saying the whole of the land so assigned, both of these tracts, as well as the 500-acre tract, should pass, we might hold, under two rules of construction, "*Ut res magis valeat quam pereat*," that the thing shall avail rather than perish, and, in case of doubt, a deed shall be taken most strongly against the grantor that all the land assigned passed. But there is descriptive language by which a thing corresponding to it perfectly can be found—the description by quantity and location. Mr. Tompkins owned just such a tract as is described thereby, and all the other descriptive language used relates to it. All the language of a deed shall have some effect, if possible, but every word and clause need not, and cannot, have effect according to its literal terms, if contrary to the intent plainly disclosed by the instrument viewed as a whole. A deed is not void for uncertainty, if, from the description given in it, the property can be located. This deed clearly grants a 350-acre tract near Kelley's creek, and adjoining the lands of

H. P. Tompkins, if the grantor owned such a tract, unless the description by quantity must be rejected. Usually it does not control a description by metes and bounds; but sometimes it does. When? "When the other terms of the description are not sufficiently certain, the number of acres specified may be an essential part of the description." Dev. Deeds, § 1045. "Where the description of tracts of land by monuments, distances, or otherwise, is vague and indefinite, by reason of conflicting lines, or by the omission of a line, or from any other cause, a statement of the acreage is an essential part of the description." *Hostetter v. Railway Co.*, 108 Cal. 38, 41 Pac. 330. In the case just quoted from, and others therein referred to, the principle was applied in locating a disputed boundary line. But it would seem to be more clearly applicable when the question is the identity of the land granted, and the quantity, with other descriptive matter, points unerringly to a particular tract. The question here is not whether anything passes, but what passes, under this deed. Under either construction contended for, there is no lack of certainty, and the controversy is simply as to which construction shall prevail. All authority answers: "That one which accords with the manifest intention of the parties as gathered from the whole instrument." "Where a deed contains a particular description of the property, the fact that it contains a statement that the granted premises are the same that were conveyed to the grantor by a certain deed does not render it conclusive that it was the intention of the grantor to convey all of the premises included in the latter deed." 13 Cyc. 633. This deed does not say the same land that was assigned nor all that was assigned. After a careful examination of the opinion filed by the special judge, above referred to, and the authorities, we are convinced of the correctness of his conclusion as to this point.

But it is urged that this conclusion is precluded by the conduct of the appellant. In our judgment Judge Chilton's opinion conclusively answers this contention also. He says: "The only action of Tompkins referred to is his sending a map to Mr. Mathews with 900 marked on it. Mr. Mathews understood this 900 to include the lands owned by Tompkins on Kelley's creek. It must be remembered that this map was sent to Mr. Mathews some 10 or 15 years ago. At that time the Steel survey was settled, and Mr. Tompkins knew what lands he owned; and for many reasons, as can be seen, Mr. Tompkins may have then told Mr. Mathews that he owned 900 acres on Kelley's creek, without meaning to say to him his trust deed embraced them all. It is claimed, further, that the action of Mr. Tompkins in not raising the question earlier in this suit shows that he construed the trust to cover all of his Kelley's creek land. This position is not

tenable from the fact that at no time in this suit has the question as to the lands involved in this deed of trust been raised so as to call on Mr. Tompkins to give his understanding of the trust deed. The only question raised in reference to the lands in the suit has been the different views taken by the special commissioners as to what was embraced in the trust deed. Without going into the several advertisements showing the views of the different special commissioners, it is sufficient to say that they have all differed, and the different opinions of the several special commissioners appointed to make the sale, whether such opinions were arrived at hurriedly or after consideration, are sufficient to show that there has always been a question as to what lands the trust deed embraced, and that this has been an unsettled question. The views of the different special commissioners, had they all agreed on one point, might be advisory as showing what they thought of this trust deed, but it certainly could not bind any party interested in the case to a construction of the trust deed. It is true that in several affidavits filed by Mr. Tompkins he refers to the Kelley's creek land as one tract of about 900 acres, but all these affidavits were after the Steel survey was settled, and Tompkins then regarded his Kelley's creek land as one tract, and the object of these affidavits was to set aside a sale which would of necessity embrace all his lands, whether included in the trust deed or not. What reason then could there be in making these affidavits to separate the lands embraced in the trust deed from the others? I cannot see how affidavits made at the time and for the purpose as were those made by Mr. Tompkins could in fairness to him be treated as in any way throwing any light on the lands that he regarded as embraced in the trust deed. The only paper filed in the case that recites the lands embraced in the trust deed is a bill prepared by Bowers for an injunction. This bill is made an exhibit with a petition filed in the case of Bowers. The object of this petition is to modify the decree of sale formerly made, so that a tract of 105 acres of land that had been sold Bowers by Tompkins would not be sold until after the other lands had been sold. I think it will be seen that, so far as affects the prayer of this petition of Bowers, it was immaterial whether the statement in the exhibit filed with said petition, that the 920 acres on Kelley's creek was described in the trust deed as a tract of 350 acres, etc., was true or not. Whether this was true or false, Bowers, it would seem, was entitled to the prayer of his petition. Then why would any one be called to deny these allegations, even though they were not true?"

Appellant Wm. H. Tompkins further complains of the refusal of the court to refer the cause to a commissioner to ascertain whether the rents and profits of the land will discharge the liens thereon within five years.

He has had the benefit of one such reference and an adverse finding, but that occurred many years ago, and a great change in the value of the property has since taken place. This grows largely out of the development of the property under the mining lease, given upon part of it by consent of all parties to this cause. Of course, there has been a large appreciation in the value of all lands in the community, but the fact principally relied upon as ground for this request is the development of the property under the lease. The order confirming the lease contains the following adjudications: "And by like consent it is further adjudged, ordered, and decreed that the entering of this decree shall not prejudice or affect the rights of the creditors of the defendant Wm. H. Tompkins to ask for a sale or sales in the above-entitled cause for the satisfaction of their respective debts, but whenever the real estate of the said defendant Wm. H. Tompkins embraced in said lease is decreed to be sold, if the lease thereof by this decree authorized to be made is in existence and unforfeited such sale or sales shall be made subject thereto. And by and with like consent it is further adjudged, ordered, and decreed that the entering of this decree shall not disturb or in any wise affect the present position, standing or priority of any of the creditors of any of the defendants in the above-entitled cause, nor shall such decree operate to release any surety upon any debt sought to be collected in said suit, or in any wise prejudice or affect the present rights of creditors against any defendants in said suit whether as principals or sureties either in said suit or in any other proceedings now pending or hereafter brought." This was subsequent to the decree of sale. Nothing remained to be done, so far as any person then knew, but the execution thereof, by the commissioners appointed for the purpose, at the request of the creditors. We regard the consent of the appellant, above expressed and adjudicated, as conclusive upon any right which he might otherwise have had to invoke any discretionary power which the court has, if any, to further delay the sale for his benefit.

It is also urged that the court erred, in the decree of sale, in clothing the commissioners with authority to make a private sale of the lands with the consent of the appellant Wm. H. Tompkins. H. P. Tompkins, whose consent to such sale is not required by the decree, also assigns this as ground of error. As the decree was made several years ago, and the time within which it might have been appealed from has long since passed, no relief could now be afforded, if we were convinced of the existence of error in that respect. As hereinbefore shown, the decree was, as to such matter, final and unalterable, except by appeal or bill of review, within the time allowed for such proceedings.

There being no error in the decree, it must be affirmed.

BRANNON, P. (concurring). I am satisfied with the decision, except that I am inclined to think that the deed of trust of Mathews covers the 920 acres, all the balance of the land of Tompkins assigned to the defendant, except the 500 acres. It does not cover merely the 350 acres, but 920 acres. I express no opinion as to whether a judgment can be relieved against by equity for usury, where the usury appears on the note or was known before judgment, and no discovery was needed.

(58 W. Va. 600)

**CRAWFORD'S ADM'R v. TURNER'S
ADM'R et al.**

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1906.)

1. DESCENT AND DISTRIBUTION—DEBTS OF DECEDENT—LIABILITY OF HEIRS.

There is no personal liability upon an heir for the debts of his ancestor; but by section 3 of chapter 86, Code 1899, all real estate of any person as to which he may die intestate is made assets for the payment of his debts and all lawful demands against his estate in the order in which the personal estate of a decedent is directed to be applied.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 433-439.]

2. SAME—PERSONAL LIABILITY OF HEIR.

But while the heir is not personally liable for the debts of his ancestor, yet if real estate descend to him from his ancestor, and he sells and conveys the same, he then becomes personally liable to the creditors of his ancestor for the value of the real estate so descended.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 435, 457-461.]

3. EXECUTORS AND ADMINISTRATORS—ACTION AGAINST ADMINISTRATOR—JURISDICTION IN EQUITY.

Equity has no jurisdiction to entertain a bill on behalf of a general creditor of a deceased person to enforce a purely legal demand, unless it is shown that the creditor has exhausted his legal remedy, or that such remedy, for some sufficient cause, would be inadequate or unavailing.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 2009, 2041.]

4. SAME—PAYMENT OF DEBTS—SUIT BY CREDITOR—PARTIES—PLEADING.

Where a bill in equity is filed by a general creditor against the administrator and heirs of a deceased person, which does not seek to charge the real estate of which the intestate died seised and to subject the same to the payment of his debts, it is bad on demurrer, if it fails to show that there are assets in the hands of the administrator to be administered; and if such bill is filed to subject the real estate of such decedent, it must be upon behalf of the plaintiff and all other creditors, and it must appear that the personal property is insufficient to pay the debts.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 2042, 2043.]

5. DESCENT AND DISTRIBUTION—SUIT AGAINST HEIRS.

An heir may be sued in equity by any creditor to whom a debt is due, for which the estate descended is liable, or for which the heir is liable in respect to such estate; and no action at

law can be maintained against such heir for any matter for which there may be redress by such suit in equity.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 405.]

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County.

Bill by David Crawford's administrator against William F. Turner's administrator and others. Decree for plaintiff, and defendant Albert F. Davis appeals. Reversed.

Trapnell & McDonald, for appellant. Forrest W. Brown, for appellee.

SANDERS, J. David Crawford died many years ago in the county of Prince George, Md., unmarried, without lawful issue, and (it was supposed at the time) intestate. After his death his personal estate was distributed among his nearest of kin, one of whom was William F. Turner, a resident of Jefferson county in this state. Before the administration of Crawford's estate had been completed Turner died, and the remainder of his distributive share was paid to his administrator. Some years after the death of Crawford, and after the distribution of his estate, his will, bearing date October 25, 1859, was discovered, and probated in the orphans' court of Prince George county, Md., on the 16th of August, 1861. Authenticated copies of the will were recorded in the county of Clarke, Va., on the 12th day of December, 1881, and in Jefferson county, this state, on the 20th of October, 1886, on which last-named date J. Garland Hurst, sheriff of Jefferson county, qualified as administrator with the will annexed of David Crawford, deceased. Turner was not one of the beneficiaries under the will of Crawford, and in October, 1886, the administrator of Crawford filed a bill in equity in the circuit court of Jefferson county against the administrator and heirs of Turner and others to recover the value of certain slaves and moneys, which he (Turner), in his lifetime, and his administrator after his death, had received from Crawford's estate under the supposition that he was one of Crawford's distributees.

There are many reasons assigned why the decree of the circuit court should be reversed, but it will only be necessary to review the action of the court in overruling the demurrer to the bill. The bill charges that Turner died intestate, and that his heirs at law are two daughters, Ellen Blerne, wife of John S. Saunders, and Sydney Turner, wife of Daniel Swan, to whom descended from their father real estate of greater value than the claim sought to be recovered; and it also charges that Ellen Blerne Saunders has property and estate in Jefferson county, consisting of a valuable tract of land. Since the institution of this suit Ellen Blerne Saun-

ders died testate, and by supplemental bill her devisees, being her four children, are made parties. And, also, during the pendency of the suit, Nathan S. White, administrator of Turner, departed this life, and Joseph Trapnell qualified as his administrator with the will annexed, and Albert S. Davis, sheriff of Jefferson county, was appointed administrator d. b. n. of Wm. F. Turner, deceased, and by another supplemental bill they were brought before the court. While the bill alleges that real estate descended from Turner to his heirs, yet it does not state that this real estate which descended is the land sought to be subjected in this suit, and it does not show where the real estate is situated—whether in the county in which the suit is brought or not—or, if disposed of, what disposition was made of it. It is true it is averred that Ellen Blerne Saunders is the owner of a tract of land situated in Jefferson county, but it nowhere appears how she became the owner of this land—whether by inheritance from her father or otherwise. The real estate of any person who dies intestate, by section 3, c. 86, Code 1899, is made assets for the payment of the decedent's debts, and by section 5, c. 86, Code 1899, the heir is only made liable to the extent of assets descended, and liable to be subjected to discharge the ancestral obligations, and only then is such heir liable when he has sold the estate. If the assets remain in kind unsold, there is no liability upon the heir, but the assets are liable to subjection. Is the property which the bill says descended from Turner to his heirs still held by them? If so, it must be subjected, and there is no liability upon the heirs, and if not, and it has been sold by the heirs, the bill must so charge before liability can be fixed upon them. The property of the heirs of Ellen Blerne Saunders, situated in Jefferson county, certainly, under the allegations of the bill, cannot be subjected to the payment of the debts of the ancestor, because it does not appear that this is the land that descended, or that the real estate which did descend to them has been sold or disposed of; and therefore it fails to charge a liability upon the heirs. Section 6, c. 86, Code 1899, provides that an heir or devisee may be sued in equity by any creditor to whom a debt is due, for which the estate descended or devised is liable, or for which the heir or devisee is liable, in respect to such estate. It will therefore be observed, if the estate descended or devised is liable to be charged with a debt, the heirs or devisees may be sued in equity, and the particular estate subjected to satisfy the same; but, if the estate has been sold by the heir or devisee, then such heir or devisee is liable in respect to such estate to the extent and value of the estate inherited or devised.

This bill not being maintainable to subject the land of the heirs in Jefferson county for the reasons given, then can it be maintained as a bill of a creditor against the administrator of the estate of Turner? This must be answered in the negative upon the authority of *Hale v. White et al.*, 47 W. Va. 700, 35 S. E. 884: "A general creditor of a deceased person cannot sustain a bill in equity on a purely legal demand, unless he shows that he has exhausted his legal remedy, or that such remedy, for some good cause, would be inadequate or unavailing." Not only is this so, but the bill makes no charge against the administrator, and only asks, in the prayer, for a settlement of his administration accounts. It is not claimed that the administrator has any funds in his hands whatever out of which the plaintiff's debt could be paid, nor is the bill filed under section 7, c. 86, Code 1899, where it is provided that, if the personal estate is insufficient for the payment of the debts of the decedent, a creditor may institute and prosecute a suit on behalf of himself and the other creditors. The bill is not filed on behalf of the plaintiff and the other creditors. It does not charge that the personal estate is insufficient to pay the debts. In short, it says nothing in reference thereto—whether there is, or is not, such estate—and it does not seek to sell real estate of which Turner died seised. But, as has been noted, the bill does aver that real estate descended from Turner to his heirs, but it does not seek to charge and sell this land so descended, but the prayer is to sell the land of the heirs of Ellen Blerne Saunders. In *Hale v. White*, supra, the remedies of the creditor of a deceased person are given as follows: "(1) An action at law against the personal representative. Section 19, c. 85, Code 1899. (2) A separate bill in chancery to compel payment of his individual debt out of the funds in the hands of the personal representative, and discover the funds or estate liable to the payment thereof. Story, Eq. Pl. §§ 99-102; 2 Tuck. Bl. Com. 425; *White v. Bannister's Ex'rs*, 1 Wash. (Va.) 168; *Duval's Ex'r v. Trent's Devisees*, 6 Munf. 29; *Clarke v. Webb*, 2 Hen. & M. 8. (3) A bill in behalf of himself and other creditors to ascertain and distribute both the real and personal estate. This is subject to the right of the personal representative to bring such suit within six months from his qualification. Section 7, c. 86, Code 1899. (4) A bill against an heir or devisee because of assets by descent. Section 6, c. 86, Id." It suffices to say that the plaintiff's bill does not come within either of the above classifications. The circuit court erred in overruling the demurrer.

We therefore reverse the decrees complained of, and remand the cause, with leave to the plaintiff to amend his bill, if he so desire.

(58 W. Va. 604)

DUDLEY v. CHICAGO, M. & ST. P. RY. CO. et al.

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1906.)

1. CARRIERS—FREIGHT—WRONGFUL DELIVERY—CONVERSION.

An inspection of property shipped by a common carrier in sealed cars, unauthorizedly permitted by such carrier at the point of destination, in consequence of which the consignor, who was also the consignee, was prevented from consummating a contemplated sale thereof, does not amount to a wrongful delivery by the common carrier, so as to make it liable for the value of the property as for a conversion thereof.

2. SAME—ABANDONMENT BY OWNER—SALE BY CARRIER.

If, in such case, the property is perishable and decaying, and the owner, upon being notified of the danger of its loss, relying upon the unauthorized inspection as constituting a conversion, gives notice of his abandonment of the property and intention to claim the value thereof, the carrier may sell the same on account of the owner, deduct his charges from the proceeds of sale, and will be liable for the balance thereof only.

3. ATTACHMENT—DISSOLUTION—RELEASE OF BOND.

When, in a suit against a foreign corporation, in which its property has been attached and afterwards released by the giving of a bond, pursuant to statutory provisions, the defendant appears and makes defense, and a personal decree is rendered against it for an amount which it has previously tendered on account of the demand set up in the bill, but not paid into court, it is error to dismiss the attachment and decree a release of the bond.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 785-787.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Bill by Lysander Dudley against the Chicago, Milwaukee & St. Paul Railway Company and others. From the decree, plaintiff appeals. Reversed in part.

V. B. Archer and Wm. Beard, for appellant. John F. Hutchinson, for appellees.

POFFENBARGER, J. Lysander Dudley has appealed from a decree of the circuit court of Wood county, in a suit instituted by him against the Chicago, Milwaukee & St. Paul Railway Company, because it allows him a smaller amount than he claimed, and, although decreeing the payment of money to him, discharged the attachment and released the bond given for the forthcoming of the attached property, certain railroad cars seized at Wheeling and Huntington.

The bill sought a decree for the value of two car loads of apples, shipped by the plaintiff over the Baltimore & Ohio Southwestern Railway and connecting lines to Elgin, Ill., and consigned to the plaintiff himself, with directions to notify J. W. Sharp, of Chicago, Ill., of the arrival of the cars at their destination. Expecting Sharp to accept and pay for the apples, plaintiff had made drafts upon him for their value as per contract, attached the bills of lading to them, and dis-

counted them at the First National Bank of Parkersburg, and said bank caused them, in due course of business, to be presented for payment at the office of Sharp. Upon notice of the arrival of the cars, Sharp's agent was allowed to inspect the apples, without producing the bills of lading or showing any title or right to the possession of them. Sharp had not then paid the drafts, nor did he afterwards do so. His agent reported that the apples were not such as the plaintiff had agreed to deliver. He immediately notified Dudley, and, presumably, the railway company also, for very soon afterwards the agent of the company notified Dudley by telegraph of Sharp's refusal, and called upon him to arrange for disposition of the apples, and continued by subsequent dispatches, from October 24, 1890, until November 3, 1890, to demand that he take care of them. Notice of the intention of the railway company to have them sold was given October 28th. The last telegram, dated November 3d, notified him that the apples were rotting on the track, and closed with the inquiry, "Shall we sell for your account?" To this Dudley replied as follows: "Have made claim against Baltimore & Ohio Southwestern Railroad for full value of cars. They were wrongfully delivered. If you sell, it will be as agent of the company and for its benefit." After a futile attempt to sell the apples at Elgin, the railroad company shipped them to Chicago, where they were sold for the sum of \$397.93, which, after deducting freight charges of \$144.84, paid, except as to its own, by the defendant, upon the guaranty of the Baltimore & Ohio Southwestern Railway Company, left \$253.09, which was tendered to the plaintiff, but refused by him, because he claimed a larger amount.

The theory of his claim, then presented, afterwards asserted by this suit, and now urged here as one ground of error in the decree, is that the conduct of the defendant railway company amounted in law to a conversion of the apples to its own use. The argument to sustain this position treats the inspection allowed to Sharp's agent as an unauthorized delivery of the property to him. That a common carrier is liable for a wrongful delivery, if in any way at fault, is perfectly clear. Such act may be treated as a conversion. Common carriers are bound to exercise the highest degree of care in this respect. "No circumstances of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person." *Hutchinson on Carriers*, § 344. To the same general effect, see *North Pennsylvania R. R. Co. v. Commercial Bank*, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287, and *Indianapolis & St. L. R. Co. v. Hernon*, 81 Ill. 143, cited by counsel for appellant. Of course, this general rule, like all others, may be subject to some slight apparent exceptions, which need not be no-

ticed here. But, if there was no delivery, the rule of law relied upon has no application. The property was never out of the possession of the defendant until sold, or removed for sale, some time after the inspection. Sharp's agent was simply permitted to enter the cars, set barrels out in his wagon, open them, and examine the apples. Then they were put back in the car and it was resealed by the agent. It may be true that he had no right to do so, and that the defendant did wrong in permitting the inspection, no evidence of title or right to possession having been shown; but it is a non sequitur to say, upon these facts, there was a delivery. It may have been an unauthorized act of dominion over the property; but whose act was it? Clearly that of the railroad company, for the property was still in its actual and legal custody. It never parted with its possession. Not every wrongful act on the part of a common carrier authorizes an action against it as for a conversion. Where goods intrusted to a common carrier are injured only, the owner's remedy is for damages for the injury, not their value. *Hutch. Com. Car.* § 770a. For delay in delivery the action must be for damages resulting, not the value of the property. *Hutch. Com. Car.* § 328; *Ryland & Rankin v. C. & O. Ry. Co.*, 55 W. Va. 181, 46 S. E. 923. What is the nature of the plaintiff's injury here? Inspection did not injure the property, so far as disclosed. It prevented the consummation of a sale to Sharp. Can that constitute the basis of an action for the value of the property? That it could not is so obvious that no such claim is made, and this branch of the contention is founded upon the extremely fanciful theory of a technical delivery, for which no authority has been found.

Claim for the value of the property as for a conversion thereof is also predicated upon the sale of it. Whether sale could have been made for the charges for carriage, without a judicial proceeding by way of enforcement of the lien, seems not to have been raised. That depends upon whether there is an Illinois statute authorizing such sale. But, it is said, the sale could not be made therefor in this instance, because the Baltimore & Ohio, Southwestern Railway Company had guaranteed the charges. But if that agreement was a mere guaranty, and not an absolute undertaking to pay, it was the duty of the defendant company to collect its charges on the delivery of the property. If by due diligence it could not do so, it might fall back upon the guaranty. However this may be, there was a clear and undoubted right of sale in the defendant upon another ground. The property was perishable, and was then decaying and becoming less valuable every day. The owner, having failed in the effort to make sale of the apples as he expected, neglected to take them out of the possession of the

company and take care of them. More than that, his telegram of November 3, 1899, could be construed as nothing more nor less than a notification that he would treat the apples as the property of the railroad company, sue for their value, and leave them in the hands of the company. This he had no right to do, as has been shown. What could the defendant do under the circumstances? Could it allow the property to decay? Perhaps it was under no duty to protect the plaintiff from a loss of his own making. This we do not decide; but a clear and undoubted right it did have to sell the property under such circumstances, and, after deducting its charges, pay the residue of the proceeds to the owner. It was still the custodian of the plaintiff's property, and bound, as such, to do whatever was necessary to mitigate and prevent, as far as possible, the natural loss incident to the decay of the fruit. "Where the goods are of a perishable character and the consignee will not accept them, or there are other reasons requiring a sale without delay, the carrier may be justified in selling the goods because of the necessity of the particular case." Elliott, R. R. § 1571. "But, while in the possession of the goods in the character of carrier, he also stands for many purposes in the relation of agent for the owner; and it is a general rule of law that although the powers of agents are ordinarily limited to the purposes for which they are employed, yet that emergencies may arise in which, from the necessities of the case, an agent may be justified in assuming extraordinary powers, and that his acts, done fairly and in good faith under such circumstances, though entirely beyond the scope of his ordinary powers, may be binding upon his principal. Such emergencies sometimes occur, in the course of the business of the carrier, in which he becomes the agent of all concerned, and in which his acts, in the exercise of a sound discretion, will be binding upon all the parties in interest; and if the necessities of the case require that the goods be sold, he not only may sell, but it becomes obligatory upon him to do so, for the benefit of the owner. If, for instance, the consignee refuse to accept the goods and they are of a perishable character, and if stored would, from rapid decay, be totally lost to the owner, it would be the duty of the carrier to sell them on his account; and the same rule would apply if, from any cause, it became impossible to deliver the goods according to the directions of the owner or bailor, or to return them before they would inevitably perish from such inherent tendency, from damage received by them in the transit, or from any other cause." Hutchinson on Carriers, § 432. If, as to the property so left on its hands, the railway company is to be regarded as a warehouseman, its right to sell the same to prevent loss by the decay thereof is equally clear. Any kind of im-

minent danger of loss or destruction will justify a sale in such case. *Rea's Adm'x v. Trotter*, 28 Grat. 585; *Jordan v. Shireman*, 28 Ind. 136.

The court erred, however, in discharging the attachment and declaring the bond released. Upon what theory this was done is not apparent, unless it was that the defendant had not only submitted itself to a personal decree by appearing and defending, but had also tendered the amount of the decree, except the interest, before suit was brought. No money was paid into court. The effect of a tender, when kept good, only prevents recovery of interest and costs. It does not pay the debt nor extinguish it. The defendant is a foreign corporation, against which the plaintiff had the right to proceed by attachment, for the sole reason that it is such a corporation. The bond taken under the attachment afforded security for the payment of the amount of the decree, either absolutely or to the extent of the value of the property attached. It was a security regularly and properly obtained, so far as this record discloses. That the defendant is amply able to pay several thousand times the amount of the decree constitutes no reason for releasing the security and sending the plaintiff to a foreign jurisdiction to procure satisfaction of his personal decree, in case the defendant should see fit to require him to do so.

For this error, so much of the decree appealed from as dismissed the attachment and released the bond must be reversed, annulled, and set aside; but in all other respects it will be affirmed, with cost in this court to the appellant, as the party substantially prevailing.

(38 W. Va. 610)

HARTIGAN v. HARTIGAN.

(Supreme Court of Appeals of West Virginia. Jan. 23, 1906.)

1. HUSBAND AND WIFE—CONTRACT OF SEPARATION—CANCELLATION.

A contract between a husband and wife in an agreement for separation and the conveyance of the wife's property to the husband will be canceled and annulled at the suit of the wife, unless it clearly appears to be fair, just, equitable, and wholly free from exception.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 1046.]

2. SAME.

In a suit by a wife for divorce from bed and board, and for the cancellation of a contract between herself and husband for a perpetual separation and an agreement on her part to convey forthwith in fee to the husband her real estate, of the value of \$10,000 or \$12,000, in consideration that the wife have full, absolute, and complete custody and control of their five children, the husband to have, use, and occupy certain rooms in the house so conveyed to him, the wife and children to have, use, and occupy the residue of the house, and the wife to provide food and clothing for said children, and pay all necessary expenses for supporting them in their said home, including the expenses of their education in the local schools, the husband to pay the wife \$50

per month for the purpose of such support and expenses, said "agreement to remain in full force and effect until the youngest child shall reach her majority," held, such agreement is unfair, unjust, and inequitable, and should be canceled.

(Syllabus by the Court.)

Appeal from Circuit Court, Monongalia County.

Bill by Mary V. Hartigan against James W. Hartigan. Decree for plaintiff, and defendant appeals. Affirmed.

Henry M. Russell and Goodwin & Reay, for appellant. W. S. Meredith and Lazzelle & Stewart, for appellee.

McWHORTER, P. At the January rules, 1902, Mary V. Hartigan filed her bill in equity in the clerk's office of the circuit court of Monongalia county against James W. Hartigan, her husband, praying for a divorce a mensa et thoro, for alimony, and the custody of their five children; that the cause remain on the docket that she might in due time according to law have a divorce a vinculo matrimonii, and for the further purpose of setting aside and annulling a contract and agreement between herself and her husband, which contract is as follows:

"This agreement made this 11th day of October, 1899, by and between J. W. Hartigan and Mary V. Hartigan, his wife, Witnesseth, that, whereas, said parties have agreed to separate from bed and board and otherwise dissolve their marital relations as hereinafter set forth: Now, therefore, they agree to make disposition of their property, etc., and adjust their future relations toward each other and their children as follows:

"(1) The said Mary V. Hartigan agrees to convey forthwith, by deed in fee, to J. W. Hartigan the house and lot now occupied by them as their residence, on Spruce street in the town of Morgantown, West Virginia.

"(2) In consideration of which said conveyance the said J. W. Hartigan agrees and hereby grants, transfers and surrenders to said Mary V. Hartigan the full, absolute and complete custody and control of their five children. The said J. W. Hartigan is not to interfere with, command, correct, or in any wise exercise any authority over or direct the discipline or education of any of said children except by permission and at the instance of said Mary V. Hartigan, but shall have the privilege of seeing them as often as he wishes and said children shall be free to visit him in his quarters at said home, socially, when they so desire.

"(3) Said J. W. Hartigan shall have the occupancy and control of the two rooms in said residence heretofore used by him as a bed room and study on the second floor, and of the back parlor as an office or other use, on the first floor, with the use of the bath room, and of the attic for storage. Said Mary V. Hartigan shall have the exclusive occupancy and control of the remaining rooms of said residence for her own use and

that of her children, and neither party shall unnecessarily invade or seek to use or control that part of said house hereby assigned to the other. And said children shall be kept in said house as their house, and not be removed therefrom to any other quarters or place whatsoever except by the mutual consent and permission of the parties to this agreement previously obtained—provided only that this shall not be construed to prevent said children going away temporarily on brief visits in company with their mother or by her consent.

"(4) Said J. W. Hartigan further agrees to pay over to said Mary V. Hartigan, or place to her credit in a bank of Morgantown, each month beginning with this month of October, 1899, the sum of fifty dollars, out of which the said Mary V. Hartigan shall provide food and clothing for said children and pay all necessary expenses for supporting them in their said home, including the expenses of their education in the local schools. And said Mary V. Hartigan shall not contract or incur any debt or debts on said account of any kind or character whatsoever.

"(5) The said J. W. Hartigan shall further provide decent and suitable household and kitchen furniture for said entire house, keep said house in good repair, and pay all other expenses, including taxes, water and gas bills, for its maintenance as a residence.

"(6) Said J. W. Hartigan shall not eat at the common table of said family, but shall make separate provision for his own boarding at a hotel or elsewhere.

"(7) This agreement shall remain in full force and effect until the youngest child shall reach her majority.

"Given under our hands this 11th day of October, 1899.

"Mary V. Hartigan.
"J. W. Hartigan."

This agreement was duly acknowledged by the said J. W. Hartigan on the 5th day of September, 1901, before the clerk of the county court of Monongalia county, and on the same day was proved before the said clerk as to the said Mary V. Hartigan by the oaths of W. P. Willey and E. H. Cooms, and admitted to record in the office of the said clerk on said 5th day of September, 1901. Plaintiff based her grounds for divorce and alimony on cruel and inhuman treatment of her, and abandonment and desertion by the defendant. The defendant answered the bill denying all its material allegations, to which the plaintiff replied generally. The depositions taken by the plaintiff and the defendant are very voluminous, constituting over 900 pages of the record in this cause. The cause was brought on to be heard on the 23d day of June, 1902, when the court decreed that plaintiff be divorced from bed and board from her husband, said defendant, and that they be perpetually separated; that plaintiff be thereafter perpetually and fully protected in her person from said defendant, and

in all her property and estate then owned by her, except as hereinafter provided, and in all her property and estate thereafter acquired against any claim or demand of defendant, and free from any marital right or claim of the husband; and a like provision for the protection of the defendant's property against plaintiff, except as hereinafter provided, and in all property and estate thereafter acquired by him against any claim or demand or estate of said plaintiff, and decreed that said contract of October 11, 1899, be set aside, canceled, and annulled, and further decreed as follows: "The court, without now determining what interest, if any, the said defendant has in the real estate known as the hospital property, situated on Spruce street in Morgantown, Monongalia county, W. Va., referred to in said contract dated October 11, 1899, and which was conveyed to the said plaintiff by John Marshall Hagans and James W. Hartigan by deed bearing date on the 2d day of April, 1897, a copy of which is filed with the bill in this cause, and expressly reserving all questions as to the interest of the defendant in said property until the future order of this court, doth adjudge, order and decree that the said plaintiff shall have and hold the exclusive use, possession, and control of the said property together with the appurtenances and privileges thereunto belonging and all the rents, issues, and profits of the same to the same extent and as fully as she, the said plaintiff, would if sole owner thereof, and that the said property shall be taken, held, and accepted by the said plaintiff in lieu of alimony, and the court doth reserve for future order of this court the question of the interests of each of the said parties in the said property and also the question of further alimony to be granted the plaintiff as against the defendant. The court doth further adjudge, order, and decree that the said defendant may, at his election, continue in possession of the said hospital property for six months from the rising of this court upon the condition, however, that he, the said defendant, pay to the said plaintiff the sum of \$50 per month for the use of said property. Said \$50 per month to be paid by the defendant to the plaintiff monthly in advance, and at the expiration of the said six months from the rising of this court, or at once, if the said defendant desires not to continue in possession thereof upon the terms and conditions of paying \$50 per month in advance to the said plaintiff, or if the defendant undertakes to remain in possession of the said property on said terms and conditions and at any time before the expiration of said six months, shall fail to pay to the said plaintiff the said \$50 per month in advance for any month, then, in either event, the plaintiff upon her motion may sue out of the clerk's office of this court a writ of possession for said property. The court doth further adjudge, order, and decree that the said plaintiff shall have the ex-

clusive care, custody, and control, and shall maintain the infant female children of plaintiff and defendant, to wit, Elizabeth Willey Hartigan, Mary Virginia Hartigan, and Sarah Hartigan, and the said plaintiff shall maintain, support, and educate them free from any charge upon defendant further than that allowed the plaintiff by this order or by future order of the court. It appearing to the court that the said plaintiff is possessed of some other estate of her own in addition to her interest and estate in said hospital property, and that she asks to be permitted to support and educate the two infant male children of plaintiff and defendant, to wit, John Marshall Hartigan and James William Hartigan, it is therefore adjudged, ordered, and decreed that the said plaintiff may, if she so elect, at her own expense, undertake the support and education of the said two infant male children and for that purpose she may have the custody and control of them, but the court doth further adjudge, order and decree that if the said plaintiff decline to so undertake to support and educate the said two male children, or if she should undertake to do so and fail, either through disinclination on her part or from her inability to control them, then they shall be placed in the charge of and under the control of the defendant, and in the event that said male children are placed under the control of the defendant, he, the said defendant, shall be liable for their support and maintenance. The court doth reserve the right to make such order in the future as shall be deemed best for the control and maintenance of the said two male infant children of plaintiff and defendant. The court doth further adjudge, order, and decree that the plaintiff recover against the defendant her cost by her in this behalf expended." From which decree the defendant appealed, and says that the court erred in granting the plaintiff the divorce from bed and board from defendant, and decreeing that the agreement, dated the 11th day of October, 1899, be set aside, canceled, and annulled, and in decreeing that the plaintiff should have and hold the exclusive use, possession, and control of the property mentioned in the decree, together with the appurtenances and privileges thereto belonging, and the rents, issues, and profits thereof, and in decreeing that the plaintiff should have the exclusive care, custody, and control of the female children mentioned in the decree; and at her option should have the control of the two male children and the like option to support and educate them.

Since the submission of the cause to this court the death of the plaintiff has been suggested on the record. The testimony taken in the case is very conflicting, and as touching the allegations of cruelty the evidence is sufficient to warrant the circuit court in granting the divorce from bed and board. Counsel for defendant contends that it may fairly be said that the evidence for the plain-

tiff does not outweigh the evidence for the defendant, and the burden of proof being upon plaintiff, she was not entitled to the decree of divorce, but the court having so found under the evidence, conflicting as it was, and this court, not being able to see that the evidence preponderates in favor of defendant, will not disturb the decree on that point. It does not appear upon the face of the decree whether the decree was based upon the evidence of cruelty, or abandonment, but as the evidence fails to sustain the decree on the latter point, we assume that it was based upon the former ground of cruelty. As to the canceling and annulling of the contract of October 11, 1899, this is a contract of separation made by a married woman with her husband, not only to live separate and apart, but by it they agree to separate from bed and board and otherwise dissolve their marital relations. "The said Mary V. Hartigan agrees to convey forthwith by deed in fee to J. W. Hartigan, the house and lot now occupied by them as their residence on Spruce street in the town of Morgantown, West Virginia." The consideration for which conveyance of said property is the agreement on the part of said J. W. Hartigan to surrender to said Mary V. Hartigan the full, absolute and complete custody and control of their five children; he to occupy certain rooms designated in the house, and she and the children to have the exclusive occupancy and control of the remaining rooms; he to pay her \$50 a month, out of which she should provide food and clothing for the children, and pay all necessary expenses for supporting them, including the expenses of their education in the local schools.

It is contended by the appellant that the agreement in its provisions "was fair and liberal towards the plaintiff." It is true plaintiff in her testimony says that she was consulted about the terms of the agreement, and that she suggested the consideration, and that she entered into the agreement with the full knowledge of her marital rights, but denied that the consideration named in the agreement was adequate, and says she signed it "because I could not get anything else. My uncle tried to induce him to be generous." What is the consideration moving from defendant to plaintiff for all this property, which the record shows is worth from \$10,000 to \$12,000? The first consideration is the giving up of the control, custody, and maintenance of the children to the plaintiff; the defendant being relieved from all responsibility and the duty of providing and caring for the said children, which the law requires at his hands. The money consideration is \$50 per month, which is an inadequate support for the wife and children, besides a considerable portion of the house is given over to defendant for his use and occupancy. It is very evident from the testimony in the case that the plaintiff at the time of the execution of said agreement had become al-

most desperate and therefore willing to execute any sort of an agreement to get entire control of her children. The property was hers, and she was entitled to the rents and profits thereof, and was entitled, at the hands of the defendant, to a support for herself and her children; and yet she entered into this contract whereby she took upon herself the burden of supporting herself and all the children for the sum of \$50 per month. And even that was to cease when the youngest child should arrive at the age of 21 years, at which time the plaintiff was to be turned "out upon the cold charities of the world;" at least upon her own resources, divested of all title or interest in her property, which she agreed to convey in fee to the defendant. This agreement to convey the property seems to be without any adequate consideration. It is claimed by counsel for appellant that he had an equity in the property by reason of the improvements he placed upon it. It is true that he placed the most of the improvements upon it, but the improvements were an absolute gift to the plaintiff by the defendant for herself and their children, and her title to the property and the enjoyment thereof was complete. It is well settled that a contract of the character of the one here in question must be fair, equitable, and just. In 4 Pom. Eq. § 1405, in treating of the essential elements and incidents of a contract which equity will enforce, the author says: "The elements which peculiarly affect the equitable character of the agreement and of the remedy are the following: The contract must be perfectly fair, equal, and just in its terms, and in its circumstances. The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive." See, also, section 397, Hogg's Eq. Pr., where it is said: "It must also be based upon a valuable consideration; * * * and the contract must also be just and equitable and free from fraud, and in harmony with equity and good conscience"—and cases there cited. And in 2 Beach, Mod. Eq. Jur. § 567: "The relief being discretionary, it follows, therefore, that in the first place the contract must, under all circumstances, be equitable and just. An agreement may be valid at law, and there may not be sufficient grounds for its cancellation in equity; and yet, upon a fair and just consideration of the attendant and collateral circumstances, the court will abstain from decreeing its performance. Before granting such a decree, the court must be satisfied, not only of the existence of a valid contract, free from fraud and enforceable in law, but also of its fairness, and of its harmony with equity and good conscience; and any fact showing that a contract is unfair, unjust, or against good conscience, will justify a court of equity in refusing to decree its specific performance." If these principles apply to agreements and

contracts made between parties trading at arms length and in every respect competent to contract, how much more strongly would they apply in favor of the wife contracting with her husband. Can it be said of the contract in question here that the consideration was adequate, or that the contract was just, fair, and equitable?

It is claimed by appellee that the contract was against public policy, and cites 1 Bish. on Mar. & Div. § 1261 et seq., and cases there cited, and therefore not enforceable in equity; while it is claimed by counsel for appellant "that the agreement was not an agreement for the separation of the husband and wife. They had already separated, and the agreement was entered into subsequently to the separation, and because it had already taken place." This is contrary to the position taken by the defendant in his answer, where he says: "In October in the year 1899, an agreement of separation was entered into between the plaintiff and the defendant, and from that time until the present they have not lived together as husband and wife." And further, "Respondent has never in any way abandoned or deserted the plaintiff, or done anything which could properly be construed as abandonment or desertion. On the contrary any abandonment or desertion which has taken place, has been by the plaintiff herself, and without any reasonable cause or occasion for the same. Respondent is advised, and therefore alleges, that the separation which took place upon and by reason of the execution of the said agreement, dated the 11th day of October, in the year 1899, could not properly, by reason of that instrument, be construed as abandonment or desertion, or as a proper ground for divorce." Thus, it will be seen that defendant clearly understood the agreement to be an agreement of separation, and which separation took place at the time of the execution of said agreement. In *Switzer v. Switzer*, 28 Grat. 574, syl., it is held: "A contract between a husband and wife in an agreement for a separation, cannot be sustained in any case in which it does not clearly appear, that in the negotiation which preceded the agreement, as well as at the time of executing the same, the wife was in a position in which she could act and did act, not only with perfect freedom, but with a full knowledge and appreciation of all the circumstances of her situation, and of her individual and marital rights; and the contract in itself must be fair and just, wholly free from exception, and such as a court of equity might have imposed upon the parties in a case in which their persons and their property had properly fallen under its jurisdiction and control." It will be observed here that the contract in itself must be fair and just, wholly free from exception, and such as a court of equity might have imposed upon the parties in a case in which their persons and their property had properly fallen under its jurisdiction and control. In case at bar the wife contracts

to convey her property absolutely and in fee for a consideration wholly inadequate, if there can be said to be a valuable consideration at all; and while it appears from her own testimony that she had full knowledge and appreciation of all the circumstances of her situation and her marital rights, at the same time it appears that the circumstances were such as to produce in her an almost frenzied state of mind, and to such an extent that she was ready to make any sacrifice of her property in order to get sole control and custody of her children, and because of these conditions she entered into this agreement, which if enforced would in a few years deprive her of all the rights and benefits in and to her said property. Can it be thought for a moment that any court of equity, having jurisdiction of the persons and the property of these parties, could or would have imposed upon the plaintiff the terms and conditions in the contract of October 11, 1899, and sought to be canceled and annulled in this cause? The circuit court did not err in setting aside, cancelling and annulling the contract, the same being so clearly inequitable, unfair, and unjust.

The assignments of error touching the custody and control of the children, it is deemed unnecessary to discuss. There is sufficient evidence in respect to this matter to support the decree at the time it was entered. New conditions have arisen since the decree, occasioned by the decease of plaintiff, which will probably make further action necessary on the part of the circuit court in relation thereto.

For the reasons stated herein, the decree of the circuit court is affirmed.

(33 W. Va. 620)

NORFOLK & W. RY. CO. v. DAVIS et al.
(Supreme Court of Appeals of West Virginia.
Jan. 23, 1906.)

1. EMINENT DOMAIN—COMPENSATION—ELEMENTS.

In a condemnation proceeding, every element of value which would be taken into consideration between private parties in a sale of property should be considered in arriving at a just compensation for the land proposed to be taken, and it is proper to consider, not only the use for which the land may be maintained at the time, but its adaptability to any and every useful purpose to which it might be put.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 352-356.]

2. SAME.

As a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 352-356.]

3. SAME.

As to the value of the property taken, the proper inquiry is, what is the value of the property for the most advantageous uses to which it may be applied?

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 352-356.]

4. SAME—ASSESSMENT OF COMPENSATION—APPEAL—PREJUDICIAL ERROR.

In a condemnation proceeding, when a false, speculative, and conjectural basis of the value of the real estate proposed to be taken is permitted to go in evidence to the jury over the objections of a party, it will be presumed that the objecting party was prejudiced thereby.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 686.]

(Syllabus by the Court.)

Error to Circuit Court, Mingo County.

Action by the Norfolk & Western Railway Company against T. J. Davis and others. Judgment for defendants, and plaintiff brings error. Reversed.

Joseph I. Doran and Holt & Duncan, for plaintiff in error. Simms & Enslow, for defendants in error.

McWHORTER, P. This is a proceeding by the Norfolk & Western Railway Company for the condemnation of a strip of land 2,567 feet in length, along the bank of the Tug Fork of Sandy river, in Mingo county, being the front of a tract of some 550 or 600 acres; the strip to be taken containing 5.02 acres, the property of T. J. Davis and others, for its use in the construction of a branch of its railroad. The applicant offered the owners \$500, which they refused to accept. It then applied to the circuit court of Mingo county for the appointment of commissioners, under the statute, to ascertain the compensation, who reported \$900 as a fair compensation for the land taken and damages to the residue of the property, which report was excepted to by the applicant, "because the amount fixed by said commissioners in their report as compensation for the land proposed to be taken and damaged is grossly excessive," and demanded that the question of compensation be ascertained by a jury. The defendants also excepted to said report, "because the amount fixed by said commissioners in their report as compensation for the land proposed to be taken and damaged is grossly inadequate," and likewise demanded a jury to ascertain the compensation and damages. Accordingly a jury was impaneled and sworn, and, after hearing the evidence, returned the following verdict: "We, the jury, find for the defendants the sum of \$2,350 as compensation and damages for the land proposed to be taken as shown and described in the petition and plat filed herein." During the trial the plaintiff objected to certain evidence offered by the defendants, and excepted to the ruling of the court in permitting the evidence to go in, and moved the court to set aside the verdict of the jury and grant it a new trial, because the same was contrary to law and without evidence to support it, which motion the court overruled and entered judgment requiring the plaintiff to pay said sum of \$2,350, to which plaintiff excepted and procured from one of the judges of this court a writ of error.

The questions presented for the consideration of this court are as to whether the amount of compensation found by the jury is so high that it must be attributed to prejudice, partiality, passion, or mistake of law or judgment, and whether the court erred in permitting certain evidence to go to the jury, as claimed by plaintiff's counsel. It is conceded, as well as proved, that the land taken for the right of way, being a strip 80 feet wide, except for a distance where a fill was made it is enlarged to 140 feet, is rough hillside land, wholly unfit for cultivation, and the evidence shows that between the right of way and the river is a strip, the most of which is bottom land, of about 90 feet in width, which is, by the road, severed from the main body of the tract of land out of which the right of way is taken. There are two producing gas wells on the land outside of the right of way proposed to be taken, one within about 10 feet of the right of way, the other about 200 feet up Lower Burning creek from its mouth, so that the well must be within 100 feet or less of the right of way, but none upon the right of way. T. J. Davis, a witness in behalf of himself and the other owners, testified that the compensation and damages should be \$4,300, that he based his judgment upon an estimate that he had made; and testified that the two wells producing gas brought in rentals of \$600 per year, to which testimony of Mr. Davis, so far as it referred to the gas upon the land and the rentals accruing from the two producing wells, the counsel for the plaintiff objected, but the objection was overruled, and plaintiff excepted. Here was proof of actual development of the gas, the wells were bringing in certain definite rentals, and it was certainly competent to show to what extent developments had been made, and what was actually being done with the land. It seems to be a rule well established that every element of value which would be taken into consideration between private parties in a sale of property should be considered in a proceeding of this character in arriving at a just compensation for the land taken, and it is proper to consider not only the use for which the land may be maintained at the time, but its adaptability to any and every useful purpose to which it might be put.

In 15 Cyc. 724: "If a tract, of which the whole or a part is taken for a public use, possesses a special value to the owner, which can be measured by money, he is entitled to have that value considered in the estimate of the compensation and damages. Compensation is not to be estimated simply with reference to the value of the land to the owner in the condition in which he has maintained it, but with reference to what its present value is in view of the uses to which it is reasonably capable of being put"—and cases there cited. In *Harrison v. Young*,

9 Ga. 359, it is held: "The value of land taken for public use is not restricted to its agricultural or productive qualities, but inquiry may be made as to all other legitimate purposes to which the property could be appropriated." In *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, it is held: "In determining the value of lands appropriated for public purposes, the same considerations are to be regarded as in a sale between private parties; the inquiry in such cases being, what, from their availability for valuable uses, are they worth in the market." And it is there further held: "As a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." In that case the court adopts the language of the Supreme Court of New York in the *Matter of Furman Street*, 17 Wend. 669, where it is said the proper inquiry was: "What is the value of the property for the most advantageous uses to which it may be applied?" In *Muller v. Railway Co. (Cal.)* 23 Pac. 265, the court says: "In arriving at the value of the land, all its capabilities, all the uses to which it is adapted, should be taken into consideration. These capabilities are estimated by a purchaser, and we cannot see why evidence in regard to them is not admissible. The same considerations are to be regarded as in a sale of land between private parties." *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206. And in *Reed v. Railway Co. (Ill.)* 17 N. E. 807, it is held: "The price to be paid by a railway company for land taken under eminent domain is its value for any purpose for which it is shown by the evidence it is available, and not simply its value as land as it is at the time." *Railway Co. v. Moore and Others (Ill.)* 15 N. E. 764. A long line of decisions is cited to the same effect from the states of Illinois, Kentucky, Massachusetts, Mississippi, Missouri, New Hampshire, New York, Tennessee, Texas, Virginia, Washington, Wisconsin, and the United States. 18 Cent. Dig. cc. 1249-1257, § 356.

It is a fact that the property proposed to be taken in the case at bar for the right of way is a developed gas property, two producing wells almost immediately on the line of the right of way. Could any one for a moment say that in negotiations between private parties for the sale and purchase of said property they would not take into consideration the fact of the existence of gas under the property as an element in ascertaining the value of the property? Gas is an article of commerce, and the fact that it is now being piped to market from the premises is entirely proper to be taken into consideration as an element of value in fixing the amount of compensation, and it was proper to

permit the witness to state what rental was being derived from the said gas wells, and it was competent evidence in estimating the value of the property. "The particular use to which the property is devoted, and in consequence of which it has an intrinsic value to the owner, is a fact which he has a right to have considered." 15 Cyc. 727, and cases there cited. See, also, 2 Lewis, Em. Dom. par. 479. The court did not err in admitting testimony in relation to the actual gas production, and the fact that the land to be taken was gas territory, in view of the fact of its development as such. Said witness, on cross-examination, was asked just how much he embraced for this five acres in his estimate of \$4,300, and answered: "I told you that I regarded the coal under the right of way to be worth about \$800. I put the land at \$500." He then stated that he put the gas territory taken at \$3,000—making up his estimate of \$4,300. Counsel for plaintiff moved the court to instruct the jury to disregard the witness' answer to the question propounded by counsel for defendants as to his estimate of damages of \$4,300, which motion was overruled, and plaintiff excepted, and counsel for plaintiff insist that the court erred therein to its prejudice, in permitting speculative and fictitious estimates of values to go to the jury and not the market value of the property to be taken, which was not stated by the witness. *Dorlan v. Railroad Co.*, 46 Pa. 520, was an action for damages to a mill property by the construction of the road, where it was held that: "The injury to the unused and surplus water power of the plaintiff is a legal ground of claim, and the measure of damages is its actual market value for any useful purpose; the mill property remaining as it was when the road was constructed. Hence, evidence as to the power that could be gained by erecting a new dam further down the stream, making a shorter race and other alterations, was irrelevant and inadmissible." In *Canal Co. v. Archer*, 9 Gill & J. 479, it is held that, in estimating the value of property condemned for public use, the jury should give the owner what in their judgment it would actually, at the time, sell for, and not what it might bring, or perhaps ought to produce, at some future time; that possible or probable profits resulting from the enjoyment of the property are not proper to be considered by the jury in making up their verdict, but they should limit themselves to the direct loss sustained by the owner. And in *Railroad Co. v. Hildebrand*, 136 Ill. 467, 27 N. E. 69, syl., point 2, it is held: "Error to instruct the jury that in estimating the compensations to be paid they should take into consideration all appreciable injuries and inconveniences caused by the taking, to the land not taken, 'although such injuries and inconveniences may be largely conjectural,' since the jury might infer that speculative damages were recoverable." *La Mont v.*

Railway Co., 62 Iowa, 193, 17 N. W. 465; Railroad Co. v. McDermott (Neb.) 41 N. W. 648; U. S. v. Taffe (C. C.) 86 Fed. 830. And in Railway Co. v. Holmes (Ga.) 11 S. E. 658, it is held that: "Evidence of what plaintiff could have made by putting the land to other uses, had defendant's tracks and buildings not been there, is inadmissible on the question of damages." "Where land is appropriated for a public use, a compensatory, not a speculative, remuneration is guaranteed by the law for lands taken and for the damages occasioned thereby to the remainder of the premises." Powers v. Railway Co., 33 Ohio St. 429.

The defendants, over the objections and exceptions of plaintiff in case at bar, had been permitted to prove by witness H. M. Payne, a civil and consulting engineer and mining engineer, the probable number of tons of coal per acre underlying the land proposed to be taken and the value thereof per ton, as measured by the usual price of royalty paid to landowners per ton for coal when the coal was leased and being produced, which doubtless formed the basis of the estimate of the witness Davis of the value of the coal under the land taken, when there was no evidence that coal was leased or mined or any royalties paid anywhere near the land taken, or that coal operations would affect that neighborhood or section in any reasonable time in the future; no works were opened near it, the land was not leased for operation, nor any near it as far as the evidence shows. There seemed to be no effort to prove the market value of the land to be taken. It was shown that there was some good coal under the land, but when it might be mined and removed does not appear. The coal is of no value while it must remain in the earth; it is the prospect of its production which gives it value. The early prospect of its development is what adds to its value; it is true it has a value now as an investment to be held for future development, and has, as such, a market value, and this market value is the true basis of compensation to be allowed. Coal lands are sold by the acre and have a market value by the acre, and the price is controlled by the various elements of value—the quality of the coal, the thickness of the seam, as well as conveniences and the facilities for conveying it to market. The estimate made by witness Davis was made upon a false basis, conjectural and speculative, and should have been excluded from the jury as well as all testimony fixing the basis of value upon the price per ton paid as royalty in coal fields being operated; the value must be arrived at by ascertaining the true market value of the land proposed to be taken, taking into consideration all the elements of value as would be done in negotiations for the sale and purchase thereof between private parties. This principle is well settled in Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. 980, where

it is held, in syllabus, point 6: "The true measure of damages is compensation for the actual loss sustained by the plaintiff in being deprived of the use of his property, and speculative profits, founded on an exaggerated notion of the real value of the property, are not recoverable. Evidence tending to establish such speculative profits is inadmissible, as it may mislead the jury in arriving at the fair rental value of the property."

It is assigned as error that the court permitted to be propounded by counsel for defendants, to witness W. H. Hovey, the question, "Tell the jury what your experience is, and, from the experience you have had, as to the probability of oil in that neighborhood," and the same to be answered over the objection of plaintiff's counsel. Mr. Hovey was placed upon the witness stand as an expert oil man. His testimony would scarcely raise a suspicion in the mind of any one that there was oil in the tract of land from which the right of way is sought to be taken. If the land contained oil, the defendants had a right to show it by any evidence they could adduce that was practical, and not merely conjectural and speculative. Nothing was shown as to the presence of oil further than the fact of the development of gas, which is, at least to some extent, an indication of the presence of oil, and this fact was already and properly before the jury without the testimony of Hovey. In the absence of all development of oil or the presence of oil, all testimony relative thereto was mere guesswork and liable to confuse or mislead the jury, and, the question being purely speculative, and any answer thereto necessarily so, the same should not have been permitted to be answered.

The first error assigned is in refusing to set aside the verdict of the jury and grant a new trial: "because the amount of compensation found by the verdict is so high that it must be attributed to prejudice, partiality, passion, or mistake of law or judgment"—citing, in support of this assignment, Railway Co. v. Nighbert, 46 W. Va. 202, 32 S. E. 1032, where it is held: "A verdict finding an amount of compensation, in a proceeding by a railroad company to condemn land, that is so high that it must be attributed to prejudice, passion, bias, partiality, or mistake of law or judgment will be set aside." It is true the verdict is very high compensation for the property proposed to be taken, and damages to the residue of the tract, when we consider the character, nature, and quality of the land taken, as well as the residue of the tract. How far the verdict of the jury was influenced by the speculative evidence permitted to go to the jury cannot be known, and, as the case must again be tried before another jury, it is not deemed proper to discuss the evidence.

It is claimed by defendants that, the jury

having viewed the premises in the course of the trial, such view is a part of the evidence in the case; that what they see relevant to the issue to be decided by them is always evidence in a primary sense, and what is detailed to them concerning the same subject-matter by witnesses is evidence merely in a secondary sense; and that the view of the premises was conclusive, and that the verdict should not be disturbed—citing several authorities. The purpose of a personal inspection by the jury is to enable them to view the whole situation and see for themselves the property to be taken, its character, and quality, and its relation to the residue of the tract from which the right of way is taken, and thereby obtain a more intelligent grasp of the evidence adduced before them, by which, taken in connection with their view, they are the better enabled to arrive at a just and proper conclusion as to the amount to be paid. In *Washburn v. Railroad Co.*, 59 Wis. 384, 18 N. W. 328, it is held: "In assessing the compensation to be made to the owner of land taken by a railroad company, the jury may resort to their own knowledge of the premises, obtained from a view thereof, and to their general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony as to value and damages; but their assessment must be supported by the testimony or it cannot stand. Instructions from which the jury might reasonably have understood that they were to assess the compensation according to their own knowledge, judgment, and good sense, aided by their view of the premises, and that they might do so without regard to the testimony or in opposition thereto, are held erroneous." In the absence of inadmissible testimony, or erroneous instructions, a verdict rendered by a jury should not be disturbed, unless it was so high, or so low, that it must be attributed to prejudice, partiality, passion, or mistake. When a false and illegal basis of values has been permitted to be placed before the jury, over the objections of a party, it will be presumed that the objecting party was prejudiced thereby.

For the reasons herein stated, the judgment is reversed, the verdict of the jury set aside, and the case remanded to the circuit court of Mingo county, there for a new trial to be had therein.

(140 N. C. 350)

MAY v. LOOMIS et al.

(Supreme Court of North Carolina. Dec. 15, 1905.)

1. FRAUD—SALES—FALSE REPRESENTATIONS.

In an action on notes given for the purchase price of timber, a judgment dismissing defendant's counterclaim is erroneous, where the evidence discloses deliberate fraud, consisting in false representations as to material facts, knowingly and willfully made as an inducement to the sale and by which it was effected, reason-

ably relied on by defendant and causing him pecuniary damages.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 8-14.]

2. SAME—RELIANCE ON REPRESENTATIONS—NEGLIGENCE.

Where a sale was induced by the sellers' false representations, and they used artifice to induce the buyers to forbear making inquiry, the buyers' claim for relief is not barred because of alleged negligence in relying on the representations.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 19-23.]

3. SAME—EXPRESSION OF OPINION.

Where the sellers of timber assured the buyers that they had the timber carefully estimated and such estimates showed certain quantities, such representations were not mere matters of opinion.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 12.]

4. SALES — FRAUD — RESCISSION—COUNTERCLAIM.

Where buyers of timber made payments in recognition of the contract and have manufactured and sold the timber, they cannot rescind the trade and plead fraud in the sale in bar of recovery on purchase-money notes, but may set up the fraud by counterclaim and recover for damages sustained.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 296, 299, 975.]

Appeal from Superior Court, Haywood County; Ferguson, Judge.

Action by Frank May against G. C. Loomis and others. From a judgment for plaintiff, defendants appeal. Reversed.

The plaintiff declared on two notes, each for \$750, bearing date December 18, 1902, due, respectively, 9 and 12 months after date. The notes were drawn by defendant Loomis to defendant Dotson and indorsed to plaintiff before maturity. The defendants answered, admitting the execution and indorsement of the notes, and alleging that the same were executed in part payment of the purchase of a sawmill plant and the standing timber on two tracts of land situated in Haywood county, one of 250 and the other of 750 acres, and that said sale was effected and the notes were procured by false and fraudulent representations on the part of the plaintiff and his partner, one W. H. Cole, who were vendors in the sale, and setting up such fraud in bar of any liability on the notes. There was further answer, setting up the alleged fraud and deceit by way of counterclaim, which is in part as follows: (1) That on December 13, 1902, the defendant bought 8,000,000 feet of merchantable hardwood timber from the plaintiff and W. H. Cole, trading under the firm name of May & Cole, at the rate of \$1 per 1,000 feet, on a tract of land on Pigeon river in Haywood county, and also at said date, in connection with the purchase of said timber, bought of the plaintiff and his said copartner the steam sawmill, boilers, and engine located on said premises, valued at \$2,500, and likewise horses, mules, and wagons, valued at \$500. (2) That at the time of making said sale, and pending negotiations for the same, the said May &

Cole represented that this was a picked tract of timber land which the said W. H. Cole had especially selected out of a large tract of land belonging to Crary, Young & Co., and that they had made two careful estimates of the merchantable hardwood timber thereon, one by W. H. Cole individually and the other by May & Cole, resulting in 3,000,000 feet, and that they guaranteed that there was 3,000,000 feet of merchantable timber thereon, 1,000,000 feet of poplar, 1,000,000 feet of chestnut, and 1,000,000 feet of oak, lynn, and other merchantable hardwood, outside of spruce and hemlock, which were not considered in the contract; and the defendants, relying on the representations and guaranty of May & Cole as to the quantity and kind of timber, which were knowingly false and fraudulent and a material inducement to the contract, purchased the said 3,000,000 feet of timber at the rate of \$1 per 1,000 feet, for the sum of \$3,000, and at said time, relying upon the said false and fraudulent representations, intending to deceive, and which did deceive, the defendants, were induced to execute a note set out in the complaint, together with other notes, and have paid off all of the said notes, except the aforesaid, when in truth and in fact there was only 464,728 feet of poplar on said boundary of land, 208,377 feet of chestnut, and 240,121 feet of oak, lynn, and all other timber, considered in said contract and guaranty, and the plaintiff, both as an individual and member of the firm of May & Cole, is due the defendants the sum of \$2,036.77 as shortage on the 3,000,000 feet of timber purchased as aforesaid, as damages. There was further allegation of similar import to false and fraudulent representations in regard to the other property, machinery, etc., conveyed. The plaintiff replied, denying all charges of fraud and deceit. The defendants in apt time tendered issues addressed to each phase of their defense, and on refusal to submit them excepted, and requested his honor to settle the issues deemed by him pertinent and raised by the pleadings. There was evidence on the part of the defendants tending to show that at the time of the trade, and as an inducement thereto, both the plaintiff and his partner stated that there were 3,000,000 feet of merchantable hardwood timber on the two tracts of land, ascertained by two careful estimates made at different times, and that the same had been picked out of 20,000 acres as 1,000 acres of choice timber land; that the machinery and other property used in connection with the same were practically new, having been in use only six months, and were in good condition; that as a matter of fact there was only about 1,000,000 feet of hardwood timber on the land, and this was well known to the plaintiff at the time, having been ascertained by them by the estimates previously made, and to which the plaintiff referred, and was unknown to the defendants, who relied on the

positive assurance and statements of the plaintiff as to the quantity of timber; that the machinery was old and worn and the boilers had many patches on the inside, and were old worn-out boilers when brought there the year before, and so defective that they had to be immediately removed as being dangerous, and replaced at an additional cost to the defendants of something like \$600.

A witness by the name of William Qulett testified, among other things, that about a week before the trade Cole came to the witness and asked him how much timber was on the boundary, that the witness told him there was 1,000,000 or 1,100,000 feet, and Cole replied that he thought there were 2,000,000 or 3,000,000 feet. Cole then said not to say anything about the estimate which had been made of the timber; that he had a chance of a sale, and it might interfere with his deal. There was also testimony to the effect that the defendant Loomis was without any experience in milling or stumpage, and Dotson alone of defendant firm had any knowledge or experience in estimating timber or manufacturing it, and that just prior to the trade, and when negotiating thereon, the parties went out to the land to take a look over it, when Dotson, who had consumption and was very weak, gave out and was unable to proceed, and that Loomis was taken by one of the plaintiffs through a small portion of the smaller tract (was gone about 15 or 20 minutes) and when they returned to Dotson, who had built a fire and was resting by the roadside, Cole said: "I will guaranty 1,000,000 feet of poplar, 1,000,000 feet of chestnut, and 1,000,000 feet of oak, and other kinds of hardwood sufficient to make up another 1,000,000 feet." That he and May had the timber estimated when they made the deal together, and also had it carefully estimated afterwards. During the negotiation Dotson said: "I have been physically unable to look over this property at all, and we have not seen the horses and mules, and do not know the value of the machinery you are offering us, and so far as the timber on the land is concerned we have simply to take your representations and guaranties about that. We believe you gentlemen are honest business men, and if you will guaranty it to be as you have represented it, we will close the deal." This was given; Cole saying it was even better than represented. When asked if the defendants relied on these statements as an inducement to the trade, they answered, "Yes." And Dotson testified further: "We had nothing else to rely on. I was unable to go over the land, and they both knew it. I stated to them that Loomis was not competent or capable of estimating timber. May and Cole both guaranteed it to be as represented by them." The defendants also offered to prove that during the bargaining, Cole advised Dotson to say nothing to people up there about the property, as they were quite peculiar, and did not like

for strangers to come in their country. On objection this evidence was held incompetent, and the defendants excepted. There was also evidence tending to show damage to the defendants by reason of the fraud and deceit to the amount of several thousand dollars. At the close of the testimony his honor declined to submit the issues of the defendant's counterclaim, dismissed the same as on judgment of nonsuit, and gave judgment against the defendants on the notes. The defendants excepted and appealed.

S. C. Welch and R. D. Gilmer, for appellants. Norwood & Norwood, for appellee.

HOKE, J. (after stating the facts). Accepting the testimony as true, and we are required so to accept it where a nonsuit is directed against the party who offers it, the facts disclose a clear case of deliberate fraud, in which there appears every element of an actionable wrong, false representations as to material facts knowingly and willfully made as an inducement to the contract, and by which the same was effected, reasonably relied upon by the other party, and causing pecuniary damage. It is well established that the principle applies to contracts and sales of both real and personal property. The authorities are decisive and are against the ruling of the judge below as to the defendant's counterclaim. *Walsh v. Hall*, 66 N. C. 233; *Knight v. Houghtalling*, 85 N. C. 17; *Lunn v. Shermer*, 93 N. C. 165; *Ramsey v. Wallace*, 100 N. C. 75, 6 S. E. 638; *Brotherton v. Reynolds*, 164 Pa. 134, 30 Atl. 234.

It is urged that the buyers in this case were negligent, and on that account their claim for relief is barred; but not so. The parties were not at arm's length in reference to these representations, and did not have equal opportunities of informing themselves. The only one of the defendants who had any experience in such matters essayed to make an examination of the property, but broke down from weakness incident to his disease, and told the plaintiffs he would have to rely on their statements. Further, there was evidence tending to show artifice used to induce the buyers to forbear making inquiry about the matter. In 14 Am. & Eng. Enc. (2d Ed.) 123, we find it stated: "In no case can a person escape responsibility for representations on the ground that the other party was negligent in relying on them, if, in addition to making the representations, he resorted to artifice which was reasonably calculated to induce the other party to forego making inquiry." Our decisions are to like effect. *Walsh v. Hall*, supra; *Hill v. Brower*, 76 N. C. 124; *Blacknall v. Rowland*, 108 N. C. 554, 13 S. E. 191; a. c., 116 N. C. 889, 21 S. E. 296.

Again, it is contended that these representations were not as to facts, but were mere matters of opinion, and we are cited to a number of authorities as supporting the plaintiff's position, *Fagan v. Newson*, 12 N. C. 20; *Saunders*

v. Hatterman, 24 N. C. 32, 37 Am. Dec. 404; *Lytle v. Bird*, 48 N. C. 222; *Credle v. Swindell*, 63 N. C. 305; *Etheridge v. Vernoy*, 70 N. C. 724; and some others. As stated in *Cash Register Co. v. Townsend*, 137 N. C. 652, 50 S. E. 306: "Expressions of commendation or opinion or extravagant statements as to value or prospects, or the like, are not regarded as fraudulent in law"; but these representations in the case before us were not of that character. They were not mere matters of opinion, but purported to be statements of fact, and were so intended and accepted by the parties. Knowing that the only one of the defendants whose experience qualified him to make an examination of the property with any intelligence was physically unable to do so, the plaintiffs assured the defendants that they had caused the timber on the land to be carefully estimated, and such estimate showed that there were 3,000,000 feet of hardwood timber on the tract; whereas, in fact and truth, the knowledge furnished to the plaintiffs by those estimates showed only 1,000,000 feet on the same. Even where there is doubt on the question, the matter must be referred to the jury to determine whether representations, though expressed in the form of opinion, were given and reasonably relied on as a material fact necessary to the trade. And the authorities cited do not support the plaintiffs on the facts of the case before us. In *Fagan's Case*, supra, the complaining party had refused his deed because the boundaries did not include two acres of meadow land which had been pointed out to him as being part of the land bargained for. Recovery was denied, the principal opinion being based on the fact that these two acres were at the time in adverse possession of third persons, and this was sufficient to put the purchaser on inquiry; and one judge, concurring, rested his opinion on the ground that, the complaining party having refused the deed, no title passed, and an action for deceit would not lie simply for the loss of a good bargain. In *Saunders' Case*, supra, the court denied relief because the representations were simply matters of opinion as to value; both parties having equal opportunities to ascertain the truth by the exercise of reasonable care. In *Vernoy's Case*, supra, there was no claim or evidence tending to show actual fraud, and this opinion intimates that, in case of actual fraud, the doctrine of caveat emptor does not apply as was said by the same judge writing the opinion in *Hill v. Brower*, supra.

The only cases which give support to the plaintiffs' position are those of *Lytle v. Bird*, and *Credle v. Swindell*, supra, in both of which it was expressly held that an action for deceit would lie in no case on the sale of land for fraudulent representation as to the quantity sold or what particular land was included in the deed; and this on the ground that the parties should inform themselves by a survey. These two cases are contrary to the

trend of modern decisions, were expressly disapproved as to the point for which they are now cited in the case of *Walsh v. Hall*, supra, and have since been ignored as authority. Where a sale has been effected by an actionable fraud, the purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price or any portion of it he may have paid, or avail himself of the facts as a defense in bar of recovery of the purchase price or any part of it which remains unpaid, or he may hold the other party to the contract, and sue him to recover the damages he has sustained in consequence of the fraud. In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence, and he is not allowed to rescind in part and affirm in part. He must do one or the other. And, as a general rule, a party is not allowed to rescind where he is not in a position to put the other in statu quo by restoring the consideration passed. Furthermore, if, after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end. These principles will be found in accord with the authorities. *Bishop on Contracts*, §§ 679-688; *Beach on Contracts*, § 812; *Page on Contracts*, §§ 137-139; *Clark on Contracts*, pp. 236, 237; *Trust Co. v. Auten*, 68 Ark. 299, 57 S. W. 1105, 82 Am. St. Rep. 295; *Parker v. Marquis*, 64 Mo. 38.

Applying these principles to the facts before us, the defendants could not now rescind the trade and plead the fraud in bar of recovery on the notes. They have made payments in recognition of the contract, they have manufactured and sold the timber, and are not in a position to restore the consideration. They contracted to manufacture and sell the timber on the land, according to the evidence, not long after the trade, and their explanation seems satisfactory. They had put out large sums of money on the enterprise; and the witness Loomis states that he complained of the fraud before the note was due, but went on and cut the timber as the best and only thing to do to save themselves. The fact, however, that they are not now in a position to rescind the trade and plead the fraud in bar of recovery on the notes, does not prevent them from setting up the fraud by way of counterclaim, and recovering for the damages suffered. This may be done, though the defendants have made payments in recognition of the contract, and may have continued to manufacture and sell the lumber after knowledge of the fraud (*Trust Co. v. Auten*; *Parker v. Marquis*, supra); the damages usually being the difference between the value of the property sold as it was and as it would have been if it had come up to the representations. The sale having been ratified, the plaintiffs can maintain an action

on the note subject to any counterclaim the defendants may have against the plaintiffs, to be determined under the law as here declared and on the facts as they may be established.

There is error. The judgment will be set aside and a new trial awarded.

New trial.

(140 N. C. 192.)

CRENSHAW et ux. v. ASHEVILLE & B. ST. RY. & TRANSP. CO.

(Supreme Court of North Carolina. Dec. 12, 1905.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A new trial on the ground of newly discovered evidence will be awarded, where it appears that the evidence was material to defendant and that it exercised reasonable diligence to procure it before the trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 201-229.]

Appeal from Superior Court, Buncombe County; Fred Moore, Judge.

Action by A. Crenshaw and wife against the Asheville & Biltmore Street Railway & Transportation Company. From a judgment for plaintiffs, defendant appeals. Reversed.

The motion for new trial presented by defendant on account of newly discovered evidence was supported by affidavits of persons present at the time of the accident to plaintiff, who was struck by a street car, tending to show that she saw the approach of the car and when last seen was in a position free from danger, and showing the exercise by defendant of diligence to ascertain the names of such persons before the trial.

Julius C. Martin, for appellant. Moore & Rollins, Frank Carter, and H. C. Chedester, for appellees.

PER CURIAM. Without any intimation as to the plaintiffs' right to recover on the testimony as it now stands, the court is of opinion that a new trial should be awarded by reason of the newly discovered evidence, set out and referred to in the affidavits of the defendant, filed for the purpose on motion duly made. Under the decision in *Herndon v. Insurance Co.*, 121 N. C. 498, 28 S. E. 144, we never discuss the facts on such motion, but simply award or refuse a new trial.

New trial.

(140 N. C. 196)

AMMONS v. SOUTHERN RY. CO.*

(Supreme Court of North Carolina. Dec. 12, 1905.)

1. CARRIERS—EJECTION OF PASSENGERS—ACTIONS—DAMAGES.

To entitle a passenger to exemplary damages for his wrongful expulsion from a train, such expulsion must be attended by rudeness, insult, or aggravating circumstances calculated to humiliate the passenger, and an award of such damages is unwarranted, where the passenger is merely told by the conductor that he must get off unless he pays the fare demanded, and on the

passenger's refusal stops the train about a quarter of a mile from a station, and the passenger alights without anything further being said.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1489.]

2. SAME.

Where a passenger is wrongfully ejected from a train, his demand may be considered as one in tort, and he may recover as actual or compensatory damages, a fair and just compensation for the wrong, including his actual loss in time or money, and the physical inconvenience or mental suffering or humiliation endured, and which occurs as a reasonable and probable result of the wrong, and he is not limited in his recovery to mere pecuniary loss.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1483-1487.]

Appeal from Superior Court, Swain County; Ferguson, Judge.

Action by W. R. Ammons against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Moore & Rollins, W. B. Rodman, and A. B. Andrews, Jr., for appellant. F. C. Fisher and A. J. Franklin, for appellee.

BROWN, J. This case was before the court at the last term and the facts are fully stated. 138 N. C. 555, 51 S. E. 127. The case comes back upon one exception only by the defendant to the refusal of the judge to give the following instruction: "That in no aspect of the case can the plaintiff recover punitive damages." The court erred in refusing the instruction. Damages are classified generally as "compensatory" and "punitive." The latter are termed also vindictive or exemplary damages. Compensatory damages are defined by Joyce and other text-writers as "those by which the actual loss sustained is measured and the injured party recompensed therefor." Joyce on Damages, § 28. Punitive damages are independent of the injury inflicted or the legal wrong committed, and are allowed in excess of simple compensation upon a theory of punishing the wrongdoer for the wrong inflicted, with the view to prevent similar wrongs in future. Where a trespass is committed deliberately in violation of plaintiff's rights, in a manner and under circumstances of aggravation and humiliation, showing a reckless and lawless disregard of the plaintiff's rights, the law allows damages beyond the strict measure of compensation by way of punishment. *Champion v. Vincent*, 20 Tex. 811; Joyce on Damages, § 28, and notes.

The facts are, as testified to by the plaintiff, that he applied to the defendant's agent at Almond for a ticket to Noland. The agent said he did not have any, and that "I could get on, and he would speak to the conductor about it, and that the fare would be 40 cents. I rode down the road about quarter of a mile, and the conductor came to me and said he wanted a ticket, and I handed him 50 cents, and said I wanted to go to Noland's Creek, and he looked at his book and said it would be 75 cents, and I asked him if he was not mistaken, and he said, 'No,' and I

told him I would not pay 75 cents, and so he told me I would have to get off. I told him I had applied for a ticket and the agent said he didn't have any, and he said they did have tickets, and I told him I didn't know anything about it, only what they told me; that they told me they didn't have any tickets, and the fare would be 40 cents, and he told me then I would have to get off. So I told him, if he put me off, I would sue the railroad company, and he pulled the cord and stopped the train and I walked out. Q. What did he say in reply to you when you said you would sue the railroad company? A. He said he could not help that. Q. Is that all he said? A. I believe that is all he said. Q. Can't you remember what he did say when you said to him that you would sue the company? A. He said several words. I don't remember every word he said. Q. Think if you know anything else? A. I don't think of anything else. Q. Where did he put you off? A. I got off by his instructions. He told me to get off. Q. Where? A. About a quarter of a mile this side of Almond. Q. How far is the station you wanted to go to from there? A. About 14 miles by rail. Q. What were you doing at that time? A. I was working on Noland's Creek. Q. What were you getting a day? A. Dollar and twenty-five cents. Q. Did you put in a day's work? A. No, I walked in in the evening, and went to work the next morning. I didn't hire anything. I walked. I just lost a day's work, is all. Q. How much did you lose? A. The day. Q. Is that all you recollect about this transaction? A. Yes, I believe it is."

To entitle a passenger to such damages, his wrongful expulsion from the train must be attended by such circumstances as tend to show rudeness, insult, "aggravating circumstances calculated to humiliate the passenger. * * * Holmes v. Railroad, 84 N. C. 318; Rose v. Railroad, 106 N. C. 170, 11 S. E. 528; Knowles v. Railroad, 102 N. C. 66, 9 S. E. 7. The subject of punitive and compensatory damages has been discussed in many cases in our own reports. In the opinion in this case at the last term, Mr. Justice Walker called attention to some of the more important. The plaintiff's testimony fails to bring his case within the authority of any of these precedents so as to justify the awarding of punitive damages. On the next trial of this case, it will be the duty of the trial judge to explain to the jury the meaning of, and difference between punitive and compensatory damages, and to instruct them upon the plaintiff's own testimony, as herein set out, that he is entitled to compensatory damages only.

The findings upon the several issues are set aside, and a new trial ordered.

New trial.

HOKE, J. (concurring). I concur in the decision awarding a new trial, and in the opinion, which declares that the facts set out in the record disclose no case for the recovery of punitive or exemplary damages.

There seems, however, to have been some misapprehension, on the trial below, as to the elements of damage involved in the two issues addressed to that question. These issues were: "(7) What is the actual damage sustained? (8) What exemplary damages if any is plaintiff entitled to recover?" The court below and the parties litigant seem to have considered that the seventh issue, on actual damages, was confined to pecuniary loss, and that any recovery over and above this must be had, if at all, on the eighth issue, above set out. But this is not at all true. "Actual" in the sense of compensatory damages, is not restricted necessarily to the actual loss in time or money. The claimant may be confined to this, if the jury so determine, but more than this is contained in the term, and more than this is covered by the issue. As said by Clark, C. J., in *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 48, where the facts and nature of the action so warrant: "Actual damages include pecuniary loss, physical pain, and mental suffering, etc." And, again: "Compensatory damages include all other damages than punitive, thus embracing, not only special damage as direct pecuniary loss, but injury to feelings, mental anguish, etc."—citing 18 Am. & Eng. Enc. (2d Ed.) 1082; Hale on Damages, pp. 99, 106. And this last author says: "It may be stated as a general rule in actions of tort, that whenever a wrong is committed which will support an action to recover some damages, compensation for mental suffering may also be recovered, if such suffering follows as a natural and proximate result." And so here, where a passenger is wrongfully ejected from a railroad train, the demand may be considered as one in tort, and, on an issue as to actual or compensatory damages, he may recover what the jury may decide to be a fair and just compensation for the injury, including his actual loss in time or money, the physical inconvenience and mental suffering or humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. *McNeill v. Railroad*, 135 N. C. 683, 47 S. E. 765, 67 L. R. A. 227; *Head v. Railroad*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; Hale on Damages, § 261. As said by Bleckley, J., in *Head's Case*: "Wounding a man's feelings is as much actual damage as breaking his limb. The difference is that one is internal, and the other external; one mental, the other physical. * * * At common law, compensatory damages include, upon principle, and I think upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them."

Exemplary or punitive damages are not given with a view to compensation, but are under certain circumstances awarded in addition to compensation as a punishment to defendant and as a warning to other wrong-

doers. They are not allowed as a matter of course, but only where there are some features of aggravation, as when the wrong is done willfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights. It is not necessary to submit this element of damage under a separate issue, but there is no objection to this course, and frequently it is desirable. As stated in the principal opinion, there are no circumstances of aggravation, shown in this evidence, which would justify an award of exemplary damages; but on the issue as to actual or compensatory damages the jury under proper instructions should be directed to award what in their judgment is a fair compensation for the plaintiff's wrong under the principle here stated, and not confined to the actual loss in time or money as was done on the former trial.

CLARK, C. J., and WALKER and CONNOR, JJ., concur in concurring opinion.

(78 S. C. 81)

WOODWARD et al. v. SANTEE RIVER CYPRESS LUMBER CO. et al.

(Supreme Court of South Carolina. Nov. 16, 1905.)

PARTITION—COMPLAINT—JOINDER OF CAUSES.

A complainant asking for the partition of the swamp lands of the estate of B., devised under his will, plaintiffs claiming one-third interest therein as remaindermen, and alleging tenancy in common with the defendant entitled to two-thirds interest as to the T. tract, and tenancy in common with another defendant entitled to two-thirds interest in the V. tract, and further alleging that defendants trace their title through conveyances to those who held under the will of the decedent as tenants in common, with plaintiffs as remaindermen, states only one cause of action.

Appeal from Common Pleas Circuit Court of Sumpter County; Dantzler, Judge.

Action by Lila M. Woodward and others against the Santee River Cypress Lumber Company and E. M. Brayton. From an order overruling a demurrer, defendants appeal. Affirmed.

Smythe, Lee & Frost, Thomas & Gibbes, and Mark Reynolds, for appellant lumber company. Allen J. Green, Ragsdale & Dixon, and Cooper & Fraser, for respondents.

JONES, J. The defendants appeal from the order of Judge Dantzler overruling their separate demurrers to the complaint upon the ground of misjoinder of causes of action. This renders it necessary to state substantially the allegations of the complaint, and we adopt the statement of the complaint as contained in respondent's argument, as follows: The complaint (1) alleges the death, testate, of N. M. Bynum, probate of his will and qualification of his executor; (2) sets out Nos. 3, 4, 8, and 10 of his will, by

which it appears the estate was to be appraised and divided into nine equal shares, and upon the division being made, one-ninth should be held in trust for his daughter, Mrs. Mobley, for life, and after her death to her children then living in fee, one-ninth should be conveyed to his son, Robert, which ninth should include a moiety of the Taylor tract, heretofore advanced him and his brother Clarence, at its appraised value, and one other ninth to Clarence, upon the same conditions as to Robert's share; (3) describes the "Taylor tract"; (4) alleges that in pursuance of the terms of the will, in order to participate in the partition of the said estate, Robert and Clarence surrendered their deeds to the Taylor tract, and the lands thereby conveyed were thrown into "hotch pot," and appraised and divided with the residue of the estate, on the 28th of November, 1876; sets out the return in partition, by which it appears 553 acres of the residuary estate was added to the upland of the Taylor tract, and made the same in judgment of commissioners in partition fully two-ninths of the land belonging to said estate, and all the swamp lands were allotted to shares Nos. 4, 5, and 6, to equalize the division; (5) that Mrs. Mobley received lot No. 4, which carried with it the undivided one-third of all the swamp land, including the swamp that before partition had been attached to the Taylor tract, and the same became vested in her for life, with remainder to her children in fee; (6) an attempted conveyance by the executor prior to the partition of the Taylor swamp to Robert and Clarence, purporting to be made in pursuance of the partition, but in direct contravention thereof, which deed is alleged to be inoperative, in so far as plaintiffs' one-third interest is concerned; (7) that the said Taylor swamp has, through successive conveyances from the executor and his grantees, with full notice of the partition and settlement and of the rights of plaintiffs thereunder, passed into the possession of defendant Brayton, and is now held by him, and the defendant Santee Company claims the timber rights on the said lands, and holds same with full notice and in subordination of plaintiffs' right; (8) the remainder of the swamp land of the said estate consists of the Van Buren tract, and, under the terms of the will and partition, became vested in the persons who received shares Nos. 4, 5, and 6, to wit, Mrs. Mobley, John T. and Julius A. Bynum, notwithstanding which John T. and Julius A., the latter of whom since partition had qualified as executor, by deed dated 11th of January, 1882, but not recorded until the 11th of February, 1889, attempted to convey the same for a nominal consideration to Mrs. Bynum, the wife of Julius, which deed is alleged to be void and inoperative as to the one-third interest of the plaintiffs; (9) that Mrs. Bynum took the said land with full notice of the rights of the plaintiffs and their

mother, and the same has, through successive conveyances from her, and with full notice of the rights and interest of the plaintiffs, passed into the possession of the defendant Santee Company by deed of June 9, 1900; (10) death of Mrs. Mobley and survival of plaintiffs, her children; (11) insanity of N. F. Mobley and appointment of his guardian ad litem; (12) corporation of Santee Company; (13) that plaintiffs and defendant Brayton are tenants in common of Taylor swamp, described in paragraph 6; plaintiffs being each entitled to an undivided six-eighths thereof, and defendant the remaining twelve-eighteenths thereof; and plaintiffs and defendant Santee Company are tenants in common of the Van Buren swamp tract, described in paragraph eight, in the same proportion, and own no other lands in common; (14) that these lands are principally valuable for their timber, and plaintiffs charge the Santee Company with cutting, removing, and converting the timber to its own use. The prayer is: (1) That Santee Company account for waste, and pay one-third of the value thereof to plaintiffs; (2) that the land be partitioned between plaintiffs and defendants; (3) injunction to prevent further waste pending suit.

The demurrer is in these words: "The defendant the Santee River Cypress Lumber Company demurs to the complaint herein on the ground that several causes of action have been united therein, in that (a) one cause of action affects one tract of land, the 'Taylor tract,' involving one set of parties and questions of fact and law; (b) another cause of action affects a different tract, the 'Van Buren tract,' involving another set of parties and other and different questions of fact and law; and neither of these causes of action, nor the property and parties involved therein, is necessarily or properly connected with the other. And the rights and remedies concerning each should and must be set up and determined in separate suits." A similar demurrer was filed by E. M. Brayton.

We think it is clear that the complaint states only one cause of action, for the partition of the swamp lands of the estate of N. F. Bynum, devised under his will, the plaintiffs claiming one-third interest therein as remaindermen under said will and alleging tenancy in common with the defendant E. M. Brayton, entitled to a two-thirds interest, as to the "Taylor tract," and tenancy in common with defendant Santee River Cypress Lumber Company, entitled to a two-thirds interest, as to the "Van Buren tract." The complaint further alleges that the defendants trace their titles through mesne conveyances to those who held under the will of N. F. Bynum, as tenants in common with plaintiffs as remaindermen, and that they took their titles with full knowledge and notice of the rights and interests of the plaintiffs. The case falls within the rule stated in *Garret v. Weinberg*, 43 S. C. 36, 20 S. E. 756, which

held that the issue of an intestate father may bring one action for the partition of all his lands, properly joining as parties defendant the grantees of the widow's interest in said lands, severally owning separate parcels. This case is so full to the point that it is unnecessary to cite other authority. The case of *Albergott v. Chaplin*, 10 Rich. Eq. 428, 433, is relied on by the appellants to sustain their view, but that case is clearly distinguishable from this. In *Albergott's Case* it was sought to compel Chaplin and Sams, in adverse possession of land, to surrender the land, that it might be partitioned among the other parties to the cause. Partition was not sought as against Chaplin and Sams, and as to them the cause of action was not partition but for the recovery of land; whereas, in the present action, partition is sought as against the defendants as tenants in common. The court said: "There is no alleged privity between the parties, nor anything to constitute the occupants 'tenants in common' with the plaintiffs; so that, if the court should order an issue or an action to try titles, the result of such trial could not bring back the cause here for partition."

In this case there is alleged privity between the parties as tenants in common. Assuming the allegations of the complaint to be true, the effect of the conveyance to the defendants was to make them tenants in common with plaintiffs. *Young v. Edwards*, 33 S. C. 404, 11 S. E. 1066, 10 L. R. A. 55, 26 Am. St. Rep. 689. The fact that each defendant is in possession of a separate parcel of the real property of the estate of Bynum does not affect the question, since plaintiffs' right of partition applies to the lands as a whole because of their tenancy in common therein with the grantors of defendants.

The judgment of the circuit court is affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(73 S. C. 18)

LOCKWOOD v. LOCKWOOD.

(Supreme Court of South Carolina. Nov. 15, 1905.)

EXECUTORS AND ADMINISTRATORS—SALE OF LANDS—PAYMENT OF PROCEEDS.

Where an executrix sued to marshal assets and prove claims, in which the court directed a master to sell lands and pay the proceeds, less expenses of sale to the executrix, and she claimed that the master had retained a greater sum than was allowable under the order, an application for an order requiring the master to pay the balance to the executrix was properly continued until the costs were adjusted.

Appeal from Common Pleas Circuit Court of Beaufort County; Purdy, Judge.

Action by Laura M. Lockwood against one Lockwood. Application by plaintiff for an order requiring the master to pay proceeds of sale to her. From an order continuing her motion, she appeals. Affirmed.

George Galletly, for appellant. Thos. Talbird, for respondent.

JONES, J. The plaintiff, as executrix of the will of William H. Lockwood, deceased, brought this action for the purpose of marshaling the assets of the estate of said deceased, calling in creditors, and winding up said estate under the direction of the court. Judge Townsend referred the cause to the master of Beaufort county to take proof of claims against said estate and report the same to the court, requiring creditors to establish their claims in this action and restraining them from otherwise enforcing their claims. Under this order, it appears that 208 claims of creditors, aggregating about \$50,000, were established before the master. On January 8, 1903, Judge Ernest Gary made a decree in the case, ordering the master to sell the land of the estate; the order further containing this direction: "That out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the master pay the same to the plaintiff, Laura M. Lockwood, as executrix of William H. Lockwood, deceased." Under this decree, the master sold the real estate in February, 1903, for \$11,025, and out of this sum paid over to the plaintiff, executrix, \$10,000, retaining the balance in his hands for costs and expenses. The plaintiff, claiming that the master was only entitled to retain in his hands "as fees and expenses on said sale" the sum of \$158.25, filed her petition asking the court to require the master to pay over to her the sum of \$866.75, and upon this petition Judge Purdy issued a rule requiring the master to show cause why he should not be ordered to pay over the said sum. The master made return claiming that he had paid out, as clerk's costs, \$17.75; master's commissions, \$168.37; advertising \$2; stamps, stationery, etc., \$18; printer's bill, \$53.10—and, further, that he had held 209 references in the case, for which he claimed at least \$740, which would leave on his hands \$25.78, which he retained to cover any future costs that might arise. Plaintiff's counsel made affidavit to the effect that there has never been a reference in the cause, and no testimony had been taken or argument had; that if any testimony had been taken it had been done without the knowledge of or notice to plaintiff's counsel; that 208 claims were filed with the master, with the usual proof necessary before the same could be filed. Judge Purdy thereupon made the following order: "With the costs to which the master may be entitled unadjusted, I think it proper that the hearing of the rule should be continued until the adjustment of the matter of costs; and it is so ordered. Let the master, in the meantime, hold all the funds in his hands, subject to the order of this court." From this order, plaintiff appeals, alleging er-

ror in not making the rule absolute; in continuing the hearing of the rule until the adjustment of the matter of costs; in directing the master to hold said funds, in the meantime, in conflict with the previous decree of Judge Gary, directing the money to be paid over to the executrix, after deducting fees and expenses on said sale.

The circuit court expressed no opinion as to the correctness of the claims made by the master for costs, fees, commissions, or disbursements; and in such case it would not be proper for this court to do so. This is a case in chancery, and, in the absence of an order providing otherwise, the same rule as to costs prevails as in cases at law. Section 323, Code Civ. Proc. 1902. The usual method of taxing costs and disbursements is by motion before the clerk of the court, and if any one is not satisfied with the action of the clerk, appeal therefrom or motion to correct, before the circuit court, from which an appeal may be taken to this court. *Bradley v. Rodelsperger*, 6 S. C. 290; *Cooke v. Poole*, 26 S. C. 326, 2 S. E. 609; *Hecht & Co. v. Friesleben*, 28 S. C. 186, 5 S. E. 475. When Judge Purdy ascertained that the costs and disbursements of the case had not been taxed by the clerk, or pursuant to the order of the court of equity, it was perfectly competent for him to continue the hearing of the rule until the costs and disbursements had been adjusted in the regular and usual way. This order was especially proper, when it appeared to him that a dispute had arisen as to the propriety of certain costs and disbursements. His order was, in effect, a continuance of the cause or hearing for the purpose of acquiring information for the guidance of his action, and was entirely within his discretion. His order was not final, and in no way prejudiced whatever right appellant may have in the premises.

While it is well settled that one circuit judge cannot review, reverse, or modify, any order by another circuit judge, unless it is administrative in character, we do not regard the order of Judge Purdy, requiring the fund to remain in the hands of the master until determination of the hearing on the rule, as at all conflicting with the order of Judge Gary. Judge Gary's order, it is true, required the master to turn over to the executrix the balance of the proceeds of sale after deducting the master's "fees and expenses on sale," but the object of Judge Gary's order was to place the fund in the hands of the executrix to be disbursed by her according to law and the order of the court. In the absence of an order making the executrix personally liable for the same, the costs and disbursements in the case are chargeable upon the funds of the estate. Section 330, Code Civ. Proc. 1902. So that no matter in whose hands the funds may be, whether in the hands of the master or the executrix, they are subject to the payment of all proper costs and disbursements. The fund being still in the

court of equity, it is proper that due provision be made for the payment of the costs and expenses chargeable thereon.

The order of the circuit court is affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(73 S. C. 15)

WITTE et al. v. CAVE.

(Supreme Court of South Carolina. Nov. 15, 1905.)

JUSTICES OF THE PEACE—CHANGE OF VENUE—AFFIDAVIT.

Under Rev. Code Civ. Proc. § 88, giving magistrates power to change the place of trial in cases pending before them, an affidavit on motion to remove stating as the reasons therefor an opinion of the affiant that the magistrate is so fixed in his views that the trial will unalterably result in a judgment against the affiant, based on appealable rulings of the magistrate at a former trial, is insufficient.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 71.]

Appeal from Common Pleas Circuit Court of Barnwell County; Dantzer, Judge.

Proceeding before Magistrate W. P. Sanders to eject trespasser by W. W. Moore, agent of C. O. Witte and E. H. Sparkman, against A. C. Cave. From circuit order affirming order of magistrate refusing to change venue, defendant appeals. Affirmed.

Davis & Best, for appellant. Bates & Simmons, for respondents.

JONES, J. In this proceeding before a magistrate, under section 2423, vol. 1, of the Revised Civil Code, to dispossess the defendant, after a mistrial before a jury and before the call of the case for a second trial, upon affidavit, he made a motion for a change of venue to the next nearest magistrate. The magistrate denied the motion and proceeded with the trial of the case and rendered judgment against the defendant. On appeal therefrom the circuit court affirmed the judgment of the magistrate, holding, with reference to change the venue, that the affidavit upon which it was based was not sufficient to make it the duty of the magistrate to remove the case, under the rule stated in *Bacot v. Deas*, 67 S. C. 248, 45 S. E. 171. The correctness of this determination is the only question presented by this appeal.

The affidavit for removal is as follows: "Before me personally appeared A. C. Cave, who, after being duly sworn, deposes and says that he is the defendant in the above-entitled cause; that he does not believe he can get a fair and impartial trial in the above-entitled action before Magistrate W. P. Sanders for the following reasons: First. That said magistrate is prejudiced against deponent and in favor of the plaintiff in this: (a) That this proceeding has already been tried before said magistrate, who ruled out all of defendant's testimony. (b) That said magistrate has expressed himself to the effect that he would not allow the defendant

to prove anything except the question of landlord and tenant. (c) That said magistrate has expressed himself by saying that the defendant cannot prove any circumstances or contract between the plaintiffs and himself going to sustain his return (which is made a part of this affidavit) except in writing. (d) That the deponent is informed by his counsel and verily believes that the magistrate herein is so fixed in his views about this case that the trial before him will unalterably result in practically directing a verdict for the plaintiff. (e) That said magistrate positively refuses to allow defendant to prove his answer to the rule save by an instrument of writing or some memorandum in the nature thereof. Wherefore the deponent prays that the case be transferred to the nearest magistrate for trial, as required by law. A. C. Cave."

The circuit court correctly held that the reasons assigned by the appellant in his affidavit were not reasons, but were statements of opinions based upon the rulings of the magistrate made during the first hearing of the case, rulings on the law and appealable to the circuit court, and that the affidavit stated no ground or fact showing that a fair trial could not be had before the magistrate. The statute (section 88 of the Revised Code of Civil Procedure), which gives magistrates power to change the place of trial in cases pending before them, requires that the party applying therefor shall file with the magistrate an affidavit to the effect that he does not believe that he can obtain a fair trial before the magistrate, and further provides that such affidavit shall set forth the grounds of such belief. When these requirements are complied with and due notice of motion given, it is the duty of the magistrate to transfer the case, and it is reversible error of law to proceed with the trial. *State v. Conkle*, 64 S. C. 372, 42 S. E. 173. But in the case of *Bacot v. Deas*, 67 S. C. 245, 248, 45 S. E. 171, where the defendant in his affidavit stated "that he does not believe that he can obtain a fair and impartial trial before Magistrate H. E. P. Sanders, for the reason that said magistrate is prejudiced against him on account of certain matters which have come up in the past between them," this court held that the magistrate committed no error in holding the affidavit insufficient and proceeding with the trial. The court, in effect, held that the affidavit should state facts tending to show that a fair trial cannot be had before the magistrate, that it is not sufficient to state the mere opinion of the affiant, and that the affidavit should contain such statement of facts as would form the basis of an indictment for perjury. Tested by this rule, the affidavit must be held insufficient.

The judgment of the circuit court is affirmed.

POPE, C. J., did not participate in this opinion because of illness.

(124 Ga. 416)

FISH v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

DISORDERLY CONDUCT — QUESTION FOR JURY — INSTRUCTIONS.

On the trial of one indicted for using opprobrious words and abusive language, it is for the jury to determine whether under all the facts and circumstances the words used were of such character as that the use of them was calculated to cause a breach of the peace, as well as to determine whether there was provocation sufficient to excuse their use. It is therefore error for the judge to instruct the jury as a matter of law that the words alleged in the indictment are opprobrious and abusive within the meaning of the statute, and that a given set of facts would not be a sufficient provocation for their use. *Williams v. State*, 31 S. E. 733, 105 Ga. 608; *Echols v. State*, 34 S. E. 289, 110 Ga. 257; *Hanson v. State*, 39 S. E. 942, 114 Ga. 104.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Disorderly Conduct, § 18.]

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Isaac Fish was convicted of disorderly conduct, and brings error. Reversed.

R. H. Lewis, for plaintiff in error. D. W. Meadow, Sol. Gen., and R. W. Moore, Sol., for the State.

COBB, P. J. Judgment reversed. All the Justices concurring.

(124 Ga. 421)

JOHNSON v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

VAGRANCY—CONVICTION OF MINOR.

Under the act of 1903 (Acts 1903, p. 46), on the subject of vagrancy, it was held in *Braswell v. State*, 45 S. E. 963, 119 Ga. 72, that "where upon the trial of a minor, between sixteen and twenty-one years of age, for vagrancy, there was no evidence that her parents were unable to support her, a conviction was unwarranted, and a new trial should have been granted upon the ground that the verdict was without evidence to support it." If the minor was under 16 years of age, she could not be convicted of vagrancy. *Teasley v. State*, 34 S. E. 577, 109 Ga. 282; *Henderson v. State*, 37 S. E. 98, 112 Ga. 19. The act of August 23, 1905, contains a provision similar to that contained in the act of 1903, in regard to persons over 16 years of age able to work and who do not work, and have no property to support them, and who are not in attendance upon some educational institute. Acts 1905, p. 109, subsec. 8. It follows from the former rulings of this court, and from the making of a special provision in the act of 1905 in regard to children over 16 years of age, that, if the child is less than that age, he or she is not subject to be convicted of vagrancy thereunder.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Sarah Johnson was convicted of vagrancy, and brings error. Reversed.

Thos. M. Hunt and R. H. Lewis, for plaintiff in error. R. W. Moore, Sol., for the State.

LUMPKIN, J. Judgment reversed. All the Justices concurring.

(124 Ga. 423)

McGOWAN et al. v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

HIGHWAYS—OBSTRUCTION—EVIDENCE.

An indictment charging one with obstructing and encroaching upon a registered road is not supported by evidence which shows that the road was laid out by a district road commissioner and two citizens of the district who acted with him, there being no proof whatever that the road was "registered" as contemplated and provided by law (Pol. Code 1895, § 516, et seq.), and a conviction under such state of facts is unwarranted by the evidence.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 452.]

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Flite, Judge.

Alice McGowan and others were convicted of obstructing a highway, and bring error. Reversed.

Payne & Payne, for plaintiffs in error. Saml. P. Maddox, Sol. Gen., and W. E. Mann, for the State.

BECK, J. Alice McGowan and Grace M. Cooke were found guilty of the offense of obstructing a registered road. Under an agreed statement of facts it appears that the road which was obstructed was regularly laid out by a legally commissioned road commissioner and two citizens who lived in the district, who were appointed and acted with the district road commissioner. Publication was made giving notice that the road would be established, and the following order was passed by the board: "And considering the foregoing report, the board ordered that publication be made, and publication having been made as the law provides, and no objection having been filed, the board now order that said new road be established." It was admitted "that all necessary publication had been made; that [two of the citizens who served on the board] were not district road commissioners at any time, but Deckert [one of the board] was; that the road was obstructed by defendants as charged in the presentment; and that the district road commissioner gave the necessary notice to defendants to remove the obstructions from the road, which defendants refused to do." After their conviction the defendants made a motion for a new trial upon the general grounds, to the overruling of which they excepted.

The indictment in this case was based upon sections 534 and 535 of the Penal Code of 1895. It is obvious that the expressions "a public road that has been registered as required by law," in section 534, and "road registered as aforesaid," and "registered public road," in section 535, have reference to the public roads which have been entered upon the book, known as the "Public Road Register," which, under the law, the county commissioners and the ordinaries, where

there are no county commissioners, are required to prepare and keep in their offices, and in which a list of all public roads are required to be entered. And in the case under consideration, there being no evidence whatever that the road described in the indictment and alleged to have been a "registered road" had been entered upon the "public road register," the verdict was without evidence to support it, and the court below erred in not granting a new trial.

Judgment reversed. All the Justices concurring.

(124 Ga. 440)

WALKER et al. v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. CRIMINAL LAW — BILL OF EXCEPTIONS — FILING.

Where, upon the filing of a motion for a new trial, the judge by order fixes a day certain for the presentation for approval of a brief of the evidence, and no brief is filed within the time fixed by the order, and the motion is subsequently dismissed on that account, such motion is not "legally dead" until the judgment of dismissal; and a bill of exceptions complaining of such judgment and other rulings on the trial of the case is in time, if it is filed within 20 days after the judgment of dismissal, although a longer time has elapsed since the date set by the order for the presentation of the brief of evidence.

2. HOMICIDE—ASSAULT WITH INTENT TO KILL —INDICTMENT.

An indictment charging that the accused committed an assault with intent to murder "with certain pieces of iron in their hands held," but which fails to describe the manner of the assault or the character of the pieces of iron, is lacking in the requisite particularity; and an appropriate special demurrer pointing out this defect should be sustained.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 247, 248.]

(Syllabus by the Court.)

Error from Superior Court, Schley County; Z. A. Littlejohn, Judge.

G. T. Walker and others were convicted of assault with intent to kill, and bring error. Reversed.

J. J. Durnham and Zach Childers, for plaintiffs in error. F. A. Hooper, Sol. Gen., for the State.

CANDLER, J. The indictment charged the accused with the offense of assault with intent to murder, for that they did on a day named "unlawfully and with force and arms, with certain pieces of iron in their hands held," feloniously, and of their malice aforethought, make an assault in and upon the person of T. G. Hudson," etc. The accused demurred to the indictment generally, and on the special grounds, in effect, that it was not alleged that the "pieces of iron" referred to in the indictment were weapons likely to produce death, and that the offense charged against them was not set out with sufficient particularity to put them on notice of the

offense charged against them. The demurrer was overruled, and the accused excepted *pendente lite*. They were then put on trial, and were found guilty, whereupon they moved for a new trial. When the motion came on to be heard it was dismissed on motion of the solicitor general, on the ground that a brief of the evidence introduced on the trial had not been presented to the judge for his approval within the time fixed by the order passed at the time the motion was made. In their bill of exceptions to this court the accused assign error upon the overruling of their demurrer to the indictment, and upon the dismissal of their motion for a new trial.

1. On the call of the case in this court, a motion was made by the Solicitor General to dismiss the writ of error, on the ground that the bill of exceptions was not filed in time. Quoting from the motion: "It should have been filed within 20 days after the date set for the presentation of the brief of evidence, and not having been so filed, it is now too late to bring same to this court upon the exceptions *pendente lite*; the defendant in error contending that the motion in law died on that date, and if plaintiffs in error desired to have same reviewed by this honorable court, it should have been excepted to within 20 days from the date aforesaid." We cannot agree with the view taken by the able solicitor that the motion-in-law "died" on the day set for the presentation and approval of the brief of evidence. To be sure, it contracted a mortal illness when that day passed without a compliance by the accused with the order of the judge, but dissolution did not actually set in until the official action of the judge dismissing the motion. As the bill of exceptions was filed within 20 days after that action, the writ of error will not be dismissed.

2. It is not essential to the validity of every indictment for assault with intent to murder that it allege that the assault was committed with a weapon likely to produce death; for, as was pointed out in Monday's Case, 32 Ga. 672, 79 Am. Dec. 314, and Johnson's Case, 92 Ga. 38, 17 S. E. 974 (3), the offense may be committed without the use of any weapon at all. It is essential, however, where the instrumentality of some physical agency is alleged, that the indictment should describe the manner of its use with sufficient particularity to put the accused on notice as to the nature of the assault which is charged. Thus, in Johnson's Case, 90 Ga. 441, 16 S. E. 92, it was held not sufficient to charge the use of "arsenic poison, and other poisons to the grand jurors unknown," without setting forth the manner in which the poisons were administered. The admirable reasoning of Mr. Justice Lumpkin in that case is strikingly applicable to the case now under consideration. "Fleeces of iron" may be of as many different sorts, and used in as many different ways, as poisons; and the accused were en-

titled to have notice of the character of the assault charged against them. The demurrer to the indictment should have been sustained.

Judgment reversed. All the Justices concurring.

(124 Ga. 288)

ADAIR et al. v. CITY OF ATLANTA et al.
(Supreme Court of Georgia. Nov. 13, 1905.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENT — TEMPORARY CLOSING OF STREET.

A city may, in the proper exercise of its discretion, and as a movement in the direction of public improvement, build a bridge in one of its streets, and incidentally close the street during the reasonable duration of the work. In like manner the municipal authorities may authorize a railroad company to build the bridge for the benefit of the city, giving it power to close the street for a reasonable time while the work is being done.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1432-1436, 1449.]

2. SAME—FEE OF STREET—RIGHTS OF ABUTTING OWNERS.

Where the fee to a street is in the abutting lot owners, and excavations are made in the street and a bridge erected thereover, the surface of the street underneath the bridge may be used by the owners of the fee in any manner not inconsistent with the right of the public.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1431, 1440-1445.]

3. APPEAL—HARMLESS ERROR—ORDER.

The order amendatory of the original judgment denying an injunction was unnecessary, but will not require a reversal of the judgment. (Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Forest Adair and others against the city of Atlanta and others. Judgment for defendants, and both parties bring error. Affirmed.

J. L. Mayson, W. P. Hill, and Dorsey, Brewster & Horsell, for plaintiffs in error. J. L. Hopkins & Sons and Rosser & Brandon, for defendants in error.

CANDLER, J. On Nelson street, in the city of Atlanta, is a bridge, owned and maintained by the city, over numerous tracks of the Southern Railway Company and other railroad corporations. The approach to this bridge on the east over Nelson street, from the corner of Nelson street and Madison avenue, is a gradual rise for a distance of several hundred feet; the street at the beginning of the bridge being about 30 feet above the level of the railroad right of way. The land on both sides of Nelson street, between Madison avenue and the bridge, is owned by the Southern Railway Company. It is the purpose of the company to erect freight terminals on this land. An agreement was made between the Southern Railway Company and the municipal authorities of the city of Atlanta, the substantial effect of

which was that the railroad company bound itself to construct for the city a metal viaduct on Nelson street, beginning at Madison avenue and extending over its right of way to a point a short distance west of the western end of the present bridge, to hold the city harmless on account of any damages that might arise out of the construction of the viaduct, and to perpetually maintain and keep the viaduct in repair when constructed, without expense to the city. It also agreed that the work should be completed within nine months, during which time the city agreed that Nelson street, between Madison avenue and Elliott street (the western terminus of the proposed viaduct), should be closed to travel. Though it was not expressed in the written agreement between the city and the railroad company, it is admitted that there was also a stipulation, or understanding, that the present grade of Nelson street should be lowered to the level of the railroad right of way; it being proposed to build the viaduct on the present street level, and to allow the railroad company to build its terminal under the viaduct and on the level of the street as lowered. At the western end of the present bridge Nelson street turns sharply to the south for a distance of 255 feet, running during that distance directly alongside the railroad right of way. It then turns obliquely, and continues in a general westerly direction. At this latter turning point in the street is situated a lot owned by the Adair estate, one of the plaintiffs in the court below. The lot is a triangle; its longest side abutting on the railroad right of way. Some distance west of the Adair property, on Nelson street, is that of Mrs. Mynatt, the other plaintiff. The present suit was brought by Adair and Mrs. Mynatt against the city and the Southern Railway Company, to enjoin the performance of the contract already referred to, to prevent the closing of Nelson street, and to prevent the digging down of the present Nelson street grade, and the erection thereon of the railroad freight terminals. By amendment, the Central of Georgia Railway Company was made a party defendant to the action. The petition alleged that the contract was without authority of law, and claimed that they would be damaged by reason of the fact that communication between their property and the business portion of the city of Atlanta would be cut off, and that the value of their property would be lessened by the erection of the proposed freight terminals. At the hearing an injunction was denied, but on the day following the rendition of the judgment the court passed the following order: "The judgment heretofore rendered in the above-stated case, * * * denying the injunction prayed for, is amended as follows: The court found, upon the evidence introduced, that the two petitioners each suffered a special injury, differing in kind from that sustained by the general public." The plaintiff

excepted to the denial of an injunction, and the defendants filed a cross-bill of exceptions, in which they complained of the supplemental order purporting to amend the judgment as originally rendered.

1. It was conceded that the present Nelson Street Bridge is sufficient for the needs of the city to-day. It was shown that it is necessary, however, for the city to make occasional repairs upon it in order to keep it in reasonably safe condition for the requirements of public travel, and that the proposed viaduct, which, under the terms of the contract, is to be kept in repair without expense to the city, will be a much more substantial structure, and better suited to the probable future needs of the city. Indeed, there was abundant evidence to the effect that the proposed viaduct will be in the nature of a very great public improvement. It will hardly be doubted that the city, under these circumstances, would have had the right to build such a viaduct itself, and to close the street to travel for a reasonable time for that purpose, provided, always, that the discretion given it by law in the management of its affairs were not abused. *Tuggle v. Atlanta*, 57 Ga. 114. This being so, we can conceive of no reason why the city may not also, in the exercise of that discretion, grant authority for the work to be done by a railroad or other corporation, or indeed by an individual. The city, of course, can act only through agents. Ordinarily, in building a bridge it would necessarily let the work to a contractor. No reason occurs to us why, in selecting an agent for the work, it may not choose a railroad corporation rather than a corporation or an individual whose regular business is that of building bridges; and the fact that in doing so the city makes an unusually good trade, securing a modern structure free of cost and the necessity to keep it in future repair, furnishes no argument why the bridge should not be built in this manner, or why the street may not be closed during its construction. In the present case there was no contention that nine months would be an unreasonable length of time to take for the building of a bridge or viaduct of the character of the one proposed, or that there will be any abuse of discretion on the part of the city or its agents in the manner of doing the work. The fact that the Southern Railway Company is a foreign corporation, and has no power of eminent domain, does not, of course, affect the situation; for, as already pointed out, the work is to be done, in effect, by the city through the railroad company as its agent. We are clear that the city had the power to close the street.

2. We come now to consider whether or not the city may, as an incident to the work of building the new Nelson street viaduct, and as part of the consideration for the work to be done and kept in repair by the railroad company, allow that company to excavate the street from its present level to the level of the company's right of way, and erect

thereon buildings which are to be a part of its proposed freight terminals. In making this question, of course, the plaintiffs have no standing in court as taxpayers or members of the public, but it is necessary for them to allege and prove special damage to themselves growing out of the alleged illegal transaction. *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Coker v. Railway Co.*, 123 Ga. 483, 51 S. E. 481. Indeed, this entire suit is predicated upon an injury to the property rights of the plaintiffs. How the erection of buildings on this little strip of ground, many hundred feet removed from the plaintiff's land, can affect the value of that land injuriously is somewhat difficult to understand; but there is evidence in the record from which such an inference could be drawn, and the question must therefore be decided. It will be borne in mind that the railroad company owns the property on both sides of Nelson street at the point where the excavations are in contemplation, and that presumptively it owns the fee to the entire street at that point, subject always to the public right to its use as a highway. It will also be borne in mind that at the present Nelson Street Bridge the street runs into a sort of cul-de-sac, being at that point some 30 feet higher than the level of the railroad right of way, so that for the block between Madison avenue and the present bridge the space beneath the surface of the street is entirely useless to the city for water or sewer pipes, or for any other conceivable municipal purpose. It will hardly be contended that the city would not ordinarily have the right to excavate its streets and build bridges across the chasm caused thereby, if, on account of the peculiar topography of the surroundings, and in the wise exercise of the discretion vested in it, it was deemed necessary or prudent. Is it, then, necessary that the surface ground under the bridge must forever remain idle for any purpose whatever? We think the true answer to be that the fee would remain just where it had been all along, and that the rule applicable to it would be in no wise different from the rule governing all public highways, viz., that the abutting property owners could put it to any use not inconsistent with its use as a public highway. Under the proposed arrangement between the city and the railroad company the latter will get only what it already has—the right to use its fee in the street in a manner not inconsistent with the right of the public to a highway. The case of *Coker v. Railway Company*, 123 Ga. 483, 51 S. E. 481, is not in any sense in conflict with what is here ruled. There it was proposed virtually to abandon a street and close it for all time to the public. For a brief time a substitute was to be provided in the form of an improvised parallel street, which was to furnish an outlet for the travel which would have gone over the street which it was proposed to close, but the agreement between the city

and the railroad company contemplated that eventually the new street should be given back to the railroad company, while no substitute was provided to take its place. It was held that the power to "open, lay out, to widen, straighten, or otherwise change" streets contained in the city's charter did not comprehend the power to make the changes indicated. Here there is no question of abandoning a street or of changing its course. The public will have the same thoroughfare open to it that it has to-day. Its convenience will not be lessened, nor the distance one will have to go between any two points increased in the slightest degree by the proposed improvement. The only difference will be that, instead of going over a dirt surface, it will pass over a metal viaduct. The case of *Hanbury v. Woodward Lumber Co.*, 98 Ga. 54, 26 S. E. 477, is very closely in point, if it is not controlling of the question now under discussion. It was there held that where, as in the present case, the fee to a street was in the abutting lot owners, the municipal corporation holding only an easement as for a right of way, "the municipal corporation may, with or without express statutory authority, in the exercise of its general discretion touching the control of the public ways, permit the owner of the fee to appropriate to its own private personal use that portion of the land covered by such street which is opposite to his abutting lots, provided such use be not inconsistent with the reasonable exercise upon the part of the public of its concurrent right of way." Counsel for the plaintiffs sought to distinguish the *Hanbury Case* from the case at bar, but the distinction drawn is one of fact only; in principle there is none.

3. There remains to be considered only the question raised by the cross-bill of exceptions, viz., whether the court erred in passing the order seeking to amend the original judgment by an adjudication that the plaintiffs would suffer special damages not shared by the general public. Construing the order in the light of the judgment denying an injunction, and of the evidence introduced on the trial, we think it is clear that the trial judge intended to go on record as saying that in his opinion the plaintiffs would, on account of the contemplated nine months' obstruction of Nelson street, suffer special damages of a temporary character, which, however, were not of sufficient seriousness or importance to warrant the grant of an injunction. It would probably have been best had this expression on a pure question of fact been omitted, as it had no material bearing on the case as decided. As the case in its present form, however, will not reach the jury, this expression in the order can have no influence upon its subsequent determination; and for this reason the judgment on the cross-bill will not be reversed. See *Wardens v. Savannah*, 69 Ga. 749; *Bleyer v. Blum*, 70 Ga. 559. In view of the ruling announced in the first

division of this opinion, and of the decision of this court in *Tuggle v. Atlanta*, 57 Ga. 114, it would seem to be immaterial whether special damage of this sort be suffered or not.

Judgment on both bills of exceptions affirmed. All the Justices concurring, except COBB, P. J., disqualified.

(124 Ga. 526)

PATTON et al. v. CITY OF ROME et al.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. MUNICIPAL CORPORATIONS — POWERS — VACATING PART OF STREET.

Under the legislative authority granted to a municipality in its charter to "open, lay out, widen, straighten, or to otherwise change streets, alleys and squares in said city," the city may vacate and sell to an abutting landowner, a private individual, a strip or part of a street, which strip will be thereafter closed to the use of the public, where it appears that the selling and closing of the strip or tract will have the effect to straighten and make more uniform in width the street from which the tract is taken and sold, without having the effect to close or prevent the free use by the public of said street.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 722, 1429.]

2. SAME—CONTRACTS—ULTRA VIRES.

A contract upon the part of a municipality to sell the strip or part of the street to a private individual, as set out in the preceding headnote, is not an ultra vires act; and the court below did not err in refusing to enjoin the city from proceeding to consummate the sale.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 629.]

3. SAME—CHANGE OF STREET—ASSESSMENT OF DAMAGES.

Having legally exercised the power to change the street, it was the duty of the mayor and council to appoint assessors under that section of the charter which provides that "whenever the said mayor and council shall exercise the power above delegated"—that is the power and authority to open, lay out, widen, straighten, or otherwise change streets—"they shall appoint two freeholders, and the owners of said lots fronting on the said streets or alleys shall, on five days' notice, appoint two freeholders, who shall proceed to assess the damages sustained or the advantages desired [derived?] by the owner or owners of said lots, in consequence of the opening, widening, straightening, or otherwise changing said streets or alleys."

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Ida N. Patton and others against city of Rome and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Mrs. Ida N. Patton, Mrs. Mary M. Brumby, and James B. Nevin, as executrices and executor of the estate of Helen A. Nevin, deceased, and individually as citizens, taxpayers, and lot owners, sought to enjoin the city of Rome from selling to E. J. and J. Henderson Lanham a strip of land, 30 feet wide by 132 feet in length, off the eastern side of North Fourth avenue in said city, in which petitioners claimed, as representatives of the estate and as individuals, general

interest as citizens and taxpayers and special interest as abutting lot owners; the city having agreed to sell said strip to the Lanhams in order that they might close the same and erect thereon a three-story brick building, claiming power and authority so to do under and by virtue of its charter. The language of that section of its charter under which the city is proceeding to sell the strip is as follows: "That the said mayor and council shall have full power and authority to open, lay out, widen, straighten, or to otherwise change streets, alleys and squares in the said city of Rome. Whenever the said mayor and council shall exercise the power above delegated, they shall appoint two freeholders, and the owners of said lots fronting on the said streets or alleys shall, on five days' notice, appoint two freeholders, who shall proceed to assess the damages sustained or the advantages desired by the owner or owners of said lots, in consequence of the opening, widening, straightening, or otherwise changing said streets or alleys; and in case said assessors can not agree they shall select a fifth freeholder; the said assessors to take an oath that they will faithfully discharge their duties, and each party to have the right to enter an appeal to the superior court of Floyd county within ten days of the rendition of said award: Provided, if any property owner shall fail after notification to appoint assessors by the time prescribed, then the two assessors appointed by the city shall proceed to make the assessment, and in the event they shall fail to agree they shall call in a third freeholder, who shall be sworn and act with them, and the finding of the majority shall stand as the award, unless appeal be entered as provided for in this section." Acts 1882-83, p. 438, § 57. In their petition the plaintiffs allege that as representatives of the said estate they are the owners of property on the western side of North Fourth avenue, across the street from the aforementioned strip, and that, if the city be allowed to sell the strip, their property will be greatly damaged; that the street at this point has been 95 feet wide for 50 years, and that the Lanhams have announced their intention to build thereon the three-story brick building aforementioned, which, taking into consideration the fact that the street would then be but 65 feet in width, would greatly mar the enjoyment of petitioner's property, "cutting off light and air, * * * obstructing the view, and taking away, to that extent, petitioner's right of ingress and egress"; that petitioners and those under whom they claim have been in possession of the property for more than 50 years. Petitioners insist that the charter of the city of Rome gives "no authority to close any part of said street, no authority to sell any part of this street, and that only by express legislative

authority can such action be had"; that there is no claim that said strip is no longer useful or convenient to the public, but "the same is being done solely for the benefit of private individuals, to wit, the proposed grantees," and that such proposed action by the mayor and council of said city is an injury to petitioners and a gross abuse of power; that the injuries threatened are irreparable and cannot be easily computed in damages, and that they have no sufficient remedy at law. Wherefore they pray, as aforesaid, that the city be enjoined from proceeding further "in this attempted disposition of said part of Fourth avenue," that the Lanhams be enjoined from erecting any building on said tract of land or otherwise obstructing the same, and that the freeholders (Brett and Wilkerson), whom it was alleged the city had appointed as assessors to determine what damage would be sustained by petitioners by reason of said sale, "be enjoined from interfering with petitioners' rights in said street, and from entering any judgment for or against petitioners." The land to be sold is a strip 30 feet wide by 132 feet in length on the east side of North Fourth avenue, beginning at the corner of that avenue and Broad street. The street north of this strip is 65 feet wide, and hence, in the event the proposed sale is made, the whole of North Fourth avenue will be of even width, to wit, 65 feet. Furthermore, by taking off this strip, the eastern line of North Fourth avenue will be on a line with, and, as it were, a continuation of the east line of South Fourth avenue, thus making the eastern boundary of South Fourth avenue, which is south of Broad street, and the east line of North Fourth avenue, which commences at the northern line of Broad street, but the continuation of one straight line. Other facts were alleged in the petition which it is not necessary to set out. In its answer to the petition the city of Rome admitted practically all of the facts alleged in the petition, except that the proposed sale would injure petitioners in any respect, and this it denied. It admitted that it had proceeded with the sale of the strip in question, and had appointed two certain freeholders to assess the damages that might be sustained by abutting lot owners under the power given it by that portion of the charter quoted. In conclusion the answer said: "This defendant answers, not only for itself, but for said Brett and Wilkerson as assessors, as it is only under the authority of this defendant that said Brett and Wilkerson are acting." The Lanhams answered, setting up substantially the same defense offered by the city. After the answers were filed the petitioners moved the court to strike them on the ground that they set forth "no defense to said petition, either in law or equity," which motion the court did not entertain. Evidence was introduced by defendants, in rebuttal to the

sworn petition, to the effect that the proposed sale of said strip and the erection thereon of a three-story brick building would enhance the value of neighboring property. After argument was had the court denied the injunction, and the plaintiffs excepted.

Denny & Harris, for plaintiffs in error.
Halstead Smith and Leaborn & Barry Wright, for defendants in error.

BECK, J. (after stating the facts). 1-3. That municipalities may be given power and authority to change, obstruct, or even vacate streets by legislative grant, in the absence of constitutional restriction, there can be no doubt. *Coker v. Railway Company*, 123 Ga. 483, 51 S. E. 481. See, also, *Adair v. City of Atlanta* (decided at this term) 52 S. E. 739. And, as it is not contended in the case at bar that there is any constitutional inhibition against the provisions of the charter of the city of Rome giving to it the power to "open, lay out, to widen, straighten, or to otherwise change streets, alleys and squares in said city," the only question to be determined is whether or not the language quoted confers upon the city, expressly or by necessary implication, the power to sell the tract which is the subject of this action. In the case of *Trustees v. City of Atlanta*, 93 Ga. 474, 21 S. E. 74, Mr. Chief Justice Bleckley, in construing this identical language, said: "This grant is comprehensive enough to embrace the alteration of a street in any respect, whether on, below or above the surface of the earth." "To widen, straighten, or to otherwise change" surely seems to be about as broad as the statute could be made. Indeed, it would be hard to conjecture a better legislative expression to cover the specific facts of this case. By making the proposed change, the street will be more uniform in its width and appearance. It will be straightened in the sense that it will be to a certain extent free from very pronounced irregularities in shape, and the street will remain open to the free and unobstructed use by the public. Hence it follows that the court did not err in refusing to grant the injunction restraining the city from selling the described strip and appointing assessors under the section of the charter set out in the third headnote.

Judgment affirmed. All the Justices concurring.

(124 Ga. 283)

BISHOP v. BISHOP.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. DIVORCE—TEMPORARY ALIMONY—SECOND ACTION.

Where a husband brought a libel for divorce against his wife, and pending the suit temporary alimony was awarded to her, and the suit terminated in a verdict denying the divorce applied for, if the husband subsequently brought a second libel for divorce against his wife, based on another ground, the allowance of alimony

pending the first suit was no bar to an application by her for temporary alimony pending the second action.

2. WITNESSES—COMPETENCY OF HUSBAND.

Where a libel for a divorce was brought by a husband against his wife on the ground of desertion, and pending the litigation she applied for temporary alimony, which he resisted on the ground that she had been living an immoral life since their separation, the husband was not a competent witness to testify to the adultery of the wife.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 159½, 172.]

3. SAME—EXCLUSION OF EVIDENCE IN CROSS-EXAMINATION.

Although the attorney for the wife, while cross-examining the husband as a witness, asked him why he had separated from his wife, and the witness replied, because he caught her in bed with another man, there was no error in excluding this evidence on motion of such attorney. The exclusion of the husband as a witness from testifying to such a fact is based on public policy.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 192.]

4. DIVORCE—ALIMONY—CHARACTER OF WIFE..

On the hearing of an application for temporary alimony, evidence merely tending to show that the general reputation of the wife is bad is inadmissible.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 619.]

5. SAME—ALIMONY AND ATTORNEY'S FEES.

There was no abuse of discretion in the amount of alimony and counsel fees allowed in this case.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by G. B. Bishop against Dollie Bishop. From an order granting temporary alimony, plaintiff brings error. Affirmed.

George W. Bishop filed a libel for divorce against his wife on the ground of adultery. She denied the plaintiff's charge, and filed a cross-libel against him. She applied for temporary alimony pending the action, which was allowed to her, and which the husband contends that he paid. On the trial the jury found that neither the plaintiff nor the defendant should be granted a divorce. Subsequently the husband filed a second libel for divorce against his wife, alleging desertion of him by her. The defendant denied the plaintiff's allegation, and made application for temporary alimony and an allowance for counsel fees pending this suit. The plaintiff contested her right to alimony on the ground that she had been living a life of immorality and shame since their separation. He also pleaded that the allowance of temporary alimony during the former litigation, and the verdict of the jury denying a divorce to either party, amounted to an adjudication which barred her claim for temporary alimony during the present suit; and he filed a plea of *res adjudicata* accordingly. On the hearing of the application for temporary alimony the presiding judge ordered the plaintiff to pay to the defendant \$50 as counsel fees, and \$10 per month as temporary alimony. To this ruling he excepted.

T. J. Ripley, Thos. L. Bishop, and W. H. Withers, for plaintiff in error. Lewis W. Thomas, for defendant in error.

LUMPKIN, J. (after stating the facts). 1. The award of temporary alimony to the wife pending a suit for divorce brought against her by her husband terminated with the conclusion of that case. If the husband afterward brought a second suit for divorce against her, she could again apply for temporary alimony pending that litigation. The allowance of temporary alimony pending the former suit, in which he failed, was no bar to a similar allowance pending the second suit. If he could bring a second libel for divorce against his wife, there was nothing to prevent her from applying for alimony and counsel fees in connection therewith. The plea of *res adjudicata* was without merit. See *Mitchell v. Mitchell*, 97 Ga. 795, 25 S. E. 385.

2. At common law a party to a cause was excluded from testifying. By the enabling act of 1866 this disability was, as a general rule, removed, but with certain exceptions. One of these is stated in Civ. Code 1895, § 5272, where it is declared that nothing contained in the act referred to "shall apply to any action, suit or proceeding in any court, instituted in consequence of adultery." This exception was based, not merely on the rights of individual parties, or made solely for their benefit, but rested on a sound public policy which prevented husband and wife from mutually destroying the character of each other because of quarrels or disagreements between themselves. At common law the legal civil existence of the wife was merged into that of the husband. The Code of this state still declares that "her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit, or for the preservation of public order." Civ. Code 1895, § 2473. It is also declared: "There are certain admissions and communications excluded from public policy. Among these are: (1) Communication between husband and wife." Civ. Code 1895, § 5198. Such communications are protected even after the relation has ceased. *Lingo v. State*, 29 Ga. 470. So a letter written by a husband to his wife, indicating the state of his feelings toward a third person and toward herself in relation to that person, is not admissible in evidence in behalf of such person on his trial for the homicide of the husband. *Wilkerson v. State*, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63. Except in certain specified instances, neither a husband nor a wife is competent to give evidence in any criminal proceeding for or against the other. Pen. Code 1895, § 1011, par. 4. These illustrations suffice to show the public policy underlying the rule of exclusion of the evidence of the husband and the wife. The expression "any action, suit or proceeding in any court, in-

stituted in consequence of adultery," used in Civ. Code 1895, § 5272, is not to be given a narrow or restricted meaning. In *Sloan v. Briant*, 56 Ga. 59, it is said: "Whether it be the immediate or the remote cause is immaterial, if the suit be the consequence of adultery as the cause. The words 'in consequence' apply as well to the initiatory as to the proximate cause of this suit." In *Graves v. Harris*, 117 Ga. 817, 45 S. E. 239, it was held that "the plaintiff, in an action for alienating the affections of his wife and inducing her to commit adultery, was incompetent at the trial to testify as a witness to any fact." See, also, *Thomas v. State*, 115 Ga. 235, 41 S. E. 578; *Cook v. Cook*, 46 Ga. 308.

3. The evidence was heard orally, and, while the husband was being cross-examined, counsel for the wife asked him, "Why did you separate from your wife, Dollie Bishop?" To this the witness answered, "Because I caught her in bed with another man." Counsel for the wife moved to rule out this answer, and the motion was sustained over objection. It is contended that, as it was made in response to a question of counsel for the adverse side, the court should have refused to rule it out. Where the question affects only the interest of the parties, "upon an oral examination a party asking a cross-question and eliciting an unfavorable reply, which the other side could not have introduced, cannot have the legitimate answer to his own question ruled out." *Anderson v. Brown*, 72 Ga. 714. This was decided in regard to a jury trial. But where witness was not competent to testify as to the facts stated in his answer, and it appeared that it was not directly called for, although to some extent responsive, it was held that there was no error in excluding it. *First National Bank of Gainesville v. Cody*, 93 Ga. 145, 19 S. E. 831. Where, in the progress of a trial, the court observes that a rule of public policy has been or is being violated in practice, it may of its own motion call attention to it, and have the proper corrective applied. *Goodrum v. State*, 60 Ga. 509. The question put to the husband was why he had separated from his wife. In answer to this he sought to testify to his wife's adultery. The court might have excluded the testimony of his own motion, and there was no error in excluding it upon motion of counsel for the wife. A husband or wife does not become competent to testify as to the adultery of the other because no objection is made. In undefended divorce cases the plaintiff would not be allowed to testify to the adultery of the defendant, although the latter was not represented or objecting. Public policy forbids that a husband should be permitted to thus testify, although there may be no objection, or even if there should be an agreement for him to do so. If adultery was not involved in this issue, the evidence would have been wholly immaterial.

But it is evident that it was directly relied on to prevent a judgment for alimony in favor of the wife.

4. Evidence was offered on behalf of the husband to show that the reputation or general character of the wife was bad. This was rejected by the court, and we think correctly so. General reputation may be proved in some cases, as to show that a house is one of ill fame. But it is no defense to an application for alimony by a wife to merely prove that her general character is bad.

5. There was no abuse of discretion in the amount of alimony and counsel fees fixed by the presiding judge.

Judgment affirmed. All the Justices concurring.

(124 Ga. 411)

BROWN v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. CRIMINAL LAW—CERTIORARI—BOND.

The bond which the applicant for the writ of certiorari in a criminal case tried in a county court is required by section 765 of the Penal Code of 1895 to give, unless he makes the prescribed pauper affidavit in lieu thereof, is a bond for his personal appearance to abide the final judgment of the court in the case.

2. SAME—APPROVAL.

This bond must be an approved bond, and an approval thereof by the county court judge is in conformity to law; and when, in response to the writ of certiorari, such judge sends up to the superior court, as a part of the proceedings in the case, a bond of this character, this, under the decision in *Watson v. State*, 11 S. E. 610, 85 Ga. 237, is equivalent to an approval thereof by him.

(Syllabus by the Court.)

Error from Superior Court, Putnam County; H. G. Lewis, Judge.

Alex Brown was convicted of a misdemeanor in the county court. From a judgment dismissing certiorari to the superior court, he brings error. Reversed.

W. T. Davidson, for plaintiff in error. Joseph E. Pottle, Sol. Gen., S. T. Wingfield, and Turner & Adams, for the State.

FISH, C. J. Alex Brown was tried in a county court for an alleged misdemeanor, and convicted. He carried his case by certiorari to the superior court, where the certiorari was, upon motion of counsel for the state, dismissed, upon the ground "that no bond was given by the defendant, or pauper affidavit made as required by the statute, as a condition precedent to the grant of the writ, and that no such bond or affidavit appeared of record." To this judgment of dismissal he excepted.

1. In response to the writ of certiorari the judge of the county court sent up to the superior court, along with his answer, a bond signed by the plaintiff in certiorari as principal and another person as surety, executed upon the very day that the accused was convicted in the county court. This bond was

witnessed by the sheriff, and upon it was an affidavit by the surety as to his solvency, which was also witnessed by the sheriff. The condition of this bond was that the accused should appear at the next term of the superior court for the county, and from day to day and term to term, to answer the final judgment in the case. Was the obligation of this bond such as the statute requires? We think it was. Section 765 of the Penal Code of 1895, which prescribes conditions to be complied with in order to obtain the writ of certiorari to review a criminal case tried in a county court, as amended by the act of December 7, 1898 (Acts 1898, p. 61), is as follows: "The writ shall not be granted unless the accused shall file his affidavit stating that he has not had a fair trial and has been wrongfully and illegally convicted, and shall give bond and security, or make affidavit as is required of persons when carrying criminal cases to the Supreme Court; and the execution and filing of said bond shall operate as a supersedeas of the judgment rendered in said court for space of ten days." It will be observed that the statute does not expressly declare what the character of the bond shall be, but if there was nothing in the statute with reference to the bond, except the words "shall give bond and security," the natural and logical inference would be that the bond should be such as would be appropriate to a criminal case, and not a bond which would be appropriate in a civil case, but unsuited to a criminal case, such as a bond for the eventual condemnation money and all future costs, which the applicant for the writ of certiorari in a civil case is, by section 4639 of the Civil Code of 1895 required to give. A certiorari bond, whether it be given in a civil or in a criminal case, is to secure the satisfaction by the applicant for the writ of the final judgment of the court. For this purpose an eventual condemnation bond is appropriate in a civil case, and a bond for the appearance of the accused, and his submission, in the event the final judgment is against him, to the sentence imposed by the court, is appropriate in a criminal case. So, although the eventual condemnation bond which section 4639 of the Civil Code of 1895 requires an applicant for the writ of certiorari to give, unless he makes the prescribed pauper affidavit in lieu thereof, is not in terms expressly confined to civil cases, it has been held by this court that the provisions of that section apply exclusively to civil cases, and have no application to a criminal prosecution. *Mohrman v. Augusta*, 103 Ga. 841, 31 S. E. 95; *Colvard v. State*, 118 Ga. 13, 43 S. E. 855. But the character of the bond required by section 765 of the Penal Code of 1895 to be given in order to obtain the writ of certiorari in a criminal case tried in a county court is not left to be inferred from the nature of the case in which it is required to be given, but is indicated by the words "as is required of persons when

carrying criminal cases to the Supreme Court." While, strictly speaking, no bond is absolutely required of persons carrying criminal cases to the Supreme Court, yet in order to obtain a supersedeas in a bailable case, and thus prevent the sentence of the lower court from being carried into execution while the convicted person is seeking to have the judgment against him set aside by the Supreme Court, a bond is required, unless the accused is unable to give bond and will make the affidavit prescribed by the statute in lieu thereof. Section 1077 of the Penal Code of 1895, in reference to criminal cases carried to the Supreme Court, provides that the bill of exceptions, when properly filed, "shall operate as a supersedeas, upon the plaintiff in error complying with the following terms: Where the offense is bailable, the defendant shall enter into a recognizance before the clerk, with security to be approved by him, in a sum to be fixed by the presiding judge, conditioned for the personal appearance of such defendant, to abide the final order, judgment or sentence of said court. If the offense is not bailable, the judge shall order a supersedeas at the time of filing the bill of exceptions. If the party is unable from his poverty to give the recognizance, the judge shall order a supersedeas upon the filing of an affidavit as provided in civil cases, but the defendant shall not be set at liberty without the recognizance." The bond here described is the bond referred to in section 765 (Pen. Code 1895) by the words, "as is required of persons when carrying criminal cases to the Supreme Court." This will more clearly appear, we think, when we consider the language of the statute as it stood before the adoption of the Code of 1895. The county court act of January 19, 1872, provided that no writ of certiorari in a criminal case "shall be granted * * * unless the party applying shall give such bond and security or make such affidavit as is permitted in the Code of Georgia, for parties in criminal cases carrying up cases to the Supreme Court of Georgia." Acts 1871-72, p. 296. This provision of the statute was codified in section 302 of the Code of 1873, and in the section of the same number in the Code of 1882, with but very slight and immaterial alteration; the words "shall give bond and security or make such affidavit as is permitted * * * for parties in criminal cases carrying up cases to the Supreme Court" being retained. Persons carrying criminal cases to the Supreme Court were then, and are now, "permitted to give bond and security, or make the affidavit," provided for in section 1077 of the Penal Code of 1895, and thereby obtain supersedeas of the judgment of the trial court. The word "required," which was substituted in the Code of 1895 for the word "permitted," which appeared in the original act and in the Codes of 1873 and 1882, refers to the same bond and security, and the same affidavit, previously

referred to by the word "permitted." The words "such bond and security" and "such affidavit as is permitted . . . for parties in criminal cases carrying up cases to the Supreme Court," clearly and unmistakably mean the same kind of a bond and the same kind of an affidavit as is permitted in carrying criminal cases to the Supreme Court. So, taking the statute as it now stands, we find that, while the language is somewhat different, the meaning is unchanged. For to "give bond and security, or make affidavit," in one case "as is required" in another, is to give the same kind of a bond or make the same kind of an affidavit. In the opinion in *Memmler's Case*, 75 Ga. 576, which was a certiorari in a criminal case tried in a county court, it was distinctly recognized that the terms and conditions of the bond in such a case should be the same as that of the supersedeas bond given when carrying criminal cases to the Supreme Court. So far as we are aware, the general practice, when giving bond in cases of this character, has been in conformity to this view. It follows that the obligation of the bond given by the applicant for the writ of certiorari on the day that he was convicted was such as the statute required.

2. Although the statute does not so expressly declare, we think it clear that the bond which it requires is an approved bond. The law does not contemplate that the person required to give the bond shall be allowed to give it in just such sum and with just such security as he may see fit. As was said in *Stover v. Doyle*, 114 Ga. 85, 39 S. E. 939, by Presiding Justice Lumpkin, in reference to the certiorari bond required to be given in a civil case: "The statute necessarily means an approved bond." This is the well-established rule in civil cases, where the statute is silent upon the question of the approval of the bond. *Hamilton v. Phenix Ins. Co.*, 107 Ga. 728, 33 S. E. 705; *Wingard v. Southern Railway Co.*, 109 Ga. 177, 34 S. E. 275; *Stover v. Doyle*, supra; *Dykes v. Twiggs County*, 115 Ga. 700, 42 S. E. 36. These cases also hold that the bond must be approved by the judge or magistrate who tried the case in the first instance, and that a writ of certiorari issued before such a bond has been filed is void; and the case last cited lays down the rule that the bond itself must, either upon its face or by other written evidence bearing the official signature of such judicial officer, show that it has been duly approved by him. The reasoning upon which this interpretation of the statute in reference to the writ of certiorari in civil cases is based would seem to apply with equal force to the statute in reference to such a writ in a criminal case tried in a county court. But, owing to the construction placed upon the last-mentioned statute in *Watson v. State*, 85 Ga. 237, 11 S. E. 610, we are bound to hold, in the present case, that an approval by the county court judge of the bond given by the plaintiff in certiorari

can be, and must be, implied from the mere act of such judge in sending up this bond to the superior court as a part of the proceedings in the case. In the *Watson Case*, which involved a certiorari in a criminal case tried in a county court, there was a motion to dismiss the certiorari "upon the ground that Watson had given no bond assessed by the county judge and approved as required by law." This motion was sustained by the judge of the superior court, but this court reversed the judgment, holding that "if, in response to the writ of certiorari, after a conviction in the county court, the judge of that court sends up, as a part of the proceedings in the case, a bond with security given by the defendant, this is equivalent to an approval of the bond by him." In *Stover v. Doyle*, and in *Dykes v. Twiggs County*, supra, the *Watson Case* was noticed, but this court refused to apply the ruling there made to a certiorari in a civil case, leaving it to stand simply as an interpretation of the statute applicable to writs of certiorari in criminal cases tried in county courts. We are now dealing with a case of the latter character, and one which, under the facts disclosed by the record relatively to the question under consideration, is exactly like the *Watson Case*. We have examined the record in that case, which is of file in this court, and find that the bond there given by the applicant for the writ of certiorari was an appearance bond, signed by him as principal and another person as surety, and neither attested nor approved by any one. If the sending up of that bond to the superior court by the county court judge was equivalent to an approval thereof by him, then, in the present case, the sending up by the judge of the county court of the appearance bond given by the accused and attested by the sheriff amounted to an approval of such bond by such judge. And if, in that case, the approval of the bond could be thus made by the county court judge after the writ of certiorari had issued, then it must follow in the present case that the approval of the bond could be made when the judge of the county court answered the writ of certiorari.

It follows from the foregoing that the judge of the superior court erred in dismissing the certiorari, and his judgment is therefore reversed. All the Justices concurring.

(194 Ga. 438)

HOPE v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. CRIMINAL LAW—NEW TRIAL—SURPRISE.

When a party is induced to go to trial upon the statement of a witness that he will testify to a given state of facts, to which another witness would testify if he were present, and during the progress of the trial the witness communicates to the party that he will not testify as promised, and no motion for a postponement is made, a new trial will not be granted upon the ground of the surprise resulting from the withdrawal by the witness of his promised statement.

2. SAME.

There was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Sandersville; P. R. Tallafarro, Judge.

Andrew Hope was convicted of crime, and brings error. Affirmed.

The accused was arraigned upon a presentment charging him with the offense of adultery and fornication, and, upon being convicted, made a motion for a new trial, which was overruled. The motion for a new trial, beside the general grounds, contained two special grounds—one based upon newly discovered evidence, and the other setting forth the following statement of facts: The defense relied upon two witnesses to establish an alibi, and these witnesses were absent when the case was called for trial; but counsel for the accused was assured by another witness that he could swear to the alibi of the accused, and, relying upon this witness to establish such fact, the accused went to trial. During the trial this witness informed counsel for accused that he could not testify to the alibi, and the accused was thus prevented from setting up this defense. Attached to this second ground was an affidavit of counsel that the facts set forth were true; but there was no affidavit from the persons named in the ground that, if they had been present, they would have testified to an alibi.

M. L. Gross, for plaintiff in error. G. H. Howard, Sol., for the State.

COBB, P. J. When counsel for the accused learned that the witness upon whose statement he relied in reference to the proof of an alibi had misled him, he should have called the attention of the court to the matter, and made a motion for a postponement of the case. As knowledge of this fact came to him pending the trial, he could not take the chances of a favorable verdict, and, after an unfavorable verdict, insist upon a new trial being granted on account of a fact which came to his knowledge before verdict. In *Rolfe v. Rolfe*, 10 Ga. 143, the evidence, which by oversight had not been introduced, was offered pending the trial, and it was held that under the circumstances it was error to reject the evidence, and a new trial was granted on this ground. Even if the ruling laid down in the case of *Wilson v. Brandon*, 8 Ga. 136, is to be followed at all at the present time, the present case, upon its facts, is not controlled by that ruling. In that case the motion for a new trial contained an affidavit of the absent witness that, if present, he would have testified to the fact which the plaintiff had failed to prove on account of being misled by the statement of another witness. That case should not be extended beyond its peculiar facts.

2. The alleged newly discovered evidence

was impeaching in its nature, and the rule is well settled that the discretion of the judge in overruling a motion for a new trial based upon the discovery of evidence of such a character will not be controlled. The evidence authorized the verdict, and there was no error in refusing to grant the new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 438)

DUGGAN v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. CRIMINAL LAW—NEW TRIAL—IMPEACHING EVIDENCE.

The fact that since the conviction of the accused the prosecutor has said that he procured the testimony of the principal witness for the state by bribery is not cause for a new trial. The witness could not be impeached by mere hearsay; and, besides, testimony purely impeaching in its character is not cause for a new trial. *Hardy v. State*, 43 S. E. 434, 117 Ga. 40.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2331, 2332.]

2. SAME—NEWLY DISCOVERED EVIDENCE.

Nor is it cause for a new trial that, since the verdict was rendered, the accused and her counsel have discovered that a certain person will swear that the prosecutor sought to bribe him to testify falsely against the accused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2331, 2332.]

3. SAME.

The fact that counsel for the accused failed to move for a continuance upon the ground of the absence of certain witnesses subpoenaed for the purpose of proving an alibi, because he was assured by another witness, who was present at the trial, that an alibi could be proved by him, but discovered, after the trial had begun, that an alibi could not be proved by this witness, is not cause for a new trial. *Hope v. State* (this day decided) 52 S. E. 747.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2300-2305.]

4. SAME—EVIDENCE.

The evidence warranted the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Sandersville; P. R. Tallafarro, Judge.

Jennie Duggan was convicted of crime, and brings error. Affirmed.

M. L. Gross, for plaintiff in error. G. H. Howard, Sol., for the State.

FISH, C. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 442)

MORGAN v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. CRIMINAL LAW—ARGUMENTS OF COUNSEL—ABSENCE OF WITNESSES.

The absence of a witness, who is competent and cognizant of material and relevant facts is a proper subject of comment in the argument of counsel before the jury, and it is error for the court to give an instruction which entirely

eliminates from the jury's deliberation the effect of such argument.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1073.]

2. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE.

In the trial of one charged with the offense of stabbing, conduct of the injured person subsequent to the occurrence under investigation is irrelevant, and testimony relating thereto should be excluded.

(Syllabus by the Court.)

Error from City Court of Americus; O. R. Crisp, Judge.

Will Morgan was convicted of the crime of stabbing, and brings error. Reversed.

R. D. Feagin, for plaintiff in error. Allen Fort, Jr., for the State.

EVANS, J. The plaintiff in error, Will Morgan, was tried in the city court of Americus upon an accusation charging him with the offense of stabbing. The jury returned a verdict of guilty, and he made a motion for a new trial. Exception is taken to the overruling of this motion.

1. It appeared at the trial that Charlie Taylor, the person whom the accused was charged with having stabbed, was temporarily in Sumter county at the time the offense was alleged to have been committed, and subsequently returned to his home, in Cuthbert, Ga., after swearing out a warrant against the accused. Taylor did not appear in his capacity of prosecutor at the commitment trial, nor was he present at the trial in the city court, nor was his absence accounted for by the state, though the evidence disclosed that he was then living at Cuthbert. Counsel for the state, in the opening argument before the jury, said he would anticipate an argument which defendant's counsel would probably make concerning the absence of the prosecutor, and insisted that there was no necessity to have him at the trial, if the case could be made out without him; that the state had called eyewitnesses to the difficulty, and it would have imposed extra and useless expense upon Sumter county, in the way of witness fees and the expense of sending after Taylor, to secure his presence at the trial. In answer to this argument, counsel for the accused stated to the jury that the law did not allow the prosecutor fees for attending court and prosecuting a case, and it was a weak argument for the state to explain the lack of its highest and best evidence, where the liberty of one of its citizens was at stake, by insisting that it would have been expensive to the county to have produced that evidence at the trial; and the defendant's counsel further argued to the jury that the absence of the prosecutor was a fact which they had a right to consider, that it might show he was absent of his own volition, because he realized he was in the wrong, and did not care to convict an innocent man. No objection was made to the argument of counsel for the state, but the defendant's

counsel sought to meet it in the manner just indicated. The court, before concluding its charge to the jury, instructed them that "the fact that the prosecutor, Charlie Taylor, is not present at this trial has absolutely nothing to do with the case." Exception is taken to this instruction, on the ground that it amounted to an expression of opinion by the court as to the weight and effect of the evidence before the jury, and because it tended to prejudice the jury against the argument of defendant's counsel, and cause them to favor the argument of counsel for the state. In a note appended to the motion for a new trial, the presiding judge states that "the charge excepted to was given just before the conclusion of the charge, in answer to the argument of defendant's counsel that the absence of the prosecutor from the trial was a reason for the acquittal of the defendant, as it tended to show that the prosecutor realized he was in the wrong, and therefore felt no interest in the case," and that the "court immediately thereafter charged the jury that if they were satisfied beyond a reasonable doubt, from the evidence introduced on the trial of the case, of the guilt of the accused, it would be their duty to convict the defendant; on the contrary, if they did not believe the defendant guilty, or if they [had] a reasonable doubt of his guilt, it would be their duty to acquit." As the court intended this charge to be "in answer to the argument of defendant's counsel," it is not unreasonable to suppose that the jury so understood the instructions and regarded the argument as not worthy of consideration, since the court had explicitly told them that the absence of the prosecutor had "absolutely nothing to do with the case." Indeed, it is hard to conceive how the accused could, in the face of this unequivocal assertion by the court, have gotten any benefit from the argument made in his behalf concerning the failure of the prosecutor to appear against him at the trial. Whether or not the instruction was proper depends upon a correct determination of the question whether, as matter of law, the absence of the prosecutor was a circumstance which the jury were not at liberty to take into consideration in passing upon the relative weight and sufficiency of the evidence upon which the state relied for a conviction, as compared with that offered by the defense, which tended very strongly to show that the accused was justified in cutting Taylor with a knife.

In the argument of cases, counsel should be allowed considerable latitude of speech; and so long as extraneous facts are not injected or improper language used, the trial judge should not interfere. The premises of the advocate should be founded upon some fact or group of facts brought to light upon the investigation; his conclusion, however absurd or illogical, goes to the jury as the result of his reasoning, and not as a statement of fact. The defendant's counsel in-

sisted before the jury that the absence of the wounded man was a circumstance persuasive of the conclusion that had he been present at the trial, he would have sustained the defendant's plea of self-defense. In anticipation of this argument, the solicitor had urged that no such inference could be drawn from the injured man's failure to appear to prosecute or testify. These conflicting deductions from the circumstance of his absence were peculiarly within the jury's domain, and exclusively for their solution. "It is customary to permit attorneys to comment upon the absence of witnesses, or their nonproduction, when they are shown to be cognizant of the facts in issue. It is a mere matter of argument, and may be discussed by either side, trusting to the good sense of the jury to properly estimate the value of such arguments." *Chicago R. Co. v. Krayenbuhl* (Neb.) 98 N. W. 44. In the case of *Inman v. State*, 72 Ga. 269, it was held that it was legitimate for counsel in argument to allude to what had transpired in the case in the presence of the jury, from the time it was called through its entire progress. So liberal has been the practice of permitting a discussion of collateral issues by counsel that it has been held: "Where, in the trial of an action for damages against a railroad company for personal injuries, the evidence as to the company's alleged negligence was conflicting, it was legitimate for the plaintiff's counsel to argue to the jury that the failure of the defendant to introduce and examine as a witness one of its employees who was present at the time when the injuries in question were sustained was a circumstance from which an inference could be drawn that, if this employee had been introduced and examined, he would have testified to facts prejudicial to the defendant." *W. & A. R. Co. v. Morrison*, 102 Ga. 319, 29 S. E. 104, 40 L. R. A. 84, 66 Am. St. Rep. 173. The absence of the person who instituted the prosecution and who would have been a competent witness for the state was a proper subject of comment by defendant's counsel; and it was for the jury, and not the court, to determine whether the conclusion of counsel was correct. The trial judge erred in giving an instruction which entirely eliminated from the jury's deliberation the effect of such argument. *McBride v. Macon Tel. Pub. Co.*, 102 Ga. 422, 30 S. E. 999. The error of this instruction was not cured by the subsequent charge that the jury should only convict in case it appeared that the defendant's guilt was established beyond a reasonable doubt by the evidence. Two conflicting accounts of the transaction were presented by the evidence. If the deduction sought to be drawn from the absence of the wounded man could be of any avail to the defendant, it would be the effect on the minds of the jurors inclining them to accept

as true the version of the affair as narrated by his witnesses.

2. It was not error to exclude from evidence the conduct of the person alleged to have been stabbed subsequent to the occurrence under investigation. What he did on returning to the scene after he was cut could not illustrate the guilt or innocence of the defendant, and was therefore irrelevant. The case must undergo another investigation, and it is not necessary to discuss the evidence, or matters complained of which are not likely to arise on the next trial.

Judgment reversed. All the Justices concurring.

(124 Ga. 446)

CODY v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. CRIMINAL LAW—HEARSAY EVIDENCE.

Where it is material to explain how or why a search for property was made, it is competent to show that this was done in consequence of information received. But such information or statements conveying it are not admissible as affirmative proof of the facts contained in them. *Lyman v. State*, 69 Ga. 404; *Stevens v. State*, 2 S. E. 684, 77 Ga. 310; *Foster v. Atlanta Rapid Transit Co.*, 46 S. E. 840, 119 Ga. 675; *Collins v. State*, 14 S. E. 474, 88 Ga. 347.

2. SAME—EVIDENCE.

Where the evidence failed to prove the offense charged, except by considering statements, not under oath, made by a person since deceased, a verdict of guilty was not supported by the evidence.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Matt Cody was convicted of crime, and brings error. Reversed.

Blalock & Cobb, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

LUMPKIN, J. Judgment reversed. All the Justices concurring.

(124 Ga. 446)

PRESSLEY v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. MASTER AND SERVANT—VIOLATION OF LABOR CONTRACT—INDICTMENT.

An accusation in a city court charging one with the offense of violating the provisions of the act approved August 15, 1903 (Acts 1903, p. 90), which fails to set forth in substance a contract definite and certain as to its terms and duration, is subject to demurrer on the ground that "there are no facts showing any valid contract between the [prosecutor] and defendant, nor consideration nor duration of said contract." *Wilson v. State*, 52 S. E. 82, 124 Ga. —.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 75.]

2. CRIMINAL LAW—APPEAL—REVIEW.

"Such accusation being fatally defective, and the trial court having erred in overruling the special demurrer thereto, the Supreme Court will not, in such a case, pass on the constitutionality of the act of the General Assembly

upon which the accusation was based." *Oglesby v. State*, 51 S. E. 505, 123 Ga. 506, and cases cited.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Ed Pressley was convicted of violating a labor contract, and brings error. Reversed.

Payton & Hay, for plaintiff in error. J. H. Tipton, Sol., for the State.

BECK, J. Judgment reversed. All the Justices concurring.

(124 Ga. 454)

WATSON v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

MASTER AND SERVANT—CONTRACT TO LABOR—FALSE PRETENSES—ACCUSATION—SUFFICIENCY.

When an accusation based on the act of 1903 (Acts 1903, p. 90) alleged that the accused contracted with the prosecutor to perform certain services as a farm laborer, and to ditch for the prosecutor, with intent to procure from him money and other things of value, and not to perform the services so contracted for, and that without good and sufficient cause the accused failed and refused either to perform said services, or to return the money advanced, to the damage of the prosecutor in the sum named, and that after so contracting he procured advances in a named amount, with intent not to perform the services so contracted for, and without good and sufficient cause failed and refused either to do so or to return the money so advanced, to the loss and damage of the prosecutor in that amount, such accusation was fatally defective, in that it did not allege when the services were to commence, or for what time they were to continue, or that the prosecutor contracted and agreed to pay any amount whatever to the defendant for such services so to be rendered. A judgment based on a verdict of guilty on such an accusation should have been arrested on motion. *Pressley v. State*, 52 S. E. 750.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 75, 1289.]

(Syllabus by the Court.)

Error from City Court of Americus; O. R. Orisp, Judge.

Aaron Watson was convicted of a misdemeanor, and brings error. Reversed.

Aaron Watson was arraigned on an accusation based on the act of 1903 (Acts 1903, p. 90). It alleged that the accused "having contracted with said M. E. Morgan to perform for him certain services, to wit, services as a farm laborer, and to ditch for said M. E. Morgan, with intent to procure from him money and other things of value, and not to perform the services so contracted for, did without good and sufficient cause fail and refuse either to perform said services or to return the money so advanced, to the loss and damage of said M. E. Morgan in the sum of \$12.75, and, after having so contracted, did thereby procure from said M. E. Morgan \$12.75 in cash, of the value of \$12.75, with intent then and there not to perform the services so contracted for, and did then

and there, without good and sufficient cause, fail and refuse either to perform said services or to return the money so advanced, to the loss and damage of said M. E. Morgan in the sum of \$12.75." After conviction he made a motion in arrest of judgment, on the ground, among others, that the warrant and accusation failed to allege any time when the service was to commence, what length of time it was to continue, or that the prosecutor at the time contracted and agreed to pay any amount whatever for such services so to be rendered. He excepted to the overruling of this motion, and also to the overruling of his motion for a new trial.

Williams & Harper, for plaintiff in error. Allen Fort, Jr., Sol., for the State.

LUMPKIN, J. Judgment reversed. All the Justices concurring.

(124 Ga. 701)

PEARSON v. WIMBISH.

(Supreme Court of Georgia. Jan. 13, 1906.)

1. JURY—RIGHT TO JURY TRIAL—VIOLATION OF MUNICIPAL ORDINANCES.

The present Constitution of this state does not guaranty a trial by jury to one charged with the violation of a valid municipal ordinance; but he may be summarily tried and convicted, without a jury, in a police court having jurisdiction to try petty offenders against the peace, good order, and security of the municipality.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 152.]

2. MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCES—PUNISHMENT—INVOLUNTARY SERVITUDE.

To punish such an offender by confining him at labor under municipal control is not obnoxious to the constitutional inhibition against "involuntary servitude, save as a punishment for crime, after legal conviction thereof."

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1375, 1416.]

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—SUMMARY TRIALS—FORM OF ACCUSATION.

The constitutional declaration that no person shall be deprived of his liberty without due process of law does not contemplate that a petty offender who may be tried summarily without a jury shall be furnished with a formal accusation or written statement of the charge preferred against him. It is sufficient if he be given timely information of the nature of the charge and be afforded full opportunity to present his defense.

4. SAME—SENTENCE—CONFINEMENT IN CHAIN GANG.

A recorder of a city may try offenders against the municipal ordinances, and impose on them such sentences as are authorized by law. But where one charged with the infraction of a municipal ordinance is sentenced to confinement for three months in the county chain gang, along with violaters of the laws of the state, upon conviction by the recorder alone and without a right to a trial by a jury, and with no record except certain entries upon the recorder's docket (stating a case of the city against the defendant, the offense with which he was charged, the name of the arresting officer, and that after hearing the evidence it was ordered that the defendant be

committed to the county chain gang for the space of three months), such sentence is in violation of the Constitution, which declares that no person shall be deprived of life, liberty, or property, except by due process of law. A provision in a municipal charter which authorizes punishment for offenses against the ordinances of the city by confinement of the offender in the chain gang of the county, where persons convicted of misdemeanors against the state and felons whose punishments have been reduced are confined, is unconstitutional.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1402.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Application for habeas corpus by Rufus Pearson against E. A. Wimblish. The court remanded applicant to custody, and he brings error. Reversed.

An application for the writ of habeas corpus was presented to the judge of the superior court of Bibb county in behalf of Rufus Pearson, who was alleged to be held and restrained of his liberty by E. A. Wimblish, superintendent of the Bibb county chain gang, under a pretended sentence and commitment of the recorder's court of the city of Macon, imposing upon the applicant the infamous punishment of being confined at hard labor in the chain gang of that county, for the term of three months. It was alleged that on October 28, 1905, Pearson was arrested without a warrant by a police officer of the city and committed to the city prison, where he was detained till the morning of the 30th of October, when he was taken before the city recorder, and, without any written charge, information, or accusation being furnished him, brought to trial without the benefit of counsel and without the right to demand or have a jury pass upon his guilt or innocence; that after a pretended trial before the recorder the sentence above stated was passed upon the applicant, and thereupon the recorder made out a writ of commitment, placing him in the custody of the superintendent of the Bibb county chain gang, who on the same day took charge of his person, manacled him in irons, which were riveted around his legs, clothed him in penitentiary stripes, and put him at hard labor on the public roads of the county. It was further alleged that the Bibb county chain gang was composed of the quota of felony convicts allotted to the county by the state under the act approved August 17, 1903 (Acts 1903, p. 65); of convicts who had been convicted of a felony, but had been sentenced as for a misdemeanor under the provisions of Pen. Code 1895, §§ 1036, 1037; of misdemeanor convicts; and of offenders summarily tried and convicted in the recorder's court. The charge brought against applicant was that of being drunk and disorderly, in violation of a city ordinance declaring that "any person who shall be found in the streets drunk, or acting in a disorderly, riotous or tumultuous manner * * * shall be arrested by the officers of the police force and confined in the city

prison until such time as he can be brought before the recorder, to be dealt with as he may think proper and necessary." The act of November 21, 1893 (Acts 1893, p. 257, § 59), in so far as it undertook to authorize the recorder to sentence offenders to the county chain gang, was attacked as unconstitutional and void, on the grounds that (1) an offender against a municipal ordinance who is sent to the county chain gang under the provisions of that act is "deprived of his liberty, convicted of an infamous crime, and sentenced to an infamous punishment" without having a written accusation preferred against him or having the benefit of counsel, and without the right to have his guilt or innocence determined by the verdict of a jury of his peers, contrary to the provisions of the Constitution of the state of Georgia and of the fourteenth amendment to the Constitution of the United States, guarantying to every one accused of a criminal offense that he shall not be convicted thereof without due process of law; (2) because such a sentence as that imposed upon the applicant subjects one found guilty of a mere petty offense, less than a crime, to involuntary servitude, contrary to the inhibition contained in our state Constitution, as well as in the thirteenth amendment to the federal Constitution; (3) because such a sentence, when imposed for such a minor offense, subjects the offender to a cruel and unusual punishment, in violation of the rights guaranteed to him by paragraph 9, § 1, art. 1, of the Constitution of this state, and deprives him of the equal protection of the law assured to him by the fourteenth amendment to the Constitution of the United States; and (4) because conviction in a municipal court, when followed by such a sentence, offends the provisions of paragraph 1, § 18, art. 3, of the Constitution of Georgia, which preserves the right of trial by jury to every one accused of a criminal offense, which an infraction of a municipal ordinance necessarily becomes when the punishment visited upon the offender is the same as that imposed upon one found guilty of an infamous crime. The applicant declared that neither under any act of our General Assembly, nor under any ordinance of the city of Macon, were any rules of procedure established for the recorder's court such as preserved the constitutional rights of one charged with a penal offense, either in the first instance or upon appeal, and that his conviction in that court, in accordance with the practice which therein obtained, was a mere nullity.

The writ of habeas corpus was issued, and in response thereto the official to whom it was directed answered, in substance, as follows: The arrest of Pearson without a warrant was authorized by law. On the hearing before the recorder's court, the charge against him was read to him, he was asked if he was ready for trial, and he replied, "Yes." He was given ample notice of the offense with which he was charged, and also given full

opportunity to make any defense he might have. After being put upon full notice of the charge against him, witnesses were sworn and examined in the case; and after the evidence for the prosecution had been heard he was told that he could make any statement in his own defense which he wished, and he availed himself of the privilege of making a statement. Thereupon he was convicted by the court, which was a police court for the city of Macon, having jurisdiction to try violators against the municipal laws in a summary manner; and he was arrested, tried, and convicted in the same manner as all other persons charged with similar violations of law are arrested and tried in the recorder's court. He was subsequently confined in the Bibb county chain gang, but not clothed in penitentiary stripes; and respondent, as the superintendent thereof, now holds him in custody, by virtue of the commitment issued by the recorder's court, after due and legal conviction therein, and after Pearson had been accorded a fair and impartial trial. No traverse to this answer was filed, but on the hearing in the court below the facts therein recited were recognized as true, taken in connection with an agreed statement of facts as to what appeared by the docket entries in the recorder's court and as to how the chain gang of Bibb county was conducted. These entries gave the number of the case and the date on which it was docketed, as well as the date of the arrest and the name of the arresting officer; defined the charge as "drunk and disorderly," and recited that after hearing the evidence in the case it was ordered by the court that the defendant be committed to the county chain gang for and during the space of three months. The commitment, a copy of which was attached to the petition for habeas corpus, formally stated the character and situs of the recorder's court, and styled the case as that of "The Mayor and Council v. Rufus Pearson," and the offense to be "drunk and disorderly"; recited that upon hearing the evidence in the case, the defendant was found guilty, whereupon it was ordered and adjudged by the court that the said defendant, then present in court, "do work in the chain gang" of the county for the term of three months, "to be computed from the date he is received by the superintendent of the public works," and that in the meantime he be committed to the city barracks. It purported to have been issued in open court, was dated October 30, 1905, and was signed, "Curtis Nottingham, Recorder of the City of Macon."

After hearing argument, the court below passed an order refusing to discharge the petitioner and remanding him to the custody of the respondent. To this order Pearson excepted, and in this court urged all of the grounds of attack upon the conviction and sentence in the recorder's court which he presented to the judge of the superior court in the petition for habeas corpus. The plaintiff in error takes the position that, under the facts admitted by the answer and the agree-

ment of counsel, his discharge from further custody was demanded.

Glawson & Fowler and Akerman & Akerman, for plaintiff in error. Winter Wimberly and Jesse Harris, for defendant in error.

EVANS, J. (after making the foregoing statement of facts). 1. In most, and perhaps in all, of the Constitutions of the different states there is contained the phrase, "The right of trial by jury shall remain inviolate," or words of similar import. With striking unanimity this and equivalent expressions have been construed to mean that the right of trial by jury as it existed in the colonies prior to the Revolution should be preserved. The privilege was not enlarged, nor was the right extended to instances where summary trial without a jury was authorized and practiced. This construction has been given to the guaranty of jury trial as contained in the first and all subsequent Constitutions of this state. *Flint River Steamboat Co. v. Foster*, 5 Ga. 195 (7), 48 Am. Dec. 248. Clearly, then, that clause of the Constitution: "The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial or traverse jury in courts other than the superior and city courts" (Civ. Code 1895, § 5876)—is only preservative of jury trial as it existed when Georgia became an independent state and a part of the United States, except as modified in the present Constitution. As was said by Jackson, C. J., in *Hill v. Dalton*, 72 Ga. 319, "such or equivalent provisions in the Constitution of the United States and all the Constitutions of this state have never been held to apply to police of cities and towns and arrests and trial, with fine and imprisonment therein, under ordinances thereof." "In England, violations of municipal by-laws, where the penalty is a fine, or by authority of Parliament a fine and imprisonment, have always been prosecuted in a summary manner, although Magna Charta secures the right of trial by jury." 1 Dill. Mun. Corp. § 433. Municipal offenses usually are confined to breaches of by-laws and ordinances which in their nature are mala prohibita, and which by legislative sanction have been enacted by the municipality for its health, peace, and tranquillity. The offenses are petty in their nature, and in this state have always been prosecuted without a jury. While it may be doubted that the Legislature may delegate to a municipality the right to declare certain acts offenses against the corporation, and offenders thereof constitutionally subject to summary trial, it is very generally held that the transgression of municipal regulations enacted under the police power for the purpose of preserving the health, peace, and good order, and otherwise promoting the general welfare within cities and towns, may be prosecuted without a jury. *McInerney v.*

City of Denver, 17 Colo. 302, 29 Pac. 516; *Byers v. Commonwealth*, 42 Pa. 89; *In re Kinsel* (Kan.) 67 Pac. 634, 56 L. R. A. 475; *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; *Mayor of Monroe v. Meuer*, 35 La. Ann. 1192; *Natal v. Louisiana*, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288; *State v. Conlin*, 27 Vt. 318; *Goddard v. State*, 12 Conn. 448; *Williams v. Augusta*, 4 Ga. 509; *Floyd v. Eatonton*, 14 Ga. 354, 58 Am. Dec. 559; *Hill v. Mayor of Dalton*, 72 Ga. 319. At common law, such disorderly offenses as common swearing, drunkenness, and a vast variety of others, formerly punished by a jury in the court-leet, were summarily tried by a justice of the peace, without a jury. 4 Bl. Com. *281. Offenses of this kind, as well as all others which were summarily triable without a jury in this state in colonial times, are cognizable in a police court, which, under our system of jurisprudence, is the forum in which such petty offenses may be tried.

But it is urged that while one summarily tried and convicted of a petty offense might be punished by fine or imprisonment, either or both, he could not be punished by imprisonment and involuntary servitude. The reply to this argument is obvious; if the offense was of such a character as to be summarily tried without a jury at the time of the adoption of the Constitution, the Legislature might authorize any suitable penalty not antagonistic to the organic law. Whether the penalty by involuntary labor on the public works in the chain gang of Bibb county is violative of any provision of the United States or state Constitution will be discussed in a later part of this opinion.

Another clause of the Constitution is invoked as providing a constitutional guaranty of trial by jury even for petty offenders. "Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel; shall be furnished, on demand, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded; shall have compulsory process to obtain the testimony of his own witnesses; shall be confronted with the witnesses testifying against him, and shall have a public and speedy trial by an impartial jury." Civ. Code 1895, § 5702. It is first to be determined whether the violation of a municipal ordinance is an "offense against the laws of this state." All the authorities concur that it is within the constitutional power of the Legislature to confer upon a municipality authority to make reasonable by-laws, rules, and ordinances necessary for the security, welfare, and convenience of the city, for preserving peace, order, and good government within the same, not repugnant to the Constitution and laws of the land. *Vason v. Augusta*, 38 Ga. 542. There is a clear distinction between offenses against the "laws of the state," directly enacted by the Legis-

lature, and offenses against the ordinances of a city, respecting the method of prosecuting and punishing offenders against the same. *Hood v. Von Glahn*, 88 Ga. 414, 14 S. E. 564. This particular clause first appeared in the Constitution of 1861, and again in the Constitution of 1868. The framers of the Constitution most probably had this distinction in mind, which was made in *Williams v. Augusta*, supra (decided in 1848), when this clause of the Constitution was drafted. If a jury trial was intended for all persons accused of crime or for all offenders of the penal laws, whether of a general character affecting the whole state and directly enacted by the Legislature, or municipal ordinances confined to offenses against the health, peace, and good order of a city, the restrictive words, "offense against the laws of this state," would hardly have been employed. These words should be given their ordinary signification; and, when thus interpreted, the safeguards thereby guaranteed apply to persons charged with a violation of one of the criminal statutes designed to protect the public at large, and not to offenders against the ordinances of a town or city. To extend the language of the Constitution to embrace offenses against a municipality, which were never triable by a jury, would be to attribute to the framers of that instrument an intent and purpose really never entertained by them. Neither of the clauses of the Constitution above quoted extend the right of trial by jury to a person accused of a violation of a municipal ordinance, and such offenders may be summarily tried in a police court without a jury.

2. It does not necessarily follow, because in the prosecution for the violation of an ordinance in a police court the offender is not entitled to a trial by jury, that the offense committed is not a "crime" in the sense in which that word is used in section 1, art. 1, par. 17, of the Constitution, forbidding "slavery or involuntary servitude, save as a punishment for crime after legal conviction thereof." This constitutional prohibition was directed against any attempt to re-establish slavery, which had but recently been abolished, or any system of servitude resembling the same. *Mayor of Monroe v. Meuer*, 35 La. Ann. 1192. The word "crime" was used in its generic sense, and comprehended all penal offenses—offenses against the ordinances of a municipality as well as offenses against the penal laws of the state. In many jurisdictions, a summary proceeding to enforce the penalty for the infraction of an ordinance has been characterized as a "quasi criminal" action. In the early cases of *Williams v. Augusta* and *Floyd v. Eatonton*, supra, language to this effect was used arguendo. But, as was pointed out by Fish, J., in *Barnett v. City of Atlanta*, 109 Ga. 169, 34 S. E. 322, the question presented for determination in those cases was the meaning of the term "criminal cases" as used in that

clause of the Constitution of 1798 which gave to the superior courts exclusive jurisdiction in all criminal cases, except as therein provided; and it was held that reference was had to violations of the public laws of the state, and not to infractions of municipal ordinances. A valid municipal ordinance is a law of local application; an offense against the city results from its violation. *McRae v. Mayor of Americus*, 59 Ga. 170, 27 Am. Rep. 390. It is penal in its nature; otherwise, an offender could not be arrested and taken in custody for its violation. Infractions of municipal ordinances are always termed "petty offenses." An offense against the law is a "crime," in the broad meaning of that word. It is none the less an offense because the offender may constitutionally be tried in a police court without a jury. The clause of the Constitution which is preservative of trial by jury is applicable both to civil and criminal cases. It does not include petty offenses of the character we have discussed; neither does it embrace equity causes, which are always classified as civil actions. Equity causes were not tried by a jury when the Constitution was adopted, and for this reason it has been held that this clause did not render such cases triable by a jury, as other civil actions. Because the right to a jury is denied a suitor in equity affords no sufficient reason why such causes may not be denominated as civil.

Furthermore, it would seem an inevitable conclusion that if imprisonment may in the first instance follow conviction, the proceeding is to be regarded as criminal. This court has in several adjudications treated a trial in a municipal police court as a criminal proceeding. Thus it was held that the decision of the superior court on certiorari, reversing the judgment of a municipal court convicting one of the violation of a municipal ordinance, is not subject to review by the Supreme Court, because the proceeding was criminal and the city stood in the place of the state. *Macon v. Wood*, 109 Ga. 149, 34 S. E. 322; *Hawkinsville v. Ethridge*, 96 Ga. 326, 22 S. E. 985. So, also, it was held that a prosecution for a violation of a municipal ordinance is a "criminal case" within the meaning of the statute requiring that in all criminal cases the bill of exceptions shall be tendered and signed within 20 days from the rendition of the decision excepted to. *Barnett v. Atlanta*, supra. See, also, *Paulk v. Mayor of Sycamore*, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128. The definition of the word "crime" in the Penal Code does not militate with the construction we are giving to that word as used in this clause of the Constitution. The Penal Code of 1895 (section 31) declared a "crime or misdemeanor shall consist in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence," and that (section 2) "every crime,

other than a felony, as therein defined, is a misdemeanor." This definition appertains to the subject-matter of the Penal Code, wherein only offenses against the public laws of the state are considered. Municipal offenses are not treated as violations of public laws, but as infractions of the local laws of the municipality, which have no place in the Penal Code of the state. If, therefore, as we conclude, the violation of a valid municipal ordinance is a "crime" within the purview of this constitutional provision, notwithstanding it may be summarily prosecuted in a police court without a jury, then a sentence to involuntary servitude as a result of legal conviction is not violative of our organic law.

3. Article 1, § 1, par. 3, of the Constitution of Georgia, declares that "no person shall be deprived of life, liberty or property, except by due process of law." Civ. Code 1895, § 5700. Counsel contend that the accused was deprived of the protection afforded by this clause of the Constitution, inasmuch as he was not furnished with a written accusation setting forth the offense with which he was charged, nor tried by a jury of his peers. We have already endeavored to show that the trial of petty offenses in the recorder's court without a jury is the substantial equivalent of a trial at common law before a justice of such offenses. In those trials before a justice of the peace, the offender was not entitled either to a jury or to a written statement of the charge preferred against him. All that was required after his appearance in person was secured was that he should be informed of the charge and should be given an opportunity to defend, that the witnesses be sworn in his presence, and that a record should be made of his conviction. 4 Bl. Com. *283. The common-law courts held that it was necessary to summon the party accused before he was condemned. Blackstone says: "After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath, and then make his conviction of the offender in writing, upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted upon him, or else to levy the penalty incurred by distress and sale of his goods. This is, in general, the method of summary proceedings before a justice." In the case of *King v. Venables*, 2 Ld. Raym. 1405, 1 Strange Rep. 631, it appeared that an order was passed by two justices of the peace, suppressing an alehouse, and that subsequently they passed another order, in which the fact was recited that the defendant had continued in violation of the first order to sell ale, whereby he was committed to jail. No summons appeared to have been issued, prior to this last order, calling upon the defendant to show cause why sentence should not be pronounced upon him for his disobedience of the first order; and the case was tried in his absence. On certiorari, it was held that in

all summary proceedings, of which nature were these orders, a summons was necessary, in order that the offender might be afforded an opportunity to appear and make his defense. But, as a justice is punishable if he enters sentence without first summoning the offender to appear before him, the presumption was that summons had been issued, that the justices had jurisdiction, and had proceeded regularly. The orders were accordingly affirmed. Afterwards, however, it being made to appear to the court by affidavits that the justices had, in point of fact, proceeded in making the last order without summoning Venables, the court granted leave to file an information against them.

In the present case, the question of the validity of the arrest of the accused is not involved. The contention is that the trial was a nullity, not that his arrest was illegal. When he was brought before the recorder's court and informed of the charge against him, he was asked if he was ready for trial, and responded in the affirmative. He was afforded an opportunity to make his defense, and the witnesses appearing against him were sworn and testified in his presence, substantiating the charge of which he was accused. The procedure followed was substantially the same as that pursued at common law before justices of the peace in the summary trial of petty offenders. Hence we cannot say that the accused was not accorded a trial in accordance with due process of law, because of the failure to prefer a written accusation specifically defining the offense with which he is charged. In the case of *Natal v. Louisiana*, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288, the Supreme Court of the United States held that an ordinance passed under legislative authority by the city of New Orleans, prohibiting the keeping of any private market within six squares of any public market of the city, under the penalty of being sentenced, upon summary conviction before a magistrate without a jury, "to pay a fine of \$25 and to be imprisoned for not more than 30 days if the fine is not paid, does not violate the fourteenth amendment of the Constitution of the United States." In delivering the opinion of the court, Mr. Justice Gray remarked (page 623 of 139 U. S., page 637 of 11 Sup. Ct., 35 L. Ed. 288): "The case is too plain for discussion." The test which we have applied in determining whether the procedure in the recorder's court of the city of Macon is in accord with due process of law, within the meaning of our state Constitution, and the conclusion announced by us, must be considered as sufficiently meeting the contention that such procedure does not conform to due process of law, as understood when the fourteenth amendment to the federal Constitution was adopted. So far as summary conviction for a petty offense is concerned, that amendment does not guaranty either a jury trial or the formality of furnishing an offender with a written accusation or statement in writing of the charge brought against him.

4. It is further contended that the penalty imposed of labor in Bibb county chain gang was a denial of due process of law, because of the nature of the penalty inflicted. For a person lawfully to be made to suffer punishment as a lawbreaker, there must not only be process of law, but due process. Process which may be sufficient to authorize punishment for petty offenses by fine, imprisonment for a reasonable time in the city barracks (or even to work upon the public works of a city, if there be in the charter any authority to impose such a sentence as confinement at labor under municipal control), will not suffice for sending a person to a county chain gang for several months. When the punishment imposed is the same, or of the same nature, as that inflicted upon offenders against the laws of the state, and to be suffered in company with them, due process requires a trial to some extent analogous to the trial of persons accused of misdemeanors against the state. To call the offense "petty" for the purpose of trial, but as serious as a violation of a state law for the purpose of punishment, is inconsistent. If the punishment is of the same character as that imposed for a state offense, the infraction of the municipal ordinance cannot be called a "petty" offense in comparison with one against the state. A sentence of a city recorder, without a right to a trial by a jury and with no more formal procedure than an entry on a docket, which subjects the prisoner to work in a county chain gang for three months, along with persons duly convicted of the violation of state laws, is not due process. It is declared in Pen. Code 1895, § 1036, that all felonies, save those therein enumerated, "shall be punished by imprisonment and labor in the penitentiary for the terms set forth in the several sections of this Code prescribing the punishment of such offenses; but on the recommendation of the jury trying the case, when such recommendation is approved by the judge presiding on the trial, said crimes shall be punished as misdemeanors. If the judge trying the case sees proper, he may, in his punishment, reduce such felonies to misdemeanors." Even if those regularly convicted of felonies, but who are left in the custody of the county authorities, be kept separately, nevertheless those falling within the provisions of the Penal Code above referred to are detained in the county chain gang. If a person who is convicted of some petty municipal offense can, after trial before the recorder, be sent to the county chain gang, he would not only be sentenced to a punishment similar in its nature and character to that imposed for misdemeanors against the state, but he would be placed in direct association with, and be confined along with, felons whose punishments have been reduced under recommendation. It cannot be that such a sentence can be imposed in Georgia by one man alone, trying a criminal case. If the sentence can be for 3 months in the county chain gang,

it may be for 6 or 12 months, if the Legislature should permit it. In fact, where would be the limit of legislative power to prescribe the extent of punishment to be meted out on a sentence of a recorder? It is not a question of the person who may be subjected to such a punishment. It is a question of whether our organic law has intrusted such arbitrary power of punishment to be imposed, even upon the humblest citizen, by a municipal recorder sitting alone. The intrusting of such power of punishment for so-called petty offenses to a single man is not consonant with the spirit of our institutions or with our Constitution, which declares that "no person shall be deprived of life, liberty, or property without due process of law." Process which tries a man without formality for a "petty offense," and punishes him in the same manner as, and along with, criminals violating the laws of the state, with no right to a jury trial, no record save the entries upon a recorder's docket, and upon his judgment alone, is not due process. We do not hold that the recorder's court of the city of Macon is illegal, or that the recorder cannot proceed to try offenders against the municipal ordinances and pass such sentences as the law authorizes; but what we hold is that a sentence which requires the offender to be confined at labor in the county chain gang along with violaters of the state laws does not furnish constitutional authority for such confinement, and that the provision of the charter of the city of Macon which authorizes the confinement of offenders against municipal ordinances in the county chain gang for not more than six months is unconstitutional.

The fact, however, that the accused has been illegally sentenced, will not result in his absolute discharge from custody where a legal sentence can be imposed. Direction is given that the applicant be not confined in the county chain gang, but be taken therefrom and carried before the recorder to be sentenced in accordance with law. *Littlejohn v. Stella*, 128 Ga. 427, 431, 51 S. E. 890, and citations; *Coleman v. Nelms*, 119 Ga. 807, 46 S. E. 451.

Judgment reversed, with direction. All the Justices concur.

(124 Ga. 437)

HOUSTON et al. v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. PUBLIC LANDS — GRANTS UNDER HEAD-RIGHT LAW — CONCLUSIVENESS.

A grant under the "headright laws," which is apparently issued conformably with the law, is not open to collateral attack.

2. EVIDENCE — BEST AND SECONDARY.

When it is shown that a muniment of title cannot be produced, parol evidence as to its contents is admissible, and has the same probative value as original evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 582-584.]

3. FISH — OYSTER BEDS — TRESPASS — OWNERSHIP.

Pen. Code 1895, § 588, makes it a misdemeanor for a person, without authority from the owner of a private bed in which oysters are planted, to take or catch any oysters therein. Relatively to a trespasser who is indicted under this section the ownership of the oysters is immaterial.

4. SAME — EVIDENCE.

The evidence authorized the verdict, which is approved by the trial judge.

(Syllabus by the Court.)

Error from Superior Court, Bryan County; P. E. Seabrook, Judge.

Cuffy Houston and others were convicted of stealing oysters, and bring error. Affirmed.

This case comes to this court upon a writ of error sued out in behalf of Cuffy Houston and Ned Maxwell to review the judgment of the court below overruling their motion for a new trial. They were tried upon an indictment framed under the Penal Code of 1895, § 588, charging them jointly with the commission of a misdemeanor, in that, on a day named, they did "take from the private bed of Silas B. Rogers, the owner thereof, oysters of the value of \$1.50, without authority from said owner," contrary to the laws of this state, etc. Both were convicted. Aside from the general grounds that their conviction was contrary to law and the evidence, complaint is made in the motion for a new trial that the presiding judge erred in refusing to direct a verdict of not guilty, on motion of their counsel made after the conclusion of the evidence for the prosecution, and the verdict of the jury is specifically assailed on the grounds: (1) That there was no evidence introduced by the state in support of the allegation in the indictment that the oysters taken were the property of Silas B. Rogers, but, on the contrary, the ownership, if any, was proved to be in the Belvedere Oyster Company, a copartnership consisting of Ira G. Rogers, Edward Rogers, and Silas B. Rogers; and (2) that "the state failed to show any title in the said Silas B. Rogers to the salt marsh where it is alleged the oysters were taken, no complete chain of title having been shown." The motion for a new trial also contained an assignment of error on the admission in evidence of a grant from the state to Philip D. Cory, which the movants characterized as a grant "conveying a tract of salt marsh in which there was admittedly not a foot of high or habitable land capable of being cultivated, and which was admittedly submerged entirely by salt water every high tide, recurring twice each 24 hours." The objection urged against the admission of this grant was that "such lands were not subject to be granted by the state under any laws thereof, and any grant purporting to convey such lands was void, as being contrary to law, without authority of law, contrary to the policy of the law, and therefore constructively fraudulent; and such grant therefore could not operate to destroy the public right of

fishery in such lands." The grant was dated August 28, 1890, and referred to an annexed plat of land, which was described in the grant as a "tract or parcel of land containing nine hundred and seventy-six acres, situate, lying and being in the county of Bryan," and having certain designated boundaries. A map of this tract, showing its shape and boundaries according to a survey made August 15, 1890, and duly recorded, was also introduced by the state. Across that portion of the map which represented the tract surveyed were written the words, "Philip D. Cory, 976 acres marsh lands."

Geo. W. Beckett and N. J. Norman, for plaintiffs in error. W. B. Stubbs and Livingston Kenan, Sol. Gen., for the State.

EVANS, J. (after stating the facts). 1. The grant to Cory was not open to collateral attack unless it was patent on its face that it was void or issued without authority of law. Civ. Code 1895, § 3220; Hilliard v. Connelly, 7 Ga. 172. This grant was issued under the headright system, which counsel for the plaintiffs in error contends is not applicable to marsh lands, but only to habitable and cultivatable lands. As supporting this view, we are referred to the various headright laws. See Prince's Dig. 517, 521, et seq.; Cobb's Dig. 660, 680. The conclusion sought to be drawn is that, if this contention be sound, then the grant issued without authority of law and should have been excluded from evidence. There is nothing in the grant to indicate that the land covered thereby is not inhabitable or cultivatable. The grant refers to an attached plat on which the words "marsh lands" are written; but we cannot say that the grant was not issued in accordance with law; nothing else appearing therefrom to indicate that the land was not such as could be legally granted. On its face the grant is perfectly regular, and apparently it was issued conformably to law. Upon the abolition of the land court the ordinary was vested with authority to discharge all the duties, which, under the various headright laws, devolved upon the land court. When the application for the grant was before the ordinary, his decision that the land could be lawfully granted was judicial in its nature, and it is entitled to all of the presumptions which usually attach to judgments rendered by a court of competent jurisdiction. So far as the papers themselves disclose, it may be that, while the bulk of the land was marshy, there was in this large tract more or less high ground, which rendered it habitable and suitable for settlement and improvement. Hence, if we concede, for the purposes of the argument, that land unfit for settlement and cultivation does not come within the operation of the headright laws, and that a fraud may have been perpetrated by the applicant for the grant in representing that the marsh lands

were cultivatable, in whole or in part, or could be made so, yet the fraudulent procurement of the grant would not authorize a collateral attack upon it. Only in a direct proceeding to which the state was a party could it be set aside on the ground that it was improvidently granted or was procured by fraud. Calhoun v. Cawley, 104 Ga. 335, 30 S. E. 773. Even if the grant was not authorized by law, it is not open to collateral attack; its illegality not appearing on its face. Vickery v. Scott, 20 Ga. 795. It follows that the grant was properly admitted in evidence.

2. Counsel for the plaintiffs in error further insists that the evidence was insufficient to sustain their conviction; the state having failed to show title to the land in Silas B. Rogers. The grant from the state to Cory was introduced, and also a deed to the land from Cory to George L. Appleton. The state further proved, by parol evidence, that Appleton had conveyed the land by deed to Silas B. Rogers, but that this deed was not accessible; it having been either lost or misplaced by him. There was no objection to this secondary evidence of title from Appleton to Rogers. When it is shown that a muniment of title cannot be produced, parol evidence as to its contents is admissible and has the same probative value as original evidence. It appeared by competent evidence that the title to the land upon which the alleged trespass was committed was in the person named in the indictment as the owner of the private bed from which the oysters were taken.

3. The further contention is made that there was a variance between the allegations of the indictment and the proof with respect to the ownership of the oysters. The proof was that the prosecutor, Silas B. Rogers, and his two sons had formed a partnership and were conducting business under the firm name of the Belvedere Oyster Company, and that they were jointly interested in the cultivation and sale of oysters which had been planted in the bed upon which the accused were charged with having committed a trespass. Pen. Code 1895, § 588, makes it a misdemeanor for a person, without authority from the owner of a private bed in which oysters are planted, to take or catch any oysters therein. Relatively to a trespasser who is indicted under this section, the ownership of the oysters is immaterial. The statute is designed to protect the owner of the land where the oysters are being cultivated; and, when it appears that oysters are wrongfully taken from a private bed of which he is the owner, the offense is established. The indictment in this case did not undertake to allege the ownership of the oysters, but only that they were taken from the private bed of Silas B. Rogers, the owner thereof, without his authority.

4. The evidence authorized a finding that

the accused wrongfully and knowingly entered upon the lands of the prosecutor and took therefrom oysters which had been planted in a private bed belonging to him. The finding of the jury was approved by the trial judge, and we will not disturb the verdict on the ground that it was contrary to the evidence.

Judgment affirmed. All the Justices concurring.

(124 Ga. 448)

INGRAM v. STATE

(Supreme Court of Georgia. Dec. 21, 1905.)

CRIMINAL LAW—FORMER JEOPARDY.

The judge of a city court, to which an indictment charging the accused with a misdemeanor has been by the superior court transferred for trial, has no right, without the consent of the defendant, after the case has been submitted to the jury and the evidence for the state introduced, to suspend the trial, withdraw the case from the jury, and require the accused to give bond for his appearance at the next term of the superior court of the county, or, in default thereof, to be committed to jail, to answer to the charge of a felony; and if he does so, the accused, having been placed in jeopardy, is entitled to an order for his final discharge as upon a verdict of acquittal, upon a motion duly made therefor in such city court.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Jonas Ingram was charged with crime, and brings error. Reversed.

R. H. Lewis, for plaintiff in error. R. W. Moore, Sol., for the State.

FISH, C. J. At the September term, 1904, of Hancock superior court, the grand jury returned an indictment against Jonas Ingram, charging him with having committed the offense of adultery and fornication with one Carry Barnes; he being a married man, and she an unmarried woman. The indictment was transferred to the city court of Sparta, in which court the case came on to be tried at the October term, 1905, thereof. After the jury had been impaneled and sworn, and the state had introduced its evidence and closed, the court, being of opinion "that the evidence developed that a felony and not a misdemeanor had been committed" by the accused, over the objection of the defendant, ordered that the trial be suspended and the case be withdrawn from the consideration of the jury, and that the accused be required to give bond in a designated sum for his appearance at the next term of the superior court of the county, in default of which he be committed to jail to answer to the charge of rape. After this the accused made a motion for his discharge, upon the ground that he had been placed in jeopardy, which motion was overruled by the court, whereupon he accepted.

Where the indictment or accusation is not fatally defective, the law recognizes two reasons only as justifying the discharge of the

jury before they have agreed upon a verdict and legally returned it into court, viz., the prisoner's consent, and necessity in some of its various forms, one of which is mistrial. *Lancton v. State*, 14 Ga. 426. And where a criminal case has been submitted to a jury upon a valid indictment, and is withdrawn from their consideration by the judge for any reason other than the two above named, it is equivalent to an acquittal of the accused. *Reynolds v. State*, 3 Ga. 53. The present case should therefore be considered as if the jury, upon the trial in the city court, had acquitted the defendant and he should subsequently have been indicted for rape and placed upon trial in the superior court and a plea of former acquittal filed. There is some confusion in the decisions of this court in reference to the test for determining the question of former jeopardy. See *Gully v. State*, 116 Ga. 527, 42 S. E. 790, wherein the cases are collected and commented on. In the early case of *Roberts v. State*, 14 Ga. 8, the court said: "To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally, and perhaps more accurately expressed, viz., that the plea of *autrefois acquit* or *convict* is sufficient, whenever the proof shows the second case to be the same transaction with the first." As was said in *Gully's Case*, *supra*, this is the rule adopted and generally followed in this state, and was applied in the following cases: *Holt v. State*, 38 Ga. 187; *Jones v. State*, 55 Ga. 625; *Buhler v. State*, 64 Ga. 504; *Goode v. State*, 70 Ga. 752; *Knight v. State*, 73 Ga. 804; *Knox v. State*, 89 Ga. 259, 15 S. E. 308. In *Holt's Case*, *supra*, he and six others were indicted for the offense of assault with intent to murder, the indictment charging them with shooting at a named person, at a stated time and place, with intent to murder her. Upon failure of trial under demand, the accused were discharged at a subsequent term. After this *Holt* and five of the others were indicted for riot, this last indictment charging them with having, at the same time and place, feloniously and maliciously shot a loaded pistol at the same person named in the former indictment, and with striking and beating her. *Holt* filed a plea of former acquittal, which was stricken on demurrer. This court held that the striking of the plea was error. In delivering the opinion of the court, *Warner, J.*, used this language: "If the state thinks proper, by its prosecuting officer, to indict a party for an assault with intent to murder, upon a given state of facts, and upon the trial thereof the defendant is acquitted, can the state then prefer another indictment, alleging precisely the same state of facts [with the exception of the malicious intent], and put the party again upon his trial for the same criminal acts, by altering the name of the offense? The state having made its election as to the nature and character of the offense for which it will prosecute the party

upon a given state of facts, if, upon the trial, the defendant is acquitted, ought not the state to be bound by its election, and not be permitted again to indict and prosecute the defendant for the same criminal acts, under the name of another offense? The question to be answered is, has the defendant been arraigned and put upon his trial upon a sufficient legal accusation, for the same criminal acts with which he is charged the second time? If he has, then he has been put in jeopardy, within the true intent and meaning of the Constitution, and cannot be tried the second time for the same criminal acts, under the same, or a different named offense. To hold otherwise would be to hold that the provision of the Constitution which declares, 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,' for all practical purposes, to be a mere shadow and delusion. These views are in accordance with the ruling of this court in *Roberts & Copenhagen v. State*, 14 Ga. 8."

Applying the same transaction test, the accused in the present case has been arraigned and put upon trial in the city court, upon a good indictment, for the same criminal act for which he was bound over to answer in the superior court, and the judge of the city court erred in not granting the motion for his discharge. Section 27 of the act establishing the city court of Sparta (Acts 1905, p. 353) provides: "If upon the trial of any case it shall appear to the judge that the evidence makes the case a felony against the accused, he shall thereupon suspend the trial and commit or ball over the defendant to the next superior court as in preliminary examination." While this language is sufficiently broad to cover a case being tried under an indictment, as well as one being tried under an accusation, we think it clear that if construed to apply to such a case, this provision of the act would be violative of the provision of the Constitution declaring that no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her motion for a new trial after conviction, or in case of a mistrial. Counsel for the state cite *Cunningham v. State*, 80 Ga. 4, 5 S. E. 251; but the ruling there made has no application here. There the accused was brought before a county court and an accusation preferred against him, charging a misdemeanor. Thereupon he waived indictment by the grand jury and demanded a jury trial in the county court; and it was held that "this amounted to an agreement to be tried under the provisions of the act regulating trials in [that] court, including the right of the judge of that court, if at any time during the progress of the trial he should be of the opinion that the evidence produced before him made the offense of a felony instead of a misdemeanor, to stop the trial at once and commit the defendant to jail, or require him to give bond for his appear-

ance at the next term of the superior court." But in the case before us the accused did not waive indictment by the grand jury and consent to be tried in the city court. He was already indicted and was before the city court for trial under the indictment. His trial in the city court was not a matter of choice with him, but of compulsion. His consent to be tried there was neither given nor invoked. The shield of the constitutional provision in question was over him, and could not be removed without his consent. Besides, the time for a preliminary investigation has passed, for the grand jury had already investigated the case and returned an indictment, and the judge of the city court had no more power to resolve the trial into a preliminary one than the judge of the superior court would have had, if the case had been on trial, under the indictment, in that court. In *State v. Blevins*, 134 Ala. 213, 32 South. 637, 92 Am. St. Rep. 22, the accused was placed on trial in the inferior criminal court of Mobile, under an affidavit and warrant charging him with the offense of assault and battery, and after the evidence was all in and the argument concluded, the judge, being of opinion from the evidence that the offense of assault with intent to ravish had been committed by the accused, ordered that unless he should enter into a recognizance to appear before a higher named court to answer the latter charge, he should be committed to jail until legally discharged. The accused sued out a writ of habeas corpus and was discharged, and the state excepted. The Supreme Court of Alabama held: "If the trial of the accused for a misdemeanor, upon issue joined on a plea of not guilty, proceeds to the conclusion of the evidence and reaches the stage of calling for a judgment of the court on the issue as made, he is placed in jeopardy, and the court has no jurisdiction to bind him over to a higher tribunal to answer for a greater offense for the same act."

It follows that the judge of the city court erred in refusing to sustain the motion for the discharge of the accused, and the judgment is therefore reversed. All the Justices concurring.

(124 Ga. 452)

MILLINDER v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. MASTER AND SERVANT — CONTRACT OF HIRING—FALSE PRETENSES—EVIDENCE.

It is not necessary in an indictment under the act of 1903 (Acts 1903, p. 90), making it illegal for a person to procure money or other thing of value on a contract to perform services with intent to defraud, to allege that the term of service had expired before the indictment was preferred. Proof of a failure to perform the services contracted for, and proof of failure to return the money or other thing of value advanced, even during the term of service provided for in the contract, is sufficient, under the act, to establish prima facie the intent to defraud which the act punishes.

2. SAME—LOSS TO HIRER.

Loss or damage to the hirer is an essential ingredient to the offense defined in the act above referred to.

3. SAME—EVIDENCE.

The evidence discloses that there was no loss or damage to the hirer, the verdict was unauthorized, and it was error to refuse to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Dawson; A. M. Raines, Judge.

Aaron Millinder was convicted of contracting to perform services with intent to defraud, and brings error. Reversed.

Aaron Millinder was convicted on an accusation charging him with cheating and swindling, under the act of 1903 (Acts 1903, p. 90). There was demurrer to the accusation, upon the ground that the time in which the labor contracted for was to be performed had not expired at the date of the accusation, and that the time in which the money procured by reason of the contract might be repaid, as provided in the act, had not expired. This demurrer was overruled. After conviction, a motion for a new trial upon the general grounds was made and overruled.

M. C. Edwards, for plaintiff in error. M. J. Yeomans, Sol., for the State.

COBB, P. J. There was no merit in the demurrer to the accusation. The offense with which the defendant was charged was the procurement of money and other things of value by entering into a contract to perform labor as a cropper which he had no intention to perform. The act provides that satisfactory proof of the contract, the procuring of money, the failure to perform the services so contracted for, or failure to return the money so advanced, with interest thereon, at the time said labor was to be performed, etc., shall be deemed presumptive evidence of the intent to defraud. The failure to perform the services contracted for is a breach of the contract which may occur before the contract expires. It may occur the first day the contract begins to run. It follows that the time when the money procured is to be returned is when there has been a failure to perform the services contracted for, or, in other words, when the contract is broken.

2. The evidence introduced by the state failed to show that the landlord, Bridges, suffered any damage or loss by the breach of the contract upon the part of the accused. Bridges testified: "I cannot say how much I was damaged. I cannot say that I was damaged any." The evidence further shows that, while the amount advanced the accused in supplies, fertilizers, etc., amounted to something over \$200, his part of the crop was worth more than \$500. Loss by or damage to the person contracted with, and from whom money or other thing of value is pro-

cured, is a necessary element in the offense with which this defendant is charged.

The evidence did not warrant the verdict; and the judgment overruling the motion for a new trial is reversed. All the Justices concurring.

(124 Ga. 453)

VINSON v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

CRIMINAL LAW — INSTRUCTIONS — STATEMENT OF ACCUSED.

"It is the duty of the presiding judge to instruct the jury substantially in the terms of the statute touching the prisoner's statement, when he makes a statement, and in no case should this be omitted." The failure to so charge will be cause for a new trial, except where it is manifest from the record that the accused was not injured thereby. This did not appear in the present case. *McCord v. State*, 10 S. E. 437, 83 Ga. 535 (7); *Vaughn v. State*, 16 S. E. 64, 88 Ga. 731 (4); *Doster v. State*, 18 S. E. 997, 93 Ga. 43 (4).

(Syllabus by the Court.)

Error from Superior Court, Polk County; Moses Wright, Judge.

J. W. Vinson was convicted of crime, and brings error. Reversed.

C. G. Janes and Bunn & Trawick, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

CANDLER, J. Judgment reversed. All the Justices concurring.

(124 Ga. 454)

RIDGLEY v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. ASSAULT AND BATTERY — UNLAWFULLY SHOOTING AT ANOTHER—EVIDENCE.

Under the uncontradicted evidence, the accused was guilty of the offense of unlawfully shooting at another, if not of the graver offense of assault with intent to murder, and the verdict of guilty of the former offense was rightly upheld by the trial court.

2. SAME—INSTRUCTIONS.

The contention of the accused that the shooting was caused by misfortune or accident was not sustained by the evidence introduced in his behalf, nor would the jury have been warranted in finding him guilty of no higher offense than that of a bare assault and battery. Accordingly it was not incumbent on the presiding judge to present this theory of the defense in his charge to the jury, or to instruct them as to the law relating to a mere assault and battery.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; J. H. Martin, Judge.

Gordon Ridgley was convicted of unlawfully shooting at another, and brings error. Affirmed.

M. B. Cannon and John R. Cooper, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 455)

HAWKS v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

The verdict was authorized by the evidence, and, there being no error of law complained of, the trial judge did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Madison County; H. M. Holden, Judge.

Ellis Hawks was convicted of crime, and brings error. Affirmed.

J. F. L. Bond and J. E. Gordon, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 456)

STEVENS v. McCURDY.

(Supreme Court of Georgia. Dec. 21, 1905.)

MORTGAGES—OCCUPANCY OF PREMISES BY THIRD PERSON—RENTS—RIGHTS OF MORTGAGEE.

A. was the owner of a lot upon which was located a storehouse, in which he was engaged in business as a merchant. He executed a security deed conveying the lot to B. After default in the payment of the debt that the deed was given to secure, A. was adjudged a bankrupt, and a trustee in bankruptcy took possession of the stock of goods and sold the same to C. B. did not prove his debt in the bankrupt court, but brought suit in the state court, obtained a special lien upon the land, and sold the land. The proceeds from the sale were not sufficient to pay the debt. The purchaser of the stock of goods from the trustee in bankruptcy went into possession of the storehouse, and remained in possession until after the sheriff's sale. The trustee in bankruptcy had made no attempt to administer the land as a part of the assets of the bankrupt's estate. After the discharge of the trustee in bankruptcy, B. brought suit against the purchaser of the goods for rent of the storehouse from the time that he entered into possession until he surrendered possession to the purchaser at the sheriff's sale. *Held*, that a demurrer, on the ground that the petition set forth no cause of action, was properly sustained.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 31-40; vol. 35, Cent. Dig. Mortgages, §§ 513-516.]

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by John F. Stevens, executor of E. M. Baker, against J. F. McCurdy. Judgment for defendant, and plaintiff brings error. Affirmed.

John F. Stevens, as executor of the estate of Mrs. E. M. Baker, brought suit against J. F. McCurdy, and alleged in substance: The testatrix made a loan of \$2,000 to one J. A. Campbell, and to secure its payment Campbell executed a security deed to her, conveying a lot of land in De Kalb county. Campbell remained in possession of

the premises, conducting thereon a general merchandise business, and after default in the payment of his note was adjudged a bankrupt. A trustee in bankruptcy took charge of Campbell's effects, and on December 22, 1902, sold the stock of goods on the premises to McCurdy. On the same day McCurdy took possession of the goods and of the storehouse, which stood upon the premises, and occupied the storehouse until November 3, 1903. The plaintiff did not prove his claim under the note against Campbell in the bankrupt court, but sued in the state court, and obtained a special judgment subjecting the land covered by the deed to the payment of the note. On November 3, 1903, the land was sold, under this judgment, and, after the payment of costs, the proceeds were applied to the debt, leaving a large balance still due. On March 1, 1903, plaintiff demanded rent of McCurdy for the storehouse occupied by him, and possession of the premises, both of which were refused. The trustee in bankruptcy did not attempt to administer the real estate above described, and prior to this suit was discharged. Whereupon the plaintiff brings his action against McCurdy for rent of the storehouse, at the rate of \$15 per month, which he avers is a reasonable rent, from December 22, 1902, the date of the defendant's entry to March 1, 1903, the date of demand by plaintiff, and for double rent from March 1, 1903, to November 3, 1903, the date of the sale of the land. The defendant demurred, on the ground that the petition set forth no cause of action, and also on special grounds. The demurrer was sustained, and the plaintiff excepted.

Green, Tilson & McKinney, for plaintiff in error. J. E. & L. F. McClelland, for defendant in error.

COBB, P. J. To maintain an action for rents there must exist between the parties the relation of landlord and tenant. In the absence of an express contract creating this relation, an obligation to pay rent is generally implied "when title is shown in the plaintiff and occupation by the defendant"; "but if the entry was not under the plaintiff, or if possession is adverse to him, no such implication arises." Civ. Code 1895, § 3116. In the present case there was no express contract of rent, and the relation of landlord and tenant must arise under the above rule of law, or the action will fail. An absolute deed, although made to secure a debt, passes title to the grantee. The plaintiff held such a deed to the premises in dispute, and so establishes the first requisite towards maintaining his action. Occupation of the premises by the defendant was also shown; and so the sole question in the case is whether or not the entry of the defendant as shown by plaintiff's petition was not under plaintiff, or possession was adverse to plaintiff, in

which case the obligation to pay rent will not arise.

It is claimed that a deed to secure a debt was in effect a common-law mortgage, in that both passed title, and both gave the grantor an equity of redemption. The English courts have held a mortgagee entitled to rents from a lessee of the mortgagor under a lease executed after the mortgage, upon notice to the lessee by the mortgagee of his claim. This is put upon the ground that a mortgagor holds the premises like a tenant at will; that a mortgagee can sue in ejectment and recover mesne profits, and would therefore be entitled to sue in assumpsit for the rents; and that a lessee of the mortgagor is in fact a lessee of the mortgagee; the mortgagor acting as agent of the mortgagee, and upon notice to the lessee the mortgagee would be entitled to rents for past occupation, if unpaid at time of notice, as well as rents accruing in the future. *Pope v. Biggs*, 32 Revised Reports, 667, and cases cited. We do not think it was ever contemplated that the grantor in a security deed should occupy such a position as that outlined above. Until default in the payment due by him, the grantor is entitled to the possession of the premises. It is true that this court has held in numerous cases that an action of ejectment may be brought upon a security deed by the grantee against the grantor, after default, but this may be successfully defended by a tender of the amount due (*Biggers v. Bird*, 55 Ga. 653); and in such a suit in ejectment mesne profits are not recoverable save during the pendency of the action, and then only to be applied in payment of the debt. *Polhill v. Brown*, 84 Ga. 343, 10 S. E. 921.

It should be borne in mind that the plaintiff in this case did not sue in ejectment, but brought a statutory proceeding, obtaining a special judgment subjecting the land in question to its payment. A separate suit for rent by the grantee against the grantor could not be maintained, even after default, as the relation of landlord and tenant did not exist between them. "One who makes to a creditor, for the purpose of securing a debt, a deed to land, but retains possession of the land, does not thereby become the 'tenant' either of such creditor or his vendee, and is not subject at the instance of the latter to be ejected from the land as a tenant holding over." *Ray v. Boyd*, 96 Ga. 808, 22 S. E. 916. But it is said that, in the present case, recovery of rent is sought, not against the grantor, but against a tenant of the grantor, after default by the latter, which entitles the grantee to possession of the land. It is readily seen that while the relation of landlord and tenant may not exist between the grantor in a security deed and his grantee after default (because the entry of the grantor was not under the grantee), such a relation may exist between the grantee and a tenant of the grantor, whose entry after de-

fault by the grantor was an entry under the grantee. If the tenant of the grantor entered before the latter's default notice by the grantee to the tenant, after the grantor's default, might possibly operate as if the tenant had attorned to him. *Morrow v. Sawyer*, 82 Ga. 226, 8 S. E. 51. So, if *McCurdy*, the defendant, was a tenant of the grantor in the security deed under which the plaintiff, as grantee therein, claims rent, he might have become a tenant of the grantee upon notice by the latter to him of his claim. *Campbell*, the grantor in the security deed, was adjudged a bankrupt after default in the payment of the debt to secure which the deed was given. If *Campbell* had put *McCurdy* in possession, he might possibly be looked upon as an agent of the grantee in putting *McCurdy* into possession of the premises; or, as the trustee in bankruptcy stood in *Campbell's* place, any tenant put in by such trustee, upon notice from the grantee might be liable to him for rent. The trustee sold the stock of merchandise in the store upon the premises in dispute to *McCurdy*. *McCurdy* took possession of the stock of merchandise, and remained in possession of the premises. If this entry was such an entry as would entitle the trustee to maintain an action for rent, the plaintiff might maintain such an action. For after notice to *McCurdy* by the grantee, treating this as an attornment, *McCurdy* would become the tenant of the plaintiff. But *McCurdy* did not enter as a tenant either under *Campbell* or the trustee in bankruptcy. His entry was under a license to take possession of the stock of merchandise. By remaining in possession of the premises, he abused his license, and became a trespasser ab initio. *Markham v. Brown*, 37 Ga. 281, 92 Am. Dec. 73. As a trespasser, no action for rent could lie against him.

The demurrer to the petition was therefore properly sustained, and the judgment of the court below is accordingly affirmed. All the Justices concurring.

(124 Ga. 472)

FRIEDMAN v. SEABOARD AIR LINE RY. CO.

(Supreme Court of Georgia. Dec. 21, 1905.)

RAILROADS—ACTIONS—VENUE.

A suit for damages against a railway company for the breach of a contract of affreightment may, under the provisions of Civ. Code 1895, § 2334, be brought either in the county in which the contract was entered into, or in the county wherein the carrier undertook to render full performance by delivery of the shipment in good order to the consignor or the person designated by him to receive the same.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by Samuel Friedman against the Seaboard Air Line Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

A suit for damages was brought by Samuel Friedman against the Seaboard Air Line Railway Company, the allegations of fact upon which the plaintiff relied for a recovery being, in brief, as follows: On January 22, 1904, plaintiff shipped from Dublin, in this state, via the Macon, Dublin & Savannah Railroad, to Vidalia, the point at which that road connects with the defendant's line of railway, a car load of cattle, consigned to plaintiff at Savannah, Chatham county, Ga. The defendant received this car of cattle in the afternoon of January 22d, in good order, from the Macon, Dublin & Savannah Railroad Company, and then and there undertook to ship and transport the same to Savannah with reasonable dispatch and care, and there deliver the cattle to plaintiff in good order. In the ordinary course of transit, if defendant had performed its duty, the cattle would have been delivered to plaintiff not later than Saturday morning, January 23d; but the defendant failed to perform its duty to transport the cattle within a reasonable time over its route from Vidalia to Savannah, and contrary to its legal duty, and in violation of its contract as a common carrier, permitted the cattle to remain in the car from the time it received the same till Sunday morning, January 24th, although the distance from Vidalia to Savannah is only about 80 miles. In consequence of the cattle being in transit for something like 41 hours, instead of 12 to 16 hours, within which time they should have been carried, 7 head were missing. Plaintiff was advised on Sunday morning of the arrival of the car, and went to inspect the cattle. He found them in bad condition, as a result of the acts of the defendant, and refused to accept the shipment, but was prevailed on by the company's agent to do so, upon his assurance that the defendant would pay the damages. On opening the car, plaintiff found that, "in addition to the seven head that had been destroyed," the other cattle had sustained injuries caused by bruises and by loss of rest, feed, and water. Some of them died, some had fever, and others were so badly injured and bruised as to necessitate feeding and pasturing them before putting them on the market. Though the car arrived in Savannah about midnight on Saturday, the defendant permitted the cattle to remain in the car till late Sunday morning, notwithstanding some of them were down in the car, and unable to get up, and were being trampled on and bruised and injured. The defendant company acted in bad faith in refusing to pay his claim for damages after having induced him to pay the freight and accept the shipment upon the assurance that the damages would be paid. The defendant demurred to the petition, one of the grounds of the demurrer being that it appeared from the plaintiff's pleadings that the alleged cause of action did not arise in Chatham county, in which county the suit was brought, but arose in the county of Montgomery, and

therefore jurisdiction over the cause of action, if one existed, was lodged exclusively in the superior court of Montgomery county. The plaintiff having announced his election to treat the action as one arising *ex contractu*, the court passed upon the demurrer, and sustained that ground of it which invoked a decision as to the jurisdiction of the court to entertain the suit. To this judgment dismissing the action the plaintiff excepts.

W. B. Stubbs and Osborne & Lawrence, for plaintiff in error. J. Randolph Anderson, for defendant in error.

EVANS, J. (after stating the facts). The allegations of the petition sufficiently set out a contract and a breach thereof, as against a demurrer raising the sole question of venue. The plaintiff construed his own petition to state a cause of action arising *ex contractu*, and the court, adopting this construction, held that the defendant was not suable in Chatham county, and dismissed the action. Civ. Code 1895, § 2334, provides that "all railroad companies shall be sued in the county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, its officers, agents or employes, for the purpose of recovering damages for such injuries; and also on all contracts made or to be performed in the county where suit is brought; any judgment rendered in any other county than the one in which the cause so originated shall be utterly void. But if the cause of action arises in a county where the railroad company liable to suit has no agent, then suit may be brought in the county of the residence of such company." By the terms of this section, a railroad company must be sued in the county where the tort was committed, if the company has an agent in that county. *So. Ry. Co. v. Johnson*, 96 Ga. 655, 23 S. E. 836; *Coakley v. So. R. Co.*, 120 Ga. 960, 48 S. E. 372. If the action is *ex contractu*, then the venue is either the county where the contract was made or the county where the final act of execution of the contract was to be performed. Unless we give this meaning to the words of the statute, "contracts made or to be performed," they will not receive their ordinary signification.

No question as to the meaning of so much of this section as relates to the venue of actions arising *ex contractu* seems to have been heretofore raised in this court. We have not been cited to a single case where a construction of this part of section 2334 was invoked. The case of *Mitchell v. Georgia Railroad*, reported in 68 Ga. 644, was a suit against the railroad company on a written contract for the shipment of live stock from Atlanta, in Fulton county, Ga., to Union Point, a station located in Greene county. The suit was brought in Greene county, where full performance of the contract was to be completed by delivery of the shipment to the consignee. The plaintiff offered an amendment to the petition, which was dis-

allowed; and on an exception to the ruling of the trial judge, refusing the amendment, Speer, J., on page 648, said: "Railroad companies are liable to be sued, not only in any county where the cause of action originated, but also on all contracts made or to be performed in the county where the suit is brought. The suit upon the written contract or upon the cause of action arising therefrom, as the contract was to be performed in Greene county, was properly brought in that county." This decision was rendered before the amending act of 1892, but the only change made in the law by that act was to strike out the provision that railroad companies should be "liable" to suit in certain jurisdictions, and to introduce in its stead the requirement that railroad companies "shall" be sued, if at all, only in those counties wherein the filing of an action is expressly authorized. In other words, while under the old law the right to sue in certain designated jurisdictions was permissive, the amending act made the choice of venue compulsory. We hold the clear import of Civ. Code 1895, § 2334, as applied to suits against railroad companies for breach of contract, to be that suit may be brought either in the county where the contract was entered into, or in the county where the final act of performance under the contract was to be consummated.

The petition alleged that the contract entered into by the railroad company was an undertaking to transport the cattle from Vidalia to Savannah, in Chatham county, and there deliver the same to the plaintiff, the person who made the contract. It follows that the suit for the breach of this contract was properly brought in the county where the delivery in good order was to be made—where the contract was to be performed.

Judgment reversed. All the Justices concurring.

(124 Ga. 475)

YOUNG v. SMITH & KELLY CO.

(Supreme Court of Georgia. Dec. 21, 1905.)

NEGLIGENCE—DEFECTIVE BUILDING—LIABILITY OF SUBCONTRACTOR.

An independent contractor is not liable for injuries to a third person, occurring after the contractor has completed the work and turned it over to the owner or employer, and the same has been accepted by him, though the injury result from the contractor's failure to properly carry out his contract.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 68.]

(Syllabus by the Court.)

Error from the City Court of Savannah; T. M. Norwood, Judge.

Action by Henry Young against the Smith & Kelly Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry Young brought an action against the Smith & Kelly Company, a corporation, for damages alleged to have been sustained by

him on account of the negligence of the defendant. The material allegations of the petition were as follows: The foreign owners of a steamship consigned her to J. F. Minis & Co. at the port of Savannah, Ga., to be loaded by them with cotton. Prior to the delivery of the ship to Minis & Co., it was delivered to the Smith & Kelly Company, to be loaded with phosphate rock. The rock was put into the hold of the vessel through its hatches, and the Smith & Kelly Company contracted with the owners of the vessel to replace and securely fasten the hatches on the sides or combings thereof; which agreement was one usually entered into between ship-owners and stevedores doing business in the port of Savannah, and was a custom well known and understood among shipowners, ship laborers, and employes in that port. Within 24 hours after the loading of the vessel with phosphate rock by the Smith & Kelly Company had been completed, it was placed by such corporation in the custody of the consignees, Minis & Co., to be loaded with cotton. Plaintiff, a laborer of Minis & Co., went to one of the hatches, with the intention of removing the top of the same in order to store cotton in the hold. The Smith & Kelly Company, or its servants, had covered this hatch with tarpaulins. Plaintiff walked on the top of this hatch, as usual and customary in such cases, and in the line of his duty, to remove the tarpaulins and take up the covering of the hatch, which had been placed there by the servants of the Smith & Kelly Company. While engaged in this work, one of the compartments or partitions of the hatch, by reason of being insecurely fastened by the servants of the Smith & Kelly Company, gave way and turned over, precipitating plaintiff into the hold below, injuring him as set out in the petition. The petition was dismissed on general demurrer, and the plaintiff excepted.

E. H. Abrahams and R. L. Colding, for plaintiff in error. O'Connor, O'Byrne & Hart-ridge, for defendant in error.

FISH, C. J. (after stating the facts). The general rule is well established that an independent contractor is not liable for injuries to a third person, occurring after the contractor has completed the work and turned it over to the owner or employer and the same has been accepted by him, though the injury result from the contractor's failure to properly carry out his contract. 1 Thomp. Neg. par. 686; Whart. Neg. § 438 et seq.; 16 Am. & Eng. Enc. Law, 209. There are some modifications of this rule. Among them are cases where the work is a nuisance per se, or where it is turned over by the contractor in a manner so negligently defective as to be imminently dangerous to third persons. See above-cited authorities. The present case, we think, falls within the general rule. The Smith & Kelly Company was an independent contractor. It had fully completed its con-

tract for loading the vessel with prosphate rock, and had turned it over to the consignees, Minis & Co. The work was not a nuisance, nor was the condition of the hatch as left by the Smith & Kelly Company imminently dangerous in itself. Plaintiff, a laborer of this firm, was injured, as the petition alleged, by the negligent failure of the Smith & Kelly Company to perform its contract with the owners of the ship. It is clear that under the rule above announced, the plaintiff, if he had been a servant of the owners of the vessel, would have had no cause of action against the Smith & Kelly Company. As he was a servant of Minis & Co. and not of the owners, the rule is equally applicable, and he had no cause of action against the defendant. *Fulton County Street Railway Co. v. McConnell*, 87 Ga. 756, 13 S. E. 828, is cited for the plaintiff in error. There a street railway company, having authority under its charter to construct a railway in a public street, had the work done by an independent contractor. An injury to a person passing along the street was caused by the negligence of a servant of the contractor in unnecessarily and improperly laying down loose rails in advance of the workmen engaged in constructing the track. In a suit against both the railway company and the contractor, the contractor was held liable for the consequences of such negligence. The railway company was held not liable, on the ground that it had not reserved any control over the conduct of the contractor in executing the work.

Counsel for plaintiff in error also cited *Ridgeway v. Downing Company*, 109 Ga. 591, 34 S. E. 1028. In that case the owner of a vacant city lot, who for years had suffered the public to use a thoroughfare over the same, employed an independent contractor to construct a building thereon, according to certain specifications, including piling for the foundation. The contractor dug a trench for such purpose across the thoroughfare. It was held that the owner of the lot was not liable for a personal injury sustained by one who fell into the trench by reason of its unguarded condition. The nonliability of the owner was put upon the same ground as that announced in *Fulton County Street Railway Co. v. McConnell*; that is, that the owner had no immediate direction and control over the work. Both of these cases were governed by the decision rendered in *Atlanta & Florida Railway Co. v. Kimberly*, 87 Ga. 161, 164, 13 S. E. 277, 27 Am. St. Rep. 231, where it was held: "Where an individual or corporation contracts with another individual or corporation exercising an independent employment, for the latter to do a work, not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or of the con-

tractor's servants." This rule is embodied in section 3818, Civ. Code 1895, and exceptions thereto in section 3819. There is nothing in these cases in conflict with the general rule that an independent contractor is not liable for injuries to a third person, occurring after the completion of the work and its acceptance by the owner or employer, resulting from the failure of the contractor to properly carry out his contract. The petition was properly dismissed upon general demurrer, as it set forth no cause of action against the defendant.

Judgment affirmed. All the Justices concurring.

(124 Ga. 478)

PROPELLER TOWBOAT CO. OF SAVANNAH v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL—RIGHT OF ACTION.

Where an agent sends a telegram for an undisclosed principal, the principal may maintain an action in his own name for damages resulting from an error in transmission which brought about delay in the delivery of the telegram.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 502, 507; vol. 45, Cent. Dig. Telegraphs and Telephones, § 87.]

2. TELEGRAPHS—TRANSMISSION OF MESSAGE—DELAY—DAMAGES.

The petition set forth a cause of action, and the damages claimed were not too remote to be the subject of a legal recovery.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by the Propeller Towboat Company of Savannah against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Reversed.

The Propeller Towboat Company of Savannah brought suit against the Western Union Telegraph Company, and alleged: The plaintiff entered into a charter party with the Savannah Lighterage & Transfer Company, whereby the plaintiff became the lessee of a schooner, the *Hilda*, owned by the lighterage company. Under the terms of the charter party six lay days were allowed for loading the schooner, and "for each and every day's detention by default of said party of the second part [the towboat company], or agent, \$56 per day shall be paid by said party of the second part to said party of the first part," etc. While the schooner lay at Lambert's Point, Va., the plaintiff, desiring her to proceed to Newport News, Va., requested the lighterage company to so instruct the captain by wire, which was attempted to be done on that day, December 15, 1903, by the lighterage company sending him a telegram over the line of the Western Union Telegraph Company. No answer being received, the lighterage company, at request of plaintiff, on December 18, 1903, again telegraphed the cap-

tain of the schooner to proceed to Newport News. The first telegram had not been delivered, by reason of an error in transmission, and the first and second telegrams were delivered at the same time on December 18, 1903. Upon receipt of these telegrams the schooner proceeded at once to Newport News, arriving there December 19, 1903, but, having to wait her turn at loading, did not complete loading until December 28, 1903. It is alleged that the schooner arrived at Lambert's Point on December 11, 1903, and having six lay days for loading, if the telegram of December 15, 1903, had been delivered promptly, could have proceeded at once to Newport News and loaded immediately without any delay, completing the act of loading within the time limit of the six lay days. But by reason of the failure to deliver the telegram until December 18, 1903, the schooner did not reach Newport News until December 19, 1903, and between December 16th and December 19th so many vessels had come in that the loading of the Hilda was delayed until December 28, 1903. For this delay the towboat company was compelled to pay and did pay demurrage, as agreed in the charter party, \$56 per day for 10½ days, amounting to \$602. A demurrer to the petition was filed, upon the ground that it set forth no cause of action. The demurrer was sustained, and the plaintiff excepted.

O'Connor, O'Byrne & Hartridge, for plaintiff in error. Osborne & Lawrence, for defendant in error.

COBB, P. J. The telegram which has given rise to this controversy was sent by the lighterage company to the captain of the schooner Hilda. The lighterage company, in so sending the telegram, acted as the agent of the towboat company; the latter being an undisclosed principal. There is no question about the right of an undisclosed principal to sue a telegraph company for negligence in the delivery of telegrams. "The governing principle is that an undisclosed principal, as the ultimate party in interest, is entitled, against third persons, to all advantages and benefits of such acts and contracts of his agent, and consequently that he may sue in his own name on such contracts. Story, Ag. § 418 et seq; Dodd Grocery Company v. Postal Telegraph Company, 112 Ga. 685, 37 S. E. 981, and see cases cited. The judge in the court below based his rulings sustaining the demurrer to the petition upon the ground that, before recovery could be had of the telegraph company, the plaintiff must show itself to have been under a legal obligation to pay the amount of demurrage to the lighterage company, which it now seeks as damages arising from the failure of the telegraph company to deliver promptly the message sent over its line. Under this test the plaintiff made out a case. The charter party provides: "It is agreed that the lay days for loading

shall be as follows: Six (6) days. And that for each and every day's detention by default of said party of the second part, or agent, \$56 per day shall be paid by said party of the second part, or agent, to said party of the first part, or agent." The telegraph company, after its acceptance of the message for transmission, became the agent of the towboat company. Its negligent failure to deliver the telegram was the negligent act of its principal, so far as the lighterage company was concerned. See *Western Union Tel. Co. v. Lumber Company*, 114 Ga. 580, 40 S. E. 815, 88 Am. St. Rep. 36; *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; and *Brooke v. Western Union Tel. Co.*, 119 Ga. 694, 46 S. E. 826. Had the lighterage company sued the plaintiff in this case for the demurrage justly due it, the plaintiff could not have escaped liability under cover of the *Western Union Telegraph Company's* negligence.

It was said that the damages were too remote. In the case of *Western Union Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877, the court held that the commissions a ship broker would have made by securing a vessel were proper damages for the nondelivery of a telegram. Mr. Chief Justice Jackson said: "The damages are said to be too remote. Not so. They were precisely what the plaintiff would have made by his contract with Nisbet if the cablegram had reached him at 11:10 a. m." And in the case of *Walden v. Western Union Tel. Co.*, 105 Ga. 275, 31 S. E. 172, where a shipment of guano was ordered by wire, and it appeared that the intending purchaser had contracted with other parties for the sale of such guano, the nondelivery of his telegram, which prevented the shipment to him of the guano, gave rise to an action for damages, in which the measure was the amount he would have earned, had he been able to carry out his contract for the sale of the guano. Counsel for plaintiff in error relies upon the cases of *Georgia Railroad v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274, and *White v. Blitch*, 112 Ga. 775, 38 S. E. 80, as authority to show that the damages claimed in the present case were too remote and speculative to be the basis of a recovery. We think, however, that these cases are distinguishable from the case at bar. In the case first referred to, stress was laid upon the fact that the railway company was ignorant of the peculiar character of the business of the traveler, as there was nothing in the case to put the company upon notice that a delay of the train upon which the traveler was riding would occasion a loss to him. In the second case cited, damages were claimed for a failure to furnish machinery for ginning cotton in thorough repair and machinery suitable for ginning a crop of a given year, the damages claimed being the diminution in the market value of cotton, and it was held that the pleading which set up this damage did not set forth sufficient facts from which it could be deter-

mined whether or not such damages had been sustained even if they were legally recoverable. And as to whether the damages claimed for the rotting of a portion of the cotton and the decrease in weight were recoverable, it was said that it could not be reasonably claimed they were sustained because of the plaintiff's failure to comply with his undertaking, and it was further said that there were no sufficient facts set forth in the pleading to show that the conclusion stated therein was correct. It is to be noted in reference to these cases that neither was decided by a full bench, the first being decided by two justices and the last by five justices.

Judgment reversed. All the Justices concurring.

(124 Ga. 481)

SMALL v. SMALL

(Supreme Court of Georgia. Dec. 21, 1905.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

In the argument before this court only the general grounds of the motion for a new trial, that the verdict was contrary to law and the evidence, were insisted upon. The evidence, while conflicting, warranted the verdict; and the judgment overruling the motion will not be disturbed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3360-3376.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action between J. O. Small and J. O. Small. From the judgment, J. O. Small brings error. Affirmed.

Geo. Gordon and E. H. Abrahams, for plaintiff in error. W. B. Stubbs, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 493)

CENTRAL OF GEORGIA RY. CO. v. DUGGAN.

(Supreme Court of Georgia. Dec. 21, 1905.)

RAILROADS—KILLING STOCK—EVIDENCE.

The facts of this case bring it within the decision announced in *Central Ry. Co. v. Neidlinger*, 35 S. E. 364, 110 Ga. 329, wherein this court ruled that where stock is killed, not at a public road crossing, but some distance beyond, and the stock suddenly came on the track at a point so nearly in front of the locomotive that, notwithstanding all possible efforts, the progress of the train could not be arrested before the stock was struck, the owner could not recover of the railway company in a suit for damages, although it appeared that in approaching the crossing the engineer did not observe the requirement of the law as to checking the speed of the train; his failure so to do not being the proximate cause of the injury.

(Syllabus by the Court.)

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Action by James Duggan against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. C. Wright and Lawton & Cunningham, for plaintiff in error. R. F. C. Smith, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concurring.

(124 Ga. 494)

AKIN v. JAUDON, Sheriff, et al.

(Supreme Court of Georgia. Dec. 21, 1905.)

INJUNCTION—CONTINUING TRESPASS.

The petition, which was duly verified, showing that a trespass had been committed by tearing down the fence and exposing the growing crops of the plaintiff to injury from cattle, and threatening a repetition thereof, insolvency of the defendant being alleged, and the allegations as to trespass being supported by evidence, in the absence of any counter showing, it was error to refuse an injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 101.]

(Syllabus by the Court.)

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Action by Joseph Akin against William Jaudon, sheriff, and others. Judgment for defendants. Plaintiff brings error. Reversed.

Simon N. Gazan, for plaintiff in error. Wm. L. Gignilleat, for defendants in error.

LUMPKIN, J. Judgment reversed. All the Justices concurring.

(124 Ga. 497)

JORDAN v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. CRIMINAL LAW—NEW TRIAL—ADMISSION OF PERJURY.

This case is controlled by the decision in *Clark v. State*, 43 S. E. 853, 117 Ga. 254, which follows the rule laid down in many other former adjudications, and has also been followed by others. See *Felton v. State*, 56 Ga. 84; *Brown v. State*, 60 Ga. 210; *O'Kelly v. Felker*, 71 Ga. 775; *Lasseter v. Simpson*, 3 S. E. 243, 78 Ga. 61; *Munro v. Moody*, 2 S. E. 688, 78 Ga. 127; *Davis v. Bagley*, 25 S. E. 20, 99 Ga. 142; *Hardy v. State*, 43 S. E. 434, 117 Ga. 40. Upon review of the cases this court is satisfied that they were properly decided, and are all reaffirmed.

2. SAME.

These decisions hold, in effect, that evidence that one of the state's witnesses since the trial has made declarations, even though under oath, that his testimony given upon the trial was false, is not cause for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Marion County; Wm. A. Little, Judge.

Crocket Jordan was convicted of crime, and brings error. Affirmed.

See 43 S. E. 352.

Jos. J. Dunham and Geo. P. Munro, for plaintiff in error. S. P. Gilbert, Sol. Gen., W. B. Short, and W. D. Crawford, for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(58 W. Va. 663)

JEFFREY et al. v. LEMON et al.

(Supreme Court of Appeals of West Virginia.
Jan. 30, 1906.)**EJECTMENT—DEFENSES—HARMLESS ERROR.**Syllabus in Davis v. Living, 40 S. E. 365, 50 W. Va. 431, approved and applied.
(Syllabus by the Court.)

Error to Circuit Court, Ritchie County.
Action by T. P. Jeffrey and others against Frederick Lemon and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Davis & Son, for plaintiffs in error. F. H. McGregor and Van Winkle & Ambler, for defendants in error.

McWHORTER, P. This is an action of ejectment brought by T. P. Jeffrey, Thomas E. Davis, and others against Frederick Lemon and others in the circuit court of Ritchie county for two tracts of land, 900 acres and 439 acres, respectively. The immediate title claimed by plaintiffs to the 900 acres is a tax deed dated May 26, 1879, executed by G. W. Amos, clerk of the county court of Ritchie county, to W. L. Hitchcox, E. J. Knight, and J. P. Strickler, the said 900 acres being a part of a tract of 1,430 acres sold by the sheriff of Ritchie county on the 8th day of June, 1874, for the taxes of 1871, charged to and returned delinquent for said taxes in the name of David Kerr and others; and to the 439 acres is a tax deed dated the 6th day of May, 1879, executed by the same clerk to the same parties, purchased by the vendees at a tax sale thereof on the 9th day of June, 1874, the said 439 acres being a part of a tract of 500 acres charged to and returned delinquent in the name of David Kerr and others, and was sold for such delinquent taxes for the years 1871 and 1872.

On the 30th day of December, 1786, there was granted by the commonwealth of Virginia a tract of 2,000 acres of land to James Henry, assignee, etc., said tract being known as "Robert Lilburn No. 15." The same became delinquent and forfeited to the commonwealth. In 1845 Peter G. Van Winkle, commissioner of delinquent and forfeited lands of Ritchie county, reported the same as delinquent and forfeited, and caused the same to be surveyed, and under decree of the circuit court of law and chancery of said county sold 1,430 acres, so much of said tract of 2,000 acres as he found not covered by other titles on which the taxes had been paid, at which sale William Campbell became the purchaser and received a deed from the said Van Winkle, commissioner, therefor, dated the 9th of September, 1846. Campbell conveyed the same afterwards to David Kerr and others on the 10th day of October, 1864. The same commissioner, Van Winkle, in another proceeding against 2,000 acres granted by the commonwealth of Virginia, by patent 18th of April, 1786, to James Newport and others,

attorneys in fact and trustees of Isaac Sidman, under like decrees of said court sold and conveyed 500 acres of said 2,000 acres to William Campbell, who also afterwards, on the 10th day of October, 1864, conveyed the same to David Kerr and others. On the 2d day of December, 1871, the said 1,430 acres were sold in the name of David Kerr and others for the nonpayment of the taxes of 1870; A. I. Rogers being the purchaser. On the 20th day of November, 1873, G. W. Amos, clerk of the county court of said county, conveyed the 1,430 acres to said A. I. Rogers under the said purchase. The defendants claim under a grant from the commonwealth of Virginia dated the 2d day of April, 1860, for 970 acres, based upon a survey made on the 29th day of June, 1858, made by virtue of land office treasury warrant No. 24,983. A verdict was rendered for the defendants. The plaintiffs moved to set aside the verdict and grant them a new trial on various grounds mentioned, which motion, being considered, was overruled, and judgment entered thereon for defendants, to which judgment plaintiffs obtained a writ of error and superseas.

Some 20 assignments of error are set out in the petition, but it seems unnecessary to discuss them in this case. Plaintiffs rely upon their tax deed of May 26, 1879, from Amos, clerk of county court of Ritchie county, for their title to the 970 acres, and on the deed of May 6, 1879, from the same clerk, for the 439 acres; the former a part of the 1,430 acres sold for the taxes delinquent for the year 1871, sold June 8, 1874. The evidence shows that the tract of 1,430 acres was not on the assessor's books for any of the years 1873 to 1880, both inclusive, in the name of David Kerr and his co-owners, or of any one or more of them, so that the same was forfeited to the state for nonentry on the land books, being omitted therefrom more than 5 years. Besides this, the said 1,430 acres was sold by the sheriff of Ritchie county on the 2d day of December, 1871, to A. I. Rogers for the delinquent taxes in the name of David Kerr and others for the year 1870, and conveyed to the purchaser by said clerk, Amos, by deed dated November 20, 1873. So we have as to the 1,430 acres two outstanding titles: First, the title of Rogers; and, second, the forfeiture to the state. As to the 500-acre tract, out of which the plaintiffs claim the 439 acres under said tax deed of May 6, 1879, the record shows that the same was omitted from the assessor's books for the years 1875 to 1880, both inclusive. Plaintiffs' deeds for the 900 acres and the 500 acres, dating in May, 1879, were after the forfeiture of both of said tracts. Davis v. Living, 50 W. Va. 431, 40 S. E. 365, seems to be conclusive of this case. Syllabus point 1 in said case holds that: "If the defendant in an ejectment suit shows that the land in controversy has been omitted from the land

books of the proper county for five successive years before the trial, he makes a prima facie case of forfeiture and defeats the plaintiff's right to recover, unless plaintiff can show that the land was assessed improperly in another county and the illegal taxes thereon paid, or that the land has been redeemed, regranted, or resold, so as to reinvest the title in him." It is further held in said case (Syl., point 2): "If, on the undisputed facts, the case is plainly for the defendants, all errors committed by the court on the trial are harmless errors so far as the plaintiff is concerned." The forfeiture to the state of the title of the 1,430 acres and the 500 acres being complete before the plaintiffs took the deeds for the 900 acres and the 439 acres, they took no title.

There is no error in the judgment of the circuit court, and it must be affirmed.

(58 W. Va. 637)

CLARK v. EMERY et al.

(Supreme Court of Appeals of West Virginia. Jan. 30, 1906.)

1. PARTNERSHIP—EXISTENCE OF RELATION.

Where one who has acquired options upon certain lands enters into a written contract with another, empowering him, in the absence of the optionee, to accept the options and make sale of the lands, and providing that all profits shall be distributed equally between them, this is not a contract creating a partnership for the purchase and sale of lands, and does not entitle the person so empowered to make such sale to share in the profits arising therefrom, unless such sale be made by him.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 13-16, 20.]

2. SAME—TEST—INTEREST IN PROFITS.

As to whether or not a partnership exists depends upon the true contract and intention of the parties, as ascertained from all the facts of the case; and the true test as to whether the partnership does exist is, did the supposed partner acquire by his bargain any property in, or control over, or specific lien to, the profits while they remained undivided, in preference to other creditors? If he did, he is a partner; and if otherwise, not.

3. SAME.

A case where the evidence is insufficient to constitute a partnership.

(Syllabus by the Court.)

Appeal from Circuit Court, Monongalia County.

Action by Joseph E. Clark against Jonas W. Emery and others. From a decree for defendants, plaintiff appeals. Affirmed.

Frank P. Corbin and H. L. Robinson, for appellant. John C. Bane, R. W. Irwin, and Frazer & Frazer, for appellees.

SANDERS, J. The plaintiff filed his bill in the circuit court of Monongalia county, claiming to be an equal partner with the defendant Emery in the profits arising from the sale of certain coal properties made by the defendant Emery to defendants Cochran.

Emery answered, denying that Clark is interested as a partner, or otherwise, in said lands, or the profits arising therefrom. Upon the hearing the circuit court entered a decree dismissing the plaintiff's bill, and it is from this decree that he has appealed.

The plaintiff predicates his suit upon a verbal contract which he claims was made between him and Emery, and says that afterwards, on the 8th day of May, 1901, for the purpose of more perfectly defining their respective interests in whatever profits might arise from a sale of the properties, and in order to confer full power on the plaintiff to sell and dispose of the same in the absence of Emery, they entered into the following written agreement:

"This agreement entered into this 8th day of May, 1901, by and between J. W. Emery and J. E. Clark, both of Washington Co., Pa., witnesseth: That both the parties hereto being equally interested in a certain option or contract made between said J. W. Emery and W. B. Hess and P. S. Johnson of Monongalia Co., W. Va., said contract covering the right of sale of from 2,300 to 2,500 acres of coal lands in said Co., W. Va., and dated May 6th, 1901. Now it is understood and agreed that in case of the absence of J. W. Emery from any cause that the said J. E. Clark is hereby fully empowered to accept said coal under the terms of contract with Hess and Johnson and conduct the sale of the property with full and absolute rights in the premises as though the contract were made in said Clark's name. All profits to be distributed equally between said Clark and Emery.

"Witnesseth our hands and seals the day and year above written.

"J. E. Clark. [Seal.]

"J. W. Emery. [Seal.]

"Attest: Geo. L. West."

The defendant Emery claims that no such verbal contract was made, but that, if found to have been made, it was a contract for the sale of real estate, and, to be binding, must be in writing and signed by the party to be charged thereby, and that the contract dated the 8th day of May, 1901, is not such a contract or memorandum as can be enforced, and does not operate to take the verbal contract without the statute of frauds. And, also, Emery claims that said writing of May 8th is not a contract creating a partnership between him and Clark, but that it was only executed for the purpose of giving Clark, in his absence, the power to accept certain options, and to sell and dispose of the property acquired thereunder, and that, if he should make sale thereof, he was to have one-half of the profits realized therefrom. We do not feel called upon to determine whether or not the written contract of May 8th is a contract for the sale of real estate, and whether or not it violates the statute of frauds, because the plaintiff, in our opinion, upon a proper construction of the very terms of the contract,

is not shown to be a partner with Emery, nor entitled to any part of the profits arising from a sale of said property, unless the sale was made by him.

It would seem, from the construction of the contract alone, that it was only intended to give to Clark the power to accept the options in the absence of Emery, and make sale of the lands. The fact that it is recited that they are equally interested in the property does not make this true, unless, as a matter of fact, they are so interested, and, if so, under the claim of Clark himself, it must be upon the verbal contract which he claims he had with Emery. The concluding part of the contract, wherein it says "all profits to be distributed equally between said Clark and Emery," is not inconsistent with the claim of Emery that, in case Clark should make the sale, he was to have one-half of the profits realized therefrom, but it is entirely in accord with Emery's contention that this writing was only given to empower Clark, in the absence of Emery, to accept the options and make sale. It cannot be correctly said that it created a contract of partnership between the parties, to continue an indefinite period, and to entitle Clark to share in the profits, without consideration or responsibility. There is nothing agreed upon and fixed by its terms, except that Clark, in the absence of Emery, is given power to accept the options and make sale of the property, and, upon his doing so, the profits were to be divided equally between them. This does not fix and define a partnership relation between the parties, but only provides for the doing of certain things by Clark in the absence of Emery, and in the event of the accomplishment of these things he to have one-half of the profits. That part of the contract which says they are "equally interested in a certain option or contract" is mere recital, and forms no part of the agreement. The only agreement expressed is that, in the absence of Emery from any cause, Clark shall have full power to accept the coal under the terms of the contract with Hess and Johnson, and conduct the sale of the property with full and absolute rights in the premises as though the contract were made in Clark's name, and all profits to be divided equally between Clark and Emery. It seems that this contract is complete within itself, and that it is not necessary or proper to admit evidence to vary, add to, or explain its terms. It is perfectly well settled that, when there is no ambiguity in a written contract, parol evidence will not be received to vary, contradict, add to or explain its terms, by proving that the agreement of the parties was different from what it appears by the writing to have been. *Campbell v. Fetterman's Heirs*, 20 W. Va. 398; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611; *Howell v. Behler*, 41 W. Va. 610, 24 S. E. 646. "A writing is presumed to contain the whole of the contract, and will be protected from any invasion of extrinsic stipulations, if, upon inspection

and study of the writing itself, read, it may be, in the light of surrounding circumstances, in order to its proper understanding and interpretation, it appears to contain the engagement of the parties, and to define the object and measure the extent of such engagements, and to have been designed by the parties to be the repository and evidence of their final intentions." 21 Am. & Eng. Ency. Law (2d Ed.) 1090.

But, if the written contract does not purport to disclose a complete contract, or, if in reading it in the light of the situation of the parties and the facts and circumstances, it appears not to contain all the stipulations of the parties on the subject, then the above rule does not apply, but, under these circumstances, parol evidence is admissible to show what the rest of the agreement was. But that part of the contract which is sought to be proven must not be repugnant to or inconsistent with the written contract; for, where a contract rests partly in writing and partly in parol, the written part must not be contradicted. 21 Am. & Eng. Ency. Law (2d Ed.) 1091-1093; *Heatherly v. Bancy*, 81 W. Va. 70, 5 S. E. 754; *Mathews v. Jarrett*, 20 W. Va. 415; *Caperton's Adm'r's v. Caperton's Heirs*, 86 W. Va. 479, 15 S. E. 257; *Scrags v. Hill*, 37 W. Va. 706, 17 S. E. 185.

The plaintiff claims that the contract of May 8th is not a complete contract between the parties, but that it contained a part of their agreement, and that the defendant's explanation of it is clearly inconsistent therewith and repugnant thereto. Admit that this contract only partially contains the stipulations and agreements of the parties, and that it may be added to or explained by parol, still we fail to see from the facts adduced anything inconsistent with the claim of the defendant Emery. And, as we have observed, the written contract does not create a partnership between Emery and Clark, and from a careful scrutiny of the other evidence we fail to find anything which would justify us in finding that there existed a partnership between the parties, but it was only intended that Clark should share in the profits in case he should sell the property. In 1900 the defendant Emery learned of this field of coal, and that Parker S. Johnson and W. B. Hess had options on it, and thereupon he went to Morgantown to see Johnson in reference to it, and then learned, through Johnson, that Johnson and Hess had transferred their options to John C. Neff. Later, and in the month of December following, he saw the plaintiff, Clark, and had a talk with him about these lands. In this conversation Clark spoke of his connection with the Wayne Iron & Steel Company and the Clyde Coal Company, and said that, if he had an option on this coal, he thought he could sell it to these companies. The matter then rested in abeyance until in April, 1901, except that Clark in the meantime made an effort to secure an option from

Neff, but failed to do so. On the 26th of April, 1901, Emery secured an option from Neff, and on the following day procured one from Johnson, beginning at the expiration of Neff's option, which was on the 2d day of May. After Emery had secured these options he immediately informed Clark of the fact, and called his attention to the conversation which he had had with him in relation to a sale of the property to the Wayne Iron & Steel Company and the Clyde Coal Company, and then agreed with Clark that, in the event he made the sale of the property, he would divide the profits arising therefrom. Clark proceeded to try to interest these companies in the sale of these lands, taking the matter up with Sanford, the superintendent of the coal company. The property was examined by the superintendent, and on the 8th day of May, 1901, the date of the written contract, Clark, Emery, and Sanford met at Brownsville, at which time the sum which Sanford should receive and the price at which the property was to be offered to the companies were agreed upon, and it was at this meeting that the contract between Clark and Emery was prepared and signed. Up to this time there had been no definite contract between them.

A sale to the companies was not consummated, but Clark, still interesting himself in making a sale, proposed to Emery that probably a sale could be negotiated through Liggett, of Pittsburg, and Emery agreed that, in the event he made a sale of the property through Liggett, he could share equally in the profits; and shortly afterwards a writing was entered into between Clark and Emery and Liggett, by which Liggett was empowered to sell for a certain price, and providing that all over and above that price he could have as his compensation for making the sale. This effort was also fruitless, and nothing further was done in the matter for nearly a year, when Emery made a sale of the property to the defendants Cochran, and since this sale the plaintiff asserts that he is entitled to one-half of the profits. He was not interested in making this sale to Cochran, took no part in it, and did nothing in regard to it. And not only is this so, but, the time limit for the Johnson and Hess options being about to expire, it became necessary that they should be accepted. They were accepted by Emery, and all contracts taken in his name individually; he thereby becoming responsible for the entire purchase money. No liability attached to Clark. No sum was paid by him, and in no way did he become responsible for a dollar in the negotiation of these options. And, not being liable, not taking any part in making this sale, it resting in abeyance for nearly a year after the effort to sell through Liggett was made, it does not seem reasonable that a contract such as is contended for by him existed. Considerable stress is laid

upon the fact that in the contract between Clark and Emery and Liggett it is recited that Clark and Emery are parties of the first part, and that they own or control certain coal lands. It is undertaken to conclude from this that there is an admission of partnership upon the part of Emery; but, in view of all the circumstances connected with and surrounding this transaction, this recital is not inconsistent with the theory of Emery, because, as claimed by him, if Clark had made the sale to the companies referred to, or through Liggett, he would have been equally interested in the profits arising from the sale; and, this being the fact, it cannot be held that there is any inconsistency in the contract as claimed by Emery and the written contract with Liggett.

The testimony of John C. Neff, to the effect that Emery came to him and asked for an option on the lands in question, and that he refused to give it to him, informing him that he had told Clark that he would wait until the latter found out whether or not he had a buyer, whereupon Emery told him that he and Clark were partners, and that whatever he did would be satisfactory with Clark, is relied upon to establish the fact of the partnership between Clark and Emery. But it will be observed that the witness says Clark thought he had a buyer for the coal, and that buyer was either the company or the manager of the company for which Clark was working. Admitting that Emery told Neff that he and Clark were partners, which Emery denies, still Emery does not deny that as to the sale to the company, which Clark claimed he could make, they were to share equally in the profits. And at the time he had this conversation with Clark he fully believed that Clark would share in the profits, because Clark had led him to strongly believe that he could make sale to one of the companies. If Clark was a partner with Emery, why were the contracts and options all taken in Emery's name? Why did Emery advance all the money, and become individually liable to the landowners? These facts are certainly not consistent with the plaintiff's claim, but speak most strongly against him.

The only proper deduction from the facts is that Clark was empowered to make sale, and, if he did so, he was to receive for his services one-half of the profits. "To constitute a partnership between parties who share in the profits, the interest in the profits must be mutual—each person must have a specific interest in them as a principal trader. He is not a partner merely because he receives a part of the profits as compensation for his services." *Sodiker v. Applegate*, 24 W. Va. 411, 49 Am. Rep. 252. And in this case, delivering the opinion of the court, Judge Snyder says: "If persons merely occupy the relation of principal and agent,

employer or employé, or factor, no partnership can be predicated upon the fact that such agent, employé, or factor receives a part or share of the profits for his services or other benefits conferred. * * * In every partnership there is a community of interest, but every community of interest does not create a partnership. There must be a joint ownership of the partnership funds, or a joint right of control over them, and also an agreement to share the profits or losses arising therefrom." *Chapline v. Conant*, 3 W. Va. 507, 100 Am. Dec. 766. There is nothing to show any liability upon Clark for losses and expenses, which is deemed an important fact tending to show that the contract is not one of partnership.

It is claimed that such transactions as we have here under consideration have been passed upon at different times by the Supreme Court of Pennsylvania, and uniformly held to be the operations of a partnership, and the cases of *Howell v. Kelly*, 149 Pa. 473, 24 Atl. 224, and *Frazer et al. v. Linton*, 183 Pa. 186, 38 Atl. 589, are cited. In the first of these cases the court decided that profits realized in a single transaction, procuring options on coal lands, and reselling them at a profit under a parol agreement, can be recovered in an action by one partner against the other, and that the statute of frauds has no application, and in the other case it was held that when a bill in equity is filed by one partner against the other for an account, where the evidence establishes the existence of the partnership, but no definite arrangement as to the division of the profits, the presumption of law is that the profits were to be equally divided. While it is unnecessary for us to either affirm or repudiate the doctrine enunciated in these decisions, yet the doctrine therein pronounced seems to be sound. But, whether so or not, it has no application here, because there it was found from the evidence that a partnership existed, and here the reverse is found. Of course, if we should find the existence of a partnership, then the doctrine of these cases might be applied.

We see no error in the decree of the circuit court, and it is affirmed.

(58 W. Va. 645)

ADKINS v. HUFF et al.

(Supreme Court of Appeals of West Virginia.
Jan. 30, 1906.)

DEEDS—CONSTRUCTION—RESERVATION.

Under a clause in a deed, reserving to the grantor therein standing timber on the land thereby conveyed, using the following terms: "Said first party, J. M. A., reserves and still owns all timber," etc., and requiring the same to be removed from the land within a specified time, the grantor does not hold absolute and unconditional title to the timber so reserved, and such of it as remains unsevered at the expiration of the time limited is the property of the owner of the land.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 462–465.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wayne County.
Bill by Milton J. Adkins against David W. Huff and others. Decree for complainant, and defendant Huff appeals. Reversed.

Taylor & Welch, for appellant.

POFFENBARGER, J. David W. Huff complains of a decree of the circuit court of Wayne county overruling in part his motion to dissolve an injunction awarded against him on the bill of Milton J. Adkins, and perpetuating the same in so far as it was not dissolved. The injunction, as perpetuated, inhibits the said David W. Huff and his codefendant, David E. Huff, from preventing, obstructing, or hindering said Adkins and his employes from cutting and removing certain timber on a tract of land, containing 43 acres, owned by the said David W. Huff. The claim of Adkins to the timber is based upon a reservation in a deed by which he conveyed the land to said Huff. The language of the clause reserving the timber is as follows: "Said first party, M. J. Adkins, reserves and still owns all timber down to a railroad tie size excepting poplar 42 inches and less in circumference 2 feet above the ground which the said David W. Huff is to have for building timber. * * * And the said M. J. Adkins is to have 34 months from this date to remove said reserve timber off of said land and to have all rights to cut, haul, and saw and remove said timber and tan bark, and to set sawmill in the calf pasture field, and to remove same as if it was his own land."

The circumstances and transactions which led up to this litigation were as follows: The deed was executed by Adkins November 16, 1900. The consideration was \$400, of which \$100 was paid at the date of the deed, and for the residue three \$100 notes were executed by the grantee, payable, respectively, in 10, 22, and 34 months after the date thereof, and payment thereof was secured by a vendor's lien. The first and second of these notes were paid as they became due. About three months before the last one became due David E. Huff, father of the grantee, who had aided his son in negotiating for the land, proposed to Adkins that, with the consent of said David W. Huff, he execute a new deed to him, David E. Huff. Very soon afterwards this was done, and the old deed delivered back to Adkins. As to the purpose of this transaction, the parties differ in their pleadings and evidence. Adkins contends that the purpose was to vest the title absolutely in David E. Huff; he having represented himself as having paid all the purchase money that had been paid, and his son as desiring to abandon the purchase. The two Huffs say the intention was merely to give the father security upon the land for \$230 which he had loaned his son to aid in paying for it. David W. Huff admits that he consented to the execution of the deed for that purpose, and both he and his father say

the understanding was that it should be an exact copy of the first deed, except that the name of the grantee should be changed and the reservation of the vendor's lien omitted. The new deed departed, however, from these specifications by altering the date at which the right of Adkins to cut and remove timber should expire. By the first deed such right would have expired September 16, 1903. This one specified April 1, 1904, as the time limit. In lieu of the vendor's lien, Adkins took the note of David E. Huff for the last payment with personal security, and he says this change in the security was the consideration for the extension of time. In December, 1903, Adkins brought this suit to enjoin David E. Huff and David W. Huff from interfering with his alleged right to cut and remove timber from the land, and from hauling away and otherwise molesting the railroad ties which he had made on the land, after September 16, 1903, and the said David W. Huff from prosecuting a civil action against him in a justice's court for the recovery of damages resulting from alleged wrongful taking of timber. A preliminary injunction was awarded in conformity with the prayer of the bill, but the court, on the hearing, sustained the motion to dissolve so much of the injunction as restrained the prosecution of said civil action, and, being of the opinion that under the clause in said first deed, reserving to Adkins title to the timber, said Adkins had the absolute title to the timber, and not a defeasible title or a mere license to cut and remove the same, perpetuated so much of the injunction as restrained the defendants from molesting him in the exercise of his right to cut and remove it.

The return to Adkins of the deed made by him to David W. Huff, and the execution of another deed to David E. Huff, containing a clause extending the time for the removal of the timber, did not, in any way, affect the rights of the parties as fixed and determined by said first deed. The title still remained in David W. Huff. When land has been conveyed by a deed, it cannot be reconveyed from the grantee to the grantor by a return of the deed or cancellation thereof. It must be reconveyed by another deed. *Jones v. Neale*, 2 Pat. & H. 339; *Grayson v. Richards*, 10 Leigh, 57; *Seibel v. Rapp*, 85 Va. 32, 6 S. E. 478; *Vaughn v. Moore*, 89 Va. 925, 17 S. E. 326. At the date of the deed executed to David E. Huff, therefore, Adkins had no title in himself to convey or reserve. Hence, the time limit fixed by the deed to David W. Huff remained unchanged. If, by the reservation in the deed to David W. Huff, absolute and unconditional title to the timber remained in the appellant, it may be that a court of equity had jurisdiction by injunction to prevent obstruction to his right to enter upon the land, sever the timber, and carry it away. It would have been an interest in the land, and the owner thereof would have had, by implication, a right of access

to it, the only adequate remedy for deprivation of which might have been in equity. This is merely suggested, not decided. But if, by his deed, he retained only a lease for the period of 34 months, with the right to cut and remove timber within that time, or a conditional title to the timber, a title dependent upon the severance thereof within the period of time limited, or a present title, defeasible by the expiration of the period of time limited without a severance of the timber having been effected, no right of his has been invaded, impaired, or interfered with.

The authorities are practically uniform in holding that an instrument granting standing timber, and containing a clause requiring or permitting it to be removed within a specified time from the date of the grant, gives no absolute and unconditional title to the property. Some courts hold the right of the grantee to be a license, others a lease, and others a defeasible title to the timber. By the great weight of authority it is determined that no right or title exists in the grantee after the expiration of the time specified in the deed or contract. *Strong v. Eddy*, 40 Vt. 547; *Judevine v. Goodrich*, 35 Vt. 19; *Utley v. Lumber Co.*, 59 Mich. 263, 28 N. W. 488; *Wasey v. Mahoney*, 55 Mich. 194, 20 N. W. 901; *Haskell v. Ayres*, 35 Mich. 89; *Haskell v. Ayres*, 32 Mich. 93; *Kelam v. McKinstry*, 69 N. Y. 264; *King v. Merriman*, 38 Minn. 47, 35 N. W. 570; *Fletcher v. Livingston*, 153 Mass. 388, 28 N. E. 1001; *Reed v. Merrifield*, 10 Metc. (Mass.) 155; *Golden v. Glock*, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32; *Larson v. Cook*, 85 Wis. 564, 55 N. W. 703; *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862; *Pease v. Gibson*, 6 Greenl. 81; *Webber v. Proctor*, 89 Me. 404, 36 Atl. 631; *Howard v. Lincoln*, 13 Me. 122. No distinction seems to be made in this respect between rights conferred by deed and those conferred by contracts which have not the form, nor all the requisites, of a deed. The grants in the following cases were all by deed: *Reed v. Merrifield*, 10 Metc. (Mass.) 155; *Golden v. Glock*, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32; *Pease v. Gibson*, 6 Greenl. 81; *Webber v. Proctor*, 89 Me. 404, 36 Atl. 631. In all the other cases above cited the instruments were contracts, some wholly executory, and others passing an equitable title; the purchase money having been fully paid.

No reason is perceived why there should be any difference between a grant of the timber on a tract of land and a reservation thereof in a deed conveying away the land. Reservations are sometimes held to have the force and effect of exceptions. *Harris v. Cobb*, 49 W. Va. 350, 38 S. E. 559. When they do, they can be of no higher dignity than a grant. A thing excepted remains in the grantor by retention. The title, therefore, cannot be more effectually in him by an exception than by a grant thereof to him. Therefore, if

this reservation could be treated as an exception of the timber from the grant of the land, it would stand on the same footing as if the land, without any exception or reservation, had been granted and a deed executed by the grantee conveying the timber back. When such grants are made with a clause requiring or permitting the removal of the timber within a specified time, the grantee takes, at most, a present defeasible title. *Mee v. Benedict*, 98 Mich. 260, 57 N. W. 175, 22 L. R. A. 641, 39 Am. St. Rep. 543. See, also, the authorities above cited. The only case found which conflicts with this view is *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821, in which the rights of the parties were governed by a contract, and in which the court held that the purchaser, in the absence of a forfeiture clause in the contract, might remove the timber sold after the expiration of the time fixed for its removal. The distinction which the court attempted to make between this case and the numerous others, some of which are above referred to, is not at all clear. A case very similar to the one now under consideration is that of *Johnson v. Moore*, 28 Mich. 3. A deed was executed conveying a tract of land. At the same time the grantee executed and delivered to the grantor a writing which recited his purchase of the land, and then said: "This is to certify that all the sawing pine and whitewood timber that is now upon the above-described tracts of land belongs to the said Robert M. Moore, who is sole owner thereof; and that said Robert M. Moore has by agreement thirty months from this date to remove the same." It was held that the contract and deed should be read and construed together as parts of a single transaction, and that, being so read, the vendor had title to so much of the timber as he should remove within 30 months, the time specified. In reaching a conclusion the court said: "The adoption of these separate provisions respecting ownership and the right of entry, together with the particular circumstances, most clearly denotes that it was in the minds of the parties that Moore should hold an interest, as well as a right of entry. The written understanding that he should 'own' the timber was as much a part of the principal transaction as the grant of the land, and it found its consideration in that transaction, and it ought to be allowed to operate as was intended, unless prevented by some rule of law, and I am aware of no such rule. Whether the technical effect of the arrangement was to preserve to Moore the conditional right or to transfer it to him is, in my judgment, a thing of no practical importance. That it was one or the other is unquestionable, and my brethren are inclined to regard it as substantially a transfer or release. *Goodtitle ex dem. Edwards v. Bailey*, Cowp. 597; *Wickham v. Hawker*, 7 M. & W. 63; *Rowbotham v. Wilson*, 8 H. of L. Cases, 348. It served to se-

cure to Moore, as against Bradley and all others having notice, the existing ownership of such of the timber as he should take off in 30 months." A deed which grants or reserves standing timber on land without any limitation of time for the removal thereof is deemed a grant or reservation of an interest in the land, absolute and unconditional. *Magnetic Ore Co. v. Markbury Lumber Co.*, 104 Ala. 465, 16 South. 632, 27 L. R. A. 434, 58 Am. St. Rep. 73; *Walt v. Baldwin*, 60 Mich. 622, 27 N. W. 697, 1 Am. St. Rep. 551. When timber is conveyed by deed with a covenant of warranty and an habendum clause, it conveys an interest in the land, although there be a time limit, but it vests either a defeasible title to the timber or a leasehold estate in the land for the time limited, with a right of appropriation to be exercised during the term. *White v. Foster*, 102 Mass. 375.

The deed now under consideration grants a tract of land. But for a subsequent clause, this would carry the timber. Said subsequent clause reserves the timber with certain exceptions, and fixes a limit of time within which it shall be removed. In determining what right the grantor thereby secured to himself, all parts of the deed must be considered. The grant is not to be cut down by the subsequent reservation to any extent beyond that indicated by the intention of the parties as gathered from the whole instrument. A reservation is not necessarily an exception. Primarily it is a new interest created out of the thing granted. *Adkins* may have still owned the timber, under the language of the clause referred to, but, if so, his title, as tested by the principles above stated, was a defeasible one, wherefore it failed, by reason of the nonperformance of the condition upon which it was held. The reservation in the deed vested in him a present title to the timber, but his failure to remove it operated to divest it out of him and vest it in the grantee of the land. If this be not the true interpretation of the deed, then the principles announced in *Null v. Elliott*, 52 W. Va. 229, 43 S. E. 173, apply, and no title vested in *Adkins* as to the timber remaining uncut at the expiration of the time specified for removal. Having no right to the standing timber, the appellee was not entitled to the protection of an injunction in attempting to cut and remove it. As to the timber already severed, he had a remedy at law for the recovery of the possession of it, if it belonged to him.

For the reasons above stated, it is plain that the circuit court erred in entering the decree complained of, as well as in refusing to dissolve the injunction. Therefore the decree entered in this cause on the 1st day of June, 1904, will be wholly reversed and set aside, the injunction dissolved, and the bill dismissed, with cost to the appellant in the circuit court, as well as his costs in this court.

(58 W. Va. 661)

MANN et al. v. MERCER COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia. Jan. 16, 1906.)

1. COUNTIES—COUNTY COURTS — CALLING ELECTION—NATURE OF DUTIES.

The duties imposed upon county courts by section 15 of chapter 39 of the Code of 1899, as amended by chapter 95, p. 206, of the Acts of 1901, are ministerial.

2. SAME—TIME FOR PROCEEDING — ADJOURNMENT.

Such courts cannot prevent action upon a petition filed under said statute at the term at which it is filed by adjourning the term.

3. SAME—BASIS OF ACTION.

Such courts must base their action on the record made in the proceeding, and not upon personal knowledge of their own members not in any way made part of such record.

4. SAME.

Knowledge and belief of the members of such court, to the effect that the petition so filed is not signed by the requisite number of legal voters, constitutes no defense upon an application for a mandamus to compel action thereon, when the petition bears the requisite number of signatures and is verified as the statute provides, and no other evidence bearing on the question appears in the record of the proceeding as it remains in said court.

5. EQUITY—JURISDICTION — SUPERVISION OF GOVERNMENTAL ACTS.

In the absence of a statute conferring it, courts of equity have no power to control, by injunction or otherwise, public officers and tribunals in the exercise of purely legislative or governmental functions.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 89.]

6. SAME—FRAUD.

Fraud, perpetrated by private persons in the procurement of the exercise of a legislative or governmental power, of itself affords no ground of equity jurisdiction, unless it is expressly given by statute.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 21-23.]

7. COURTS—ADJOURNMENTS.

Section 2 of chapter 114 of the Code of 1899, authorizing circuit and county courts to adjourn from day to day until their business is dispatched or until the ends of their terms, does not limit or restrict the common-law powers of such courts to adjourn to a distant day, or, as it is sometimes expressed, from time to time, provided the day fixed be not beyond the time to which the term could legally continue.

8. SAME.

Section 10 of chapter 114 of the Code of 1899 does not limit the period of time over which a circuit or county court may adjourn. Its purpose is to prevent the loss of a term by reason of the failure of any court to sit on any day appointed by law, or by its own adjourning order, for that purpose.

9. MANDAMUS — COMPELLING OFFICIAL ACTION.

A court or other tribunal, charged with the performance of a mandatory duty at a given term or session, which adjourns without having performed such duty, may be reconvened and compelled to perform such duty by mandamus; and the act, when so done, will be deemed to have been performed at the term or session at which the law required it to be done.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 62.]

(Syllabus by the Court.)

Mandamus, on petition of Edwin Mann and others, against the county court of Mercer county, and others. Writ awarded.

Brown, Jackson & Knight and Mollohan, McClintic & Mathews, for petitioners. C. W. Smith, J. H. Holt, and J. W. Kennedy, for respondents.

POFFENBARGER, J. On the 31st day of October, 1905, this court, upon the petition of Edwin Mann and 1,939 other citizens and legal voters of Mercer county, awarded a mandamus nisi, directed to the county court of said county and the commissioners thereof, commanding said commissioners to reconvene as such county court, and make and enter an order calling a special election for the determination of the question whether the county seat of said county shall be removed from the town of Princeton therein to the city of Bluefield in said county, and be relocated at said city, in accordance with the prayer of the petition of said Mann and others which had theretofore been presented to said county court. Said petitioners, on the 30th day of September, 1905, presented to the county court their said petition, for the calling of said election, properly verified by affidavit, and accompanied by a bond of \$5,000, as required by the statute, and the court permitted the petition and bond to be filed, and made and entered an order directing said election to be held on the 12th day of December, 1905, and then adjourned until the following Tuesday, the 3d day of October, 1905. Upon reconvening on that day it set aside said order upon the motion of James Scott and others, and thereupon the petitioners again presented the petition and bond to the court, and asked that they be filed and an order made providing for the holding of such election, but the court refused so to do. The action of the court in setting aside said order and refusing to re-enter the same was based upon the theory that at the time of its entry, as well as at the time of the application for a re-entry thereof, the court was not legally in session. It had convened in regular session on Wednesday following the second Tuesday in September, 1905, and adjourned from day to day and from time to time until said 30th day of September. Some of these adjournments were for longer periods than three days. One of them was from the 21st day of September until the 26th. On said last-named day an adjournment was taken until the 30th day of September.

The principal defenses set up in the return to the writ were the following: First. The petition presented to the county court did not contain the signatures of a sufficient number of legal voters. Second. An injunction had been awarded by the circuit court of said county inhibiting and restraining the said petitioners from moving for, and said county court and the commissioners thereof from ordering, an election upon the petition of said Mann and others until the

further order of the said circuit court. Third. At the time of the presentation of said petition to the county court of said county the regular term thereof at which said petition could have been filed had ceased and ended by operation of law, by reason of the adjournments which had occurred. Fourth. If said term had not so ended, there had been a final adjournment thereof on the 3d day of October, 1905, wherefore it could not be reconvened for the transaction of business which it was its duty to perform at that term.

The proceeding for obtaining the calling of an election for the relocation of a county seat is special and statutory, and the duty of the county court as to it purely ministerial. *Doolittle v. County Court*, 28 W. Va. 158. Section 15 of chapter 39 of the Code, as amended by chapter 95, p. 206, of the Acts of 1901, prescribes minutely the duty of the county court respecting the same. The petition shall be signed by two-fifths of all the legal voters of the county, to be estimated by allowing one vote for every six persons in the county, as shown by the last preceding census, and an affidavit shall be appended thereto that the petitioners are, as affiant verily believes, legal voters of said county. At the same term at which such petition is filed the court shall make an order that the vote be taken at the next general election to be held in said county upon the question of such relocation at the place named in the petition, if a general election is to be held in that year, and, if none is to be so held, the court shall, at the same session at which the petition is filed, fix a day for, and order the holding of, a special election upon the question of such relocation. A petition containing the requisite number of names, and so verified by affidavit, makes a prima facie case, and if it is not in any way contested, nor the prima facie case thus made overthrown, the court must act upon it as it is. The affidavit is the only proof required, and the court cannot ignore the petition and refuse to act merely because members of it are of opinion that some of the persons whose names appear therein are not legal voters. That the requisite number of names was subscribed to the petition is not denied. The only fact controverted by the answer is that a sufficient number of the petitioners are legal voters. That was a matter to be determined by the county court according to the record as it was in that court at the time it was called upon to act, and, as the record then stood, it was bound to find and determine that the petition was sufficient, because there was no evidence that any person whose name appeared in the petition was not a legal voter. In order to sustain the position taken in this court, it would be necessary for the record, as it remains in the county court, to show that enough of the names subscribed to the petition to reduce the entire number below the requisite two-

fifths were names of persons who were not legal voters. There should be at least some evidence tending to rebut the prima facie case made by the petition. Acting upon mere personal knowledge or belief of its own members, not in any way put into the record of the proceeding so as to permit the correctness thereof to be inquired into, the court could not refuse to order the election. The return fails, not only to show anything in the record indicating insufficiency of the petition, in the respect above mentioned, but also that anybody proposes to test its sufficiency by any attack upon it. What the action of this court might be, if it appeared that upon the reconvening of the county court counter affidavits and other evidence would be adduced showing such defect in the petition, we are not called upon to say. No such showing is made.

The function performed by a county court in ordering an election under the statute hereinbefore referred to is legislative or governmental in its nature. It neither concerns nor affects any private right in the legal sense of the terms. Injunction is not a remedy which may be invoked by the citizen for the purpose of controlling public officers or tribunals in the exercise of their functions and powers. In order to sustain it the plaintiff must show that he has a special interest, in respect to which he will suffer a special injury of a private nature. It is not enough that the community in which he resides will be injuriously affected by some governmental or legislative action. Injunction is not within his reach until in some way his private, personal or property rights are invaded. "Courts of equity have no jurisdiction, independent of statute, to enjoin at the suit of citizens the proceedings of county officers because of the illegality of the act creating such county, when no question of private right is involved." *High on Inj.* (4th Ed.) § 1249. "A court of equity has no jurisdiction to interfere in disputes concerning municipal elections, and when a court has assumed jurisdiction in such a case, and has enjoined a board of municipal officers, such as the common council of a city, from canvassing the returns of a municipal election, which is made their duty by law, such injunction will be regarded as absolutely void for want of jurisdiction over the subject-matter." *Id.* § 1250. "Equity will not interfere to prevent the enforcement of a city ordinance simply on the ground of its illegality, nor will it assume jurisdiction to question the lawful election of officers, or the validity of the ordinance per se, for the purpose of protecting citizens from an uncertain and remote injury." *Id.* § 1243. These general principles have been asserted by this court in *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182. See, also, *Spelling on Inj.* § 630; 10 Am. & Eng. Ency. Law, 817; *Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. 23, 3 L. R. A. 53, 25 Am. St. Rep. 792. Courts cannot interfere by appeal, in-

junction, or otherwise with the exercise of governmental powers and functions, when the statute does not expressly authorize such interference. *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747; *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. 488.

The Legislature, in prescribing the mode of calling and holding elections for the relocation of county seats, has failed to provide any mode of reviewing or controlling the officers or tribunals charged with duties in respect thereto. If courts of equity should interfere on the ground of a want of remedy, the very object which the Legislature sought to avoid might thereby be accomplished, namely, the filling of the courts with controversies of a political nature, a matter entirely foreign to the ordinary jurisdiction of equity. No doubt the citizen has the right to appear before the county court and remonstrate and point out insufficiencies and defects in the petition, and contest the truth of its allegations, but it does not follow that he may appeal from the action of the court, or have a power of control over it by means of an injunction from a court of equity. The Legislature has seen fit to vest in the county courts power to call such elections, without providing any special mode of review of their action. Who shall say the Legislature could not do this? What authority or reason in law is there for saying it may not give county courts power to order such elections, whenever, in the opinion of the court, it shall seem expedient to do so? Undoubtedly it could do so. Having full and unrestricted power over the subject, it could have made the affidavit appended to the petition conclusive evidence of the truth of the facts stated in it. So also, relying upon the ability and integrity of the county courts of the state, it could make their action upon the petition final, and was not bound to provide any mode of review or control. Whether it has done so we do not determine further than to say there is no special provision of that kind, and courts of equity have no such power under general law. Fraud is a ground of equity jurisdiction, but only when it works injury of a private nature. Why should there be any elaborate system of laws for the mere calling of an election? It only gives the people a chance to vote on the question. Of itself it effects nothing. Our statute safeguards the taxpayers by making the petitioners pay the expenses of the election. In view of the principles above stated and the nature of the act in question, we think the circuit court had no jurisdiction, and that its injunction is void.

The contention that the court was not in session at the times at which the petition was presented is founded upon sections 2 and 10 of chapter 114 of the Code of 1899. Said section 2 reads as follows: "The Supreme Court of Appeals and circuit and county courts may at any time adjourn from day to day until the business is dispatched, or until

the end of its term." Said section 10 provides that, "although a court be not held on the first day of a term, it may nevertheless be opened on any subsequent day: Provided, in the case of a circuit or county court, the same shall be done before four o'clock in the afternoon of the third day. If, after a court is opened, it fail to sit on any day, it may nevertheless sit on any subsequent day of the term: Provided, in the case of a circuit or county court there be not more than three consecutive days of such failure." That the two sections have different purposes is perfectly apparent. The object of section 10 is to prevent the loss of a term of court, and discontinuance of pending cases, when, for any reason, the court fails to open on the day fixed for the beginning thereof, or on any day to which a term, after it had been opened, may have been adjourned. It does not purport to fix the time to which an adjournment may be made by any court, or place any limitation thereon. It merely continues the term by force of law, when the court has failed to commence business at the time appointed by law, or by its own adjourning order, for that purpose. Making no mention of, or reference to, adjournments, but ignoring the fiction by which the whole term is, for some purposes, considered a day, and assuming that the power of adjournment, possessed by all courts, will be exercised, it makes provision for failure to sit on the day to which a court may adjourn. As to when a court may adjourn, and for what period of time, it is absolutely silent.

It only remains, therefore, to determine the effect of section 2. By the common law a court has the inherent power to adjourn its session, not only from one day until the next, but to a distant day, or, as it is sometimes expressed, from time to time. *Mechanics' Bank v. Withers*, 6 Wheat. 106, 5 L. Ed. 217; *In re Hunter*, 84 Iowa, 388, 51 N. W. 20; *Stirling v. Wagner* (Wyo.) 31 Pac. 1032. The case last cited carefully reviews a large number of decisions of different states of the Union, and clearly shows that by the great weight of authority a court may so adjourn, unless the power to do so is restrained or limited by statute. Although our statute says adjournments may be from day to day, it does not necessarily follow that it means to limit the power of the court to an adjournment from one day until the next. Many statutes are simply declaratory of the common law. They are made for the purpose of avoiding all doubts and difficulties as to what the common law is and has been. *Suth. Stat. Constr.* § 329; *Dwar. on Statutes*, §§ 475, 477. This gives the statute effect under the rule that the courts, in construing statutes, must make them effect some purpose, for the Legislature is deemed to have had some reason for passing every statute. "A statute made in the affirmative, without any negative expressed or implied, does not take

away the common law." *Suth. Stat. Constr.* § 320. No negative word or phrase appears in section 2. There is a presumption, also, that the Legislature does not intend to make any innovation upon the common law further than the necessity of the case requires, wherefore the courts will not, by construction, extend the effect of the language used beyond its natural meaning. *Suth. Stat. Constr.* § 454. This rule probably does not apply to merely remedial statutes or those relating to public policy, and may not therefore be applicable to this case. By the application of these rules it is difficult to reach a satisfactory conclusion as to what the Legislature intended. Under such circumstances it is highly proper to resort to the well-settled and very wholesome rule of contemporaneous construction. It is a fact known to the court, by the experience and observation of its members during their practice at the bar, their general knowledge of the proceedings of the circuit and county courts of the state, and information imparted by members of the legal profession, that said courts have almost, if not quite, uniformly interpreted and construed this statute as allowing adjournments from time to time as well as from day to day. Such has been the practice here since the formation of the state, and probably was, under the same statute, by the courts of Virginia prior to the organization of the state. Some of them cautiously avoid adjourning for more than three days, but, in most instances no such limit is observed. If section 2 inhibits an adjournment for more than one day, no authority for a longer adjournment exists. Section 10 does not confer it, and an adjournment for three days would be as unwarranted as one for 10 days. The only difference would be in this, that a failure for three days or less to sit would not destroy the term, while such failure for 10 days would do so. During all this time the Legislature has acquiesced in this construction of the statute. In some of the recent legislation of the state adjournments by the circuit courts from time to time have been expressly authorized. Code 1899, c. 112, § 5, relating to special terms. Such acquiescence on the part of the Legislature gives rise to the presumption that this construction of the statute is in conformity with its intent. "A contemporaneous construction is that which it [a statute] receives soon after its enactment. This, after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the Legislature. If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation, sanctioned by long acquiescence on the part of the Legislature and judicial tribunals, is the strongest evidence that it has been rightly

explained in practice. A construction under such circumstances becomes established law." *Suth. Stat. Constr.* § 473, citing numerous cases, including *Hahn v. United States*, 107 U. S. 402, 2 Sup. Ct. 494, 27 L. Ed. 527; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; and *Hamilton v. McNeil*, 13 Grat. 394. "The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons." *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690; *Morris v. Board of Canvassers*, 49 W. Va. 251, 258, 38 S. E. 500; *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *Brown v. United States*, 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079.

Great evil would result from a judicial repudiation of this construction, for it would invalidate numerous judgments, decrees, and orders of the various courts of the state. This is a consideration not lightly to be passed over in reaching a conclusion as to the meaning of the doubtful language found in the statute. No adjudication by this court or by the Virginia court sustains the view taken by counsel for the respondents, nor does any reported decision expressly enunciate the proposition here asserted; but, under substantially the same statute, one authorizing adjournment from day to day, the Supreme Court of Virginia, in *Langhorne v. Waller's Ex'rs*, 76 Va. 213, virtually holds that an adjournment may be taken to a distant day. The court had adjourned from the 20th to the 23d of December, but did not sit on the 23d, nor until the 26th, and it was held that a judgment rendered by it before 4 o'clock on the 26th of December was valid. In the opinion it is said the power of the circuit court to adjourn from the 20th to the 23d was not questioned, and the appellate court expressly decided that such an adjournment could properly be made. The language in section 4 of chapter 114, and section 13 of chapter 18, lends countenance to the view that an adjournment can be for but one day, but it is all clearly reconcilable with the other construction. A provision in a notice to take depositions for continuing the taking thereof from day to day has been held not to authorize an adjournment to a distant day. *Buddicum v. Kirk*, 3 Cranch, 293, 2 L. Ed. 444; *Raymond v. Williams*, 21 Ind. 241; *Harding v. Herrick et al.*, 3 Ala. 60. But the taking of depositions differs from the holding of a court, and, moreover, the opinions in the cases just cited are unsatisfactory, because they set forth no reason for the conclusions stated.

The reported decisions of this court disclose no instance of hardship, surprise, or other cause of injury or complaint arising out of the operation of the statute so construed. How could it occur? Every cause must be matured and placed on the docket of a circuit court before the first day of a term

thereof, else it cannot be heard at that term, unless it be some special proceeding. If it is on the docket, and the parties want to be heard, they must attend on the day set for the hearing, and remain until some disposition of the case is made. If an adjournment over one or more days occurs, the record shows it and affords notice. The business of county courts affecting private interests is now, for the most part, *ex parte* in character, and the requirement of notice does not enter extensively into its transactions. If the Legislature did intend to prevent an adjournment to a distant day, in the interest of economy in the public expenditures, or for any other reason of public policy, the statute would probably have to be regarded as directory, for the length of the adjournment would not be of the essence of the holding of a term of court, and the statute contains no inhibitory language.

To hold that a county court or other tribunal, charged with the performance of a ministerial duty, at a given term, cannot be reconvened and compelled to perform that duty as of that term, when it has adjourned without having performed it, would place it in the power of every such body to refuse performance of its duty, and at the same time deny to those who are entitled to have it performed any remedy whatever. In order to evade performance of duty it would be necessary only to adjourn. In *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690, the power to reconvene a board of canvassers after a final adjournment on its part, without having legally performed its duties, was expressly declared and exercised, and that case has been followed by several others. Although a distinction between the county court sitting as a board of canvassers and a county court sitting as such is urged, no substantial ground therefor is perceived. The argument is that, as the court had finally adjourned, it would not, if reconvened, be in regular session, but in special session, and, as the action required of it can only be taken in regular session, it would be a vain and futile thing to require the members of the court to reassemble. The theory upon which a court or other tribunal is reconvened by mandamus, and compelled to perform its duty, is that it cannot legally adjourn as long as a mandatory duty rests upon it, respecting anything to be done at that term. The adjournment is final as to all other matters, but, as to that matter, there is not in law any adjournment, but only a formal adjournment and a physical absence of the members of the court. As to such matter, the court has no power to adjourn, if proper steps to prevent it are promptly taken; and, when the members reassemble under the mandate of a supervising tribunal, the court is in regular session quoad the duty it has failed to perform.

(140 N. C. 266)

ROSE v. DAVIS et al.

(Supreme Court of North Carolina. Dec. 12, 1905.)

1. ANIMALS—RUNNING AT LARGE — OWNERSHIP BY NONRESIDENT—BONA FIDE CLAIM.

Code, § 2319, looks to the forfeiture by a nonresident of a fixed sum per head, for stock driven within the state during a certain period of the year, and suffered to range at large, but provides that within certain limits the section shall not apply to one "who * * * may own in said county any estate in land for one year, or other higher estate." *Held*, that the good faith of a nonresident, or a bona fide claim to title, would not bring him within the proviso.

2. PARTITION PROCEEDINGS—JURISDICTION—SERVICE ON NONRESIDENT—COLLATERAL ATTACK.

The summons was not contained in the record of certain special partition proceedings. In the affidavit and order of publication, however, it appeared that a summons was issued, and a return made that defendants could not be found "after due search," and that defendants were nonresidents, having an interest in the subject of the action which was property within the jurisdiction of the court. The order of publication and notice of publication were full and explicit, and due publication was made of the summons according to law. The land was sold, the purchase money paid, the sale confirmed, and deed made to the purchaser by the commissioner. *Held*, that there was no defect in the proceedings sufficient to oust the jurisdiction of the court so as to admit of collateral attack.

Appeal from Superior Court, Swain County; Ferguson, Judge.

Action by Q. L. Rose against J. R. Davis and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

This is an action brought by the plaintiff under section 2319 of the Code for the penalties mentioned therein. That section of the Code is as follows: "If any person who shall be a resident citizen of another state or one of the territories shall drive or cause to be driven into any county in this state any horses, mules, hogs, cattle, or sheep, between the first day of April and the last day of November, and suffer them to run at large in any marsh or forest range in this state, he shall forfeit five dollars for each head so permitted to run at large to any one who may sue for the same, or proceed by attachment, in case the offender is not to be found, one half to the party suing for the same, the other half to the school fund of the county. Provided, this section shall not apply to any non-resident, who for the time being may own in said county any estate in land for one year, or other higher estate, unless such non-resident shall bring into the range more than twenty head of any of said beasts for every two hundred acres of land owned by him in manner aforesaid in said county." There are other provisos, but they are not material to this case.

Fry & Howe, for appellant.

BROWN, J. It was admitted and found on the trial that plaintiff was a resident of this state, and that the defendants were non-residents. The plaintiff offered evidence to the effect that the defendants, in the year 1903, between the first day of April and the last day of November, drove or caused to be driven into Swain county 220 head of sheep and cattle, and ranged them in the forests of the Smoky Mountains in said county. The defendants offered evidence to the effect that they drove only 120 head, and also evidence tending to show that they had such an estate in 1,200 acres of land in said county as would justify them for driving that number of sheep and cattle into said county by bringing themselves within the purview of the first proviso contained in section 2319 of the Code. The plaintiff seeks to recover the penalty provided in the act for illegally driving and ranging 120 head of sheep and cattle in Swain county. The court submitted certain issues to the jury, to which there was no exception. The first issue was as follows: "Did the defendants or either of them drive, or cause to be driven, between the first day of April, 1903, and the last day of November, 1903, unlawfully and without right or authority drive or cause to be driven into the county of Swain, in the state of North Carolina, cattle or sheep, and unlawfully and without right or authority range or cause to be ranged in the forests and commons in said county and state, and cause them to run at large in the forests of said county; and if so, how many? Answer: No." The defendants contended that they did not drive more than 120 head of cattle and sheep during the said year, and sought to justify by showing a claim or title to certain land.

His honor charged the jury, among other things, that if the defendants believed in good faith, at the time they drove or caused to be driven into Swain county cattle and sheep and ranged them in Swain county, that they had a bona fide claim or title to 1,200 acres of land in Swain county, then they would have been entitled to range in Swain county 120 head of cattle and sheep, without being liable for the penalty therefor. In this instruction there was error. The question of the defendants' good faith or bona fide claim does not enter into the case. In order to justify the defendants in ranging at large their cattle and sheep in Swain county, the burden is upon them to show that they own an estate in land in said county for one year or other higher estate. Under the provisions of section 2319 of the Code, if a nonresident owns such an estate in land in said county, then he may bring into the range 20 head of the beasts mentioned in the statute. If he brings in more than 20 head of such beasts to range, then he must show such an estate in 200 acres of land for

every additional 20 head which he may turn into the range.

It is contended by the plaintiff that the special proceeding for partition, entitled Samuel L. Davis et al. v. James A. Sparks and others, under which defendants seek to establish title to certain lands, is null and void for irregularity, and so much so that it may be attacked collaterally. We have examined it with care and do not find any grave irregularity in it—certainly nothing that avoids it on the face of the record. Although the summons in the special proceeding is not in the record, it sufficiently appears in the affidavit and order for publication that a summons was issued and that a return was made thereon that the defendants could not be found after due search. The affidavit for publication sets out the return of the sheriff and avers that defendants cannot be found "after due search." This is tantamount to "due diligence." It further states that defendants are nonresidents of this state and that they have an interest in the property, the subject of the action and in the jurisdiction of the court. The order of publication is equally full and explicit in its recitals, and it appears that due publication was made of the summons according to law. The notice of publication is set out in the record, and it is full and explicit. The land was sold for partition, and the purchase money paid by the purchaser, the sale confirmed and deed made to him by Everett, the commissioner, in due form.

We find no defects in the proceeding sufficient to avoid the sale, much less to oust the jurisdiction of the court.

New trial.

(140 N. C. 270)

HYATT et al. v. DE HART et al.

(Supreme Court of North Carolina. Dec. 12, 1905.)

1. APPEAL — PRESUMPTIONS — BURDEN OF SHOWING ERROR.

The presumption prevails on appeal, even in injunction cases, that the judgment and proceedings below are correct, and the burden is on appellant to assign and show error.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 3667, 3670.]

2. INJUNCTION—RESTRAINING ORDER PENDING HEARING—DISSOLUTION.

Where the relief demanded by injunction is a restraining order against a tax levied by virtue of an election which had been held under Laws 1901, p. 65, c. 4, § 72, as amended by Laws 1903, p. 756, c. 435, § 24, authorising a special school tax, and providing for the use of the tax in the education of the young, and the granting of the relief would seriously interfere with the education of the young, an injunction to the hearing is properly dissolved, where the judge found as facts that one-fourth of the freeholders of the district signed the petition for the election, and that, while there were some irregularities in holding the election and recording the result, these were

not such as to vitiate the election or make the collection of the tax illegal.

Appeal from Superior Court, Swain County; Ferguson, Judge.

Suit for injunction by R. H. Hyatt and others against S. A. De Hart and others. From an order dissolving a restraining order, plaintiffs appeal. Affirmed.

F. O. Fisher, for appellants.

CLARK, C. J. This is an appeal from an order dissolving a restraining order, which had been granted until the hearing, against a tax levied by virtue of an election, authorizing a special school tax, held by virtue of section 72, c. 4, p. 65, Laws 1901, as amended by section 24, c. 435, p. 756, Laws 1903. The evidence was conflicting. The judge found as facts that one-fourth of the freeholders of the district signed the petition for the election, and that a majority of the voters voted in favor of the special tax, and that, while there were some irregularities in holding the election and recording the result, they were not of such nature as to vitiate the election or make the collection of the tax illegal. Ordinarily, the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct, and the burden is upon the appellant to assign and show error; and, looking into the affidavits in this case, we cannot say there was error below.

The general rule is that when the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is itself the main relief, the court will not dissolve the injunction, but will continue it to the hearing. *Marshall v. Commissioners*, 89 N. C. 103. But, when the injunction is against the prosecution of enterprises which tend to develop the resources of the country, an injunction to the hearing will ordinarily be refused. *Walton v. Mills*, 86 N. C. 280. Certainly, therefore, an injunction to the hearing should be denied or dissolved on the state of facts here found when the relief sought will seriously interfere with the education of the young. There can doubtless be a speedy trial of the disputed issues of fact before a jury, and in the meantime the schools should not be interrupted when the weight of the testimony is found by the judge to be as above stated.

Affirmed.

(140 N. C. 231)

M. MILLHISER & CO. v. LEATHERWOOD.
(Supreme Court of North Carolina. Dec. 12, 1905.)

1. APPEAL—NONSUIT—REVIEW.

The court, on appeal from a judgment of nonsuit, must assume that the evidence tending to prove plaintiff's case is true and view it in the aspect most favorable to him, drawing every legitimate inference therefrom which a jury could have drawn.

2. SAME—ESTOPPEL TO ALLEGE ERROR.

The refusal to dismiss a case at the close of plaintiff's case is not reviewable, where defendant introduced evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3614.]

3. JUDGMENT—CONCLUSIVENESS—PERSONS CONCLUDED—PERSON NOT A PARTY.

A person is not bound by a judgment rendered in an action to which he was not a party.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1230-1233.]

4. PAYMENT—EVIDENCE—QUESTION FOR JURY.

Where a creditor sent a claim to an attorney for collection, and in the settlement of another controversy between the debtor and a third person money came into the possession of the attorney and was deposited in a bank to his credit under arrangement that the attorney should send his own check to the creditor in payment of the claim, the question whether the creditor could recover from the attorney on the theory that the debtor had paid the claim to the attorney was for the jury.

Brown, J., dissenting.

Appeal from Superior Court, Swain County; Shaw, Judge.

Action by Gustavus Millhiser and others, trading under the firm name and style of M. Millhiser & Co., against R. L. Leatherwood. From a judgment of nonsuit, plaintiffs appeal. Reversed.

This action was brought to recover the sum of \$647, which it is alleged the defendant received on a claim he held for collection as attorney for the plaintiffs, and which, upon demand, he has failed to pay over. This allegation is denied in the answer. The evidence tended to show that the plaintiffs had sold and delivered goods to Marr & Co. to the amount of \$1,000. They paid \$230, and the account, then amounting to \$730, was sent by plaintiffs to defendant as their attorney for collection. Coffin & McDonald owned and operated a mill, and had contracted with one W. W. Ladd to saw logs for him. Coffin & McDonald failed to pay their hands, and Marr & Co. advanced the money, at their request, to the hands, and took an assignment of the claims of the hands against Coffin & McDonald, and filed liens upon lumber which belonged to Ladd. The defendant also represented Ladd as attorney. It was agreed between the defendant, as plaintiffs' attorney, and W. T. Conley, acting for Marr & Co., that if Conley would release the liens, and take down the notices of sale, which had been posted on the lumber piles, the defendant would assume the payment of the account of the plaintiffs against Marr & Co.; he stating at the time that Ladd, his client, had placed the money in the bank to his credit in order to pay the amount secured by the liens and discharge the same, and that he would pay the amount for which liens were filed out of this money. W. T. Conley, a witness for the plaintiffs, in this connection testified: "Defendant said that if I would take notices of sale off the lumber, so that he could load it, he would pay the Millhiser debt to the amount of the notices taken off. The

debt amounted to \$630, and the liens to \$700." The witness further testified: "I told him the Millhiser debt was what I wanted to be paid, and that I would go on and take the liens off if he would apply the money to the payment of the Millhiser debt, and I then went and helped to take the notices of sale off the lumber, and it was then loaded and shipped away. Ladd had Noble to load the lumber. Leatherwood said he would pay the amount to Millhiser & Co., instead of paying it to me, as he held the claim against me, and I agreed to this. The next morning I went to the defendant to get a receipt, and he said that he was busy right then, and would give a receipt just as soon as the lumber was loaded." About two weeks afterwards, Conley saw the defendant, who told him that some of the checks he had drawn on the fund in bank had been returned protested, as they had drawn the money out before his checks were presented. Conley then asked defendant for a receipt for the claim of Millhiser & Co. against Marr & Co., and he replied that he would rather wait until he collected the money out of them. Defendant paid some of the lienors, but stopped paying when the money had been drawn from the bank. Sheriff Teague (who held the execution for the sale of the lumber issued in the proceedings to enforce the liens) testified that the defendant requested him to postpone the sale, stating at the time that the money to satisfy the liens would be sent to the bank and might be there that day. The sheriff refused to postpone the sale, when defendant told him, if he would go to Asheville with him to see about the money, he would pay his expenses. They went and saw Rankin, the bank's cashier. They inquired of him if any money was there for the defendant, and he said there was not. Defendant then said, "We will go to dinner and come back." They returned to the bank after dinner, and the cashier told them that the bank had been wired to put \$1,000 to defendant's credit. The sheriff then wired his deputy to postpone the sale. The witness Teague further testified: "The next day the defendant gave me a check for the liens. I sent the check to the bank, and Rankin told me defendant had no funds to meet the check, as Stewart had wired the money out of Leatherwood's hands, or countermanded his order. Defendant said this money was to pay off the liens. After refreshing my recollection I remember that the defendant told Conley he would receipt him for the Millhiser debt if he would release the liens." There was other testimony corroborating that already stated. The defendant testified in his own behalf that he thought the \$1,000 was in the bank when he gave his check to Sheriff Teague for \$142. Rankin told him, not that the money was in the bank to his credit, but that the bank had received a telegram to put \$1,000 to his credit, and that the order to do so was immediately countermand-

ed. He stopped shipping lumber, and was not afterwards notified that any money had been placed to his credit. Defendant then testified: "I never told Conley that I would give him a receipt for the Millhiser claim till money was placed to my credit. If there was any conversation about the receipt, I don't remember it. I owed Marr & Co. an account, and I might have agreed to credit it on the Millhiser matter and give him a receipt, but I didn't do it." He further testified that he did not tell any one that he had \$1,000 in the bank. If anything was said about it by him, it was when he returned from Asheville and repeated what Rankin had told him. The other material portions of the plaintiffs' evidence were denied. The witness Rankin testified that the bank had received a telegram to pay defendant \$1,000, but that in about an hour the request had been withdrawn, and that he had no time to place the amount to the credit of defendant, and that he had never notified him of it. No such amount was ever placed to his credit. He had searched for the telegrams, but could not find them, and thought they were burned. The order authorized the bank to draw for \$1,000, and place that amount to defendant's credit. He also said that he did not recollect telling Teague what the latter stated he had said to him at the bank about defendant having a credit there of \$1,000. At the close of the plaintiffs' testimony, the defendant moved for a judgment of nonsuit under the statute, which the court refused, and at the close of all the testimony he renewed the motion. The court sustained it, and entered judgment of nonsuit. Plaintiffs excepted and appealed.

Fry & Rowe, for appellants.

WALKER, J. (after stating the facts). A judgment of nonsuit requires us to assume that all the evidence which tends to establish the plaintiffs' case is true, and to view it in the aspect most favorable to the plaintiffs, drawing every reasonable and legitimate inference therefrom which the jury could have drawn, had they passed upon the case. All the facts that make for the plaintiffs must be taken as established, and considered by us, and all those that make against them must be rejected. In a few words, they are entitled in this court to the most favorable interpretation of the evidence after excluding all that is against them. *Springs v. Schenck*, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552; *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953; *Printing Co. v. Raleigh*, 126 N. C. 516, 36 S. E. 33. In *Brittain v. Westhall*, 135 N. C. 495, 47 S. E. 616, the principle was thus formulated: "It is well settled that on a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true, and construed in the light

most favorable to the plaintiff, and every fact which it tends to prove must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony." It was said in *Avery v. Stewart*, 136 N. C. 430, 48 S. E. 775, 68 L. R. A. 776: "The right of the plaintiff to have [the case] submitted to the jury cannot be denied or abridged, provided there is some evidence tending to establish the plaintiff's contention." The same principle applies with equal force when a plaintiff, in deference to an adverse intimation of the court, submits to a nonsuit. *Gibbs v. Lyon*, 95 N. C. 146; *Springs v. Schenck*, supra; *Abernathy v. Stowe*, 92 N. C. 213. The court declares in the case last cited that the plaintiff is entitled to go to the jury if in any view of the evidence he has made out a prima facie case. The question as to what is evidence fit to be considered by the jury was discussed by us in *Byrd v. Express Co.*, 51 S. E. 851, and *Campbell v. Everhart* (at this term) 52 S. E. 201.

We will now proceed to examine this case in the light of this well-settled rule. If the first ruling made by the court was right—that is, the refusal to nonsuit the plaintiff at the close of his testimony, then the second ruling was wrong, as none of the evidence afterwards introduced could be considered against the plaintiff, but only such as was in his favor. But we pass by the first ruling, as it was eliminated when the defendant introduced testimony, and we are now confined to the second ruling dismissing the action at the close of all the testimony. It appears that the plaintiffs sued Marr & Co. for the recovery of the debt due to them, and obtained judgment. Defendants appealed to this court, and it was held here that the transaction between Marr & Co., the bank, and Leatherwood constituted a payment of the plaintiffs' claim, and a new trial was awarded. *Millhiser v. Marr*, 128 N. C. 318, 38 S. E. 887. The case was again tried below, when the defendant got a judgment and the plaintiff appealed. Upon testimony substantially identical with that we have before us, this court held that there was evidence for the consideration of the jury upon the plea of payment, and that the only question involved was one of fact, whether the money had been placed in the bank to Leatherwood's credit, and, the jury having found with the defendant, the judgment was affirmed. *Millhiser v. Marr*, 130 N. C. 510, 41 S. E. 872. Leatherwood is certainly not bound by either of those decisions, under the doctrine of *res judicata*, for they cannot have that force and effect as to him; he not having been a party to the action. But, if we are to follow those cases as precedents, there is no way of avoiding the conclusion that his honor erred in the trial of this cause, when he withdrew the case from the jury and decided as matter of law that the plaintiff was not entitled to recover, in any

view of the evidence. In the first of the decisions of this court to which we have referred it is said: "In what way Ladd drew the money out of the bank does not appear, but it does not concern defendants. Under their agreement with Leatherwood, who had it in bank to his credit, it had been appropriated for the payment of plaintiffs' debt, and if, by negligence or otherwise upon the part of the attorney or the bank, Ladd got hold of the money, plaintiffs must look to them, and not to defendants. Plaintiffs were acting through their agent, having placed in him authority and trust, and are bound by his acts in dealing with defendants. In no sense was he the agent of the defendant, and they lost all control over, right to, and responsibility for the money when he agreed to and did accept it in payment of his client's debt." 128 N. C., at page 321, 38 S. E. 888. And in the second of the decisions the court says: "His honor committed no error in holding, at the close of the evidence, that all there was in the case was whether or not the \$1,000 had been placed in the bank to the credit of Leatherwood to pay off the liens. There is no suggestion that Leatherwood misapplied the fund, but it is admitted that he did not do so. Under the decision of this court (*Millhiser v. Marr*, 128 N. C. 318, 38 S. E. 887) it is held that plaintiffs' debt against defendants was settled when W. T. Conley released his lien and agreed that his money in Leatherwood's hands should be applied to that purpose." 130 N. C., at page 512, 38 S. E. 887.

Without discussing or deciding the question as to the liability of the defendant, we simply hold that there was evidence for the jury upon the issue raised by the pleadings. We prefer not to intimate any opinion as to the present stage of the case as to the liability of the defendant, nor until we have a finding of the jury upon the facts. They may find against the plaintiffs, and it may not, therefore, become necessary ever to decide that question, and, if they find for the plaintiffs, we do not now know exactly how the matter will be presented, if there is an appeal. We fully concur in what is said by the court in *Millhiser v. Marr*, 130 N. C. 512, 38 S. E. 887, namely, that there is no suggestion, and, we add, no evidence, that Leatherwood ever misapplied the fund or any part of it, nor, indeed, that he ever had it in his actual possession. His liability must depend upon facts, from which it will appear that he has derived no personal benefit from the transaction.

There are other exceptions in the case, but it is not necessary to consider them, as the decision upon the matter discussed is sufficient to dispose of the appeal, and the other questions may not again be presented. We will suggest, however, that if the plaintiffs expect to recover upon any other ground than that stated in the complaint, for example, upon the ground of negligence, they

must amend their pleading. They can recover, if at all, only according to the allegations of their complaint. *Faulk v. Thornton*, 108 N. C. 314, 12 S. E. 998.

There was error in the ruling of the court. The nonsuit will be set aside, and a new trial awarded.

Error.

BROWN, J. (dissenting). I am impelled to dissent from the opinion and conclusion in this case.

1. The allegations of the complaint are to the effect that the defendant received the money from his client, and the action is evidently brought to recover the money so had and received. There is no evidence that the defendant ever received the money or anything else in payment of the debt.

2. If the defendant is to be charged with negligently releasing the lien on the lumber, which it is claimed he held for his client's benefit, that would involve a radical amendment to the pleadings, and practically a change in the cause of action. As no amendment was asked for in the superior court or in this court, I think the judgment should be affirmed.

(140 N. C. 133)

RUTHERFORD COUNTY COM'RS v.
ERWIN et al.

(Supreme Court of North Carolina. Dec. 12, 1905.)

APPEAL—REVIEW—EXCEPTION—NECESSITY.

Under rule of practice 27 (39 S. E. vii), requiring objections to be noted by exceptions, and providing that no exception not so set out and made a part of the case or record shall be considered, a general exception to the trial court's action on the report of a referee will not be considered on appeal, where there are various exceptions to the report and several questions of law and fact passed upon.

Appeal from Superior Court, Rutherford County; W. R. Allen, Judge.

Action by the commissioners of Rutherford county against L. P. Erwin and others. From a judgment modifying and affirming a report of a referee and dismissing the action, plaintiff appeals. Affirmed.

Civil action to foreclose a tax certificate heard on exceptions to the report of a referee. There was judgment modifying and confirming the report, and on the report so modified there was further judgment dismissing the action. Plaintiff excepted and appealed.

Solomon Gallert, for appellant. McBrayer & McBrayer and B. A. Justice, for appellees.

HOKE, J. (after stating the case). There is no objection properly noted in the case which requires or permits this court to disturb the judgment of the court below, and the same is affirmed. The only exception to the action of the judge on the report is in

this language: "The plaintiff excepts to such rulings adverse to it and appeals." A general exception to the many rulings of the judge below on a report and judgment of the kind here presented is contrary to the course and practice of the court and will not be considered. If a party litigant considers himself aggrieved by the rulings of a judge on exceptions to the report of a referee, he should point out his objections by exceptions duly noted, and as a rule only objections so indicated will be considered. Rule of Practice No. 27 (39 S. E. vii); Clark's Code, § 422, and notes; *Young v. Kennedy*, 95 N. C. 266; *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384; *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513. In *Young v. Kennedy* it is held that an exception to the report of a referee will not be considered, where it is vague and indefinite and imposes on the court the necessity of an examination of the entire record to find out its meaning. And in rule 27, requiring objections to be noted by exceptions briefly stated and numbered, it is said that "no exception not thus set out or filed and made a part of the case or record shall be considered by the court other than exceptions to the jurisdiction or because the complaint does not state a cause of action, or motion in arrest for the insufficiency of an indictment."

It may be that a judgment and report thereon could be so restricted in its nature that a single or general exception would note the only point in question, but not so here; and there could be no better illustration of the wisdom of the rule and the reasonableness of its requirement than in the case now before us. Here is a complaint containing 23 allegations as necessary to state the plaintiff's grievance; on answer duly filed a reference is ordered; the referee, after taking quite an amount of testimony, makes an elaborate and carefully prepared report on the points in controversy; to this report the plaintiff files 37 exceptions as to what the report does, and a good number indicated by letters as to what it fails to do. The judge below gives the matter painstaking consideration, passes upon the questions of law and fact, confirms or modifies certain portions of the report, and sets aside others, in some instances substituting his own findings of fact for those modified or set aside. It is a full and well-considered judgment, and the only notice of any objection to it is in the language of the exception above stated. Under the law and rules of practice, such an exception will not be considered as raising any valid objection, and the judgment of the court below dismissing the action is affirmed. While we rest our decision on the form of the exception, there seems to be no error in the proceedings or judgment which gives the plaintiff any just ground of complaint.

Affirmed.

(73 S. C. 21)

ALEXANDER v. DU BOSE.

(Supreme Court of South Carolina. Nov. 16, 1905.)

1. PLEADING—IRRELEVANT MATTER.

Within Code Civ. Proc. 1902, § 181, providing that irrelevant or redundant matter in a pleading may be stricken out on motion of any party aggrieved, an allegation is irrelevant when it has no substantial relation to the controversy.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1156.]

2. EQUITY—PLEADING—FRAUD.

In a suit in equity, where fraud is alleged, it is essential that the facts and circumstances constituting the fraud should be clearly stated and it is not reversible error to refuse to strike out matters which are directly or remotely relevant to the matter sought to be established.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 326.]

Appeal from Common Pleas Circuit Court of Florence County; Dantzler, Judge.

Action by M. Eliza Alexander against Charles W. Du Bose. From an order striking out certain allegations of the complaint, and refusing to strike out others, both parties appeal. Affirmed.

A. B. Stuckey and Galletly & Ragsdale, for plaintiff. J. P. McNeill and Wilcox & Wilcox, for defendant.

JONES, J. Both sides appeal in this case from an order of Judge Dantzler made on the hearing of defendant's motion to strike out certain portions of the complaint as irrelevant or redundant. The defendant moved to strike out those portions of the complaint, herein set out in full, which are italicized, and of those italicized portions, the judge struck out those enclosed within brackets and refused to strike out those not so enclosed. The defendant appeals from so much of the order as refuses to strike out, and the plaintiff appeals from so much of the order as strikes out. The complaint is as follows:

"(1) That the plaintiff is the owner in fee, and in the possession of a part, and entitled to the immediate possession of the whole, of all that tract situate in the county of Florence, state aforesaid, containing, by a recent survey, 826 acres, more or less, in the deeds of conveyance thereof, and is bounded by lands owned by persons now or formerly as follows: North by lands of W. M. Timmons, S. E. B. Hickson, and Adeline Sims; east by lands of S. E. Carter and Margaret Conyers; south by Lynches river; and west by lands of J. J. Ward.

"(2) That there is a cloud upon the title of the plaintiff to the said premises, by reason of the fact that there appears of record in the clerk's office of said county, in Book 1, on page 728, an instrument of writing, purporting to be a deed of conveyance by the plaintiff to the defendant, for the considera-

tion, therein expressed, of \$3,547.49, and which purports to have been signed by the plaintiff, as the grantor, and two subscribing witnesses, namely J. E. Du Bose and May Du Bose. That, while the plaintiff admits that she placed her signature to the original of said instrument of writing, her signature thereto was obtained by the defendant by fraud and deception practiced upon her by him, as hereinafter more fully stated. Yet at the time she signed the same there was no consideration whatever, expressed or stated in the instrument, nor was it witnessed by the subscribing witness May Du Bose, whose name appears as a witness thereto [who was then, at the time of the signing of said original instrument, not at the plaintiff's home, where she signed the same, but was many miles away, as the plaintiff is informed and believes], and that the plaintiff has never acknowledged to her that she signed or executed said instrument of writing. [That the other subscribing witness, J. E. Du Bose, was present at the plaintiff's home on or about the date of said instrument, to wit, the 16th day of September, 1897 and did witness the plaintiff's signature thereon. That if the signature of the said May Du Bose was placed upon the original instrument, of which the said record purports to show a copy, it was put there without the authority or consent of the plaintiff] and that the deed is, therefore, null and void in law, and should be canceled of record by the proper order of this court.

"(3) That the defendant is now [endeavoring to defraud the plaintiff of her right and title to said property] by claiming that he holds the absolute title thereto, and denying that the plaintiff has any title or interest in law or equity to the same; whereas, not only is the said instrument purporting to be a deed illegal, by reason of the defects and deficiencies above stated, but that the signautre of the plaintiff was wrongfully and fraudulently obtained thereon by the defendant by reason of the following facts and circumstances, to wit: That the plaintiff's former husband, Dorsey G. Du Bose, departed this life on or about the 10th day of June, 1891, leaving the plaintiff, his widow and the mother of their children, eight in number, most of whom were small and of tender years. That a few years before his death, acting under the counsel and advice of her husband, who was the manager of all her affairs, she sold a tract of land in Darlington county, and after paying the mortgage debt thereon reinvested the net proceeds in the purchase of the tract of land above described; the title deed being taken to and in the name of the plaintiff, who executed a mortgage thereon to secure the balance of the purchase money thereof, to one Mrs. Mary Byrd, about the year 1889. That the defendant is the plaintiff's next oldest son, and his father, shortly before his death, and being conscious that his death was near hand, told, the defendant, who.

by experience and superior advantages of education, was, as he thought, the best qualified to take his place in the management of the business affairs of the plaintiff after his death, and that he wanted him to take care of his mother, the plaintiff, and take charge of the affairs at home, and the defendant promised to do so. That immediately upon the death of the plaintiff's said husband the defendant took exclusive control of the said plantation, and of all the affairs of the plaintiff, employed his younger brothers, the plaintiff's other children, to work share crops upon said land year after year, hiring some for wages, and agreeing out of their shares of the proceeds of the crops to pay their board to the plaintiff, who kept them, boarded them, and cared for them at her home on said farm, with the understanding that the net proceeds of the crops were to be paid by the defendant upon the said purchase money mortgage debt. He received all of the same and has never accounted therefor to the plaintiff. Some time during the year 1897 Reddin Byrd, the son of the said Mrs. Mary Byrd, and her heir at law, as she had died, came to the plaintiff and asked for the payment of the said mortgage debt; that she referred him to her son, the defendant, and had no further business transaction with the said Reddin Byrd. The defendant then undertook to borrow the money for the plaintiff elsewhere by a mortgage of the premises, and shortly thereafter sent out to the plaintiff's home—the defendant was not, and had not been, being at home with the plaintiff for several years—the agent of the Scottish Loan Company, to inspect the land and ascertain its value, with the view of lending the money upon a mortgage therefor. The said agent stated to the plaintiff and the family that the land was valuable, and that the said company would lend the money thereon. The plaintiff and her entire family were pleased at this statement, and became satisfied that the home would be saved from foreclosure of the first-named mortgage, for the plaintiff had been informed by the defendant that the said premises were then being advertised for sale under the power of sale in the first-named mortgage, which could only be prevented by obtaining the money elsewhere to pay off the same. A few days after the agent went away, the defendant came again to the home of the plaintiff on the said tract of land, and without any previous agreement or understanding with her brought with him the said instrument of writing purporting to be a deed of conveyance, and requested the plaintiff to sign for same, stating that it was necessary for her to make the title over to him, as the said Scottish Loan Company had refused to lend the money to her on account of her age; she being, as he said, above the age, under their rules, to borrow money of them. While the defendant was her son, and she placed great confidence in him, she hesitated to do so, asking him what interest she would then have. The defend-

ant replied that the land was about to be sold under the first mortgage, 'and you and the family will be turned out of the house and home, and be put in the public road, if you do not sign this deed.' The plaintiff began to cry, and the defendant walked away from the house, and in a few minutes came back again, and repeated the statement to her, that, if she did not sign the deed, she would be put in the public road, and, as a further inducement to the plaintiff, told her that he would see to it that she at least was saved 100 acres around the dwelling house. That the plaintiff was and had been for some time in declining health, under the constant treatment of her physician, and was not expected to live many months, her mind and body being both in a weak condition, but trusting the defendant that he would do all that was right and proper by her and her children as to the whole premises, and believing, from defendant's statement, that she and her children would be put out penniless if she did not do so, signed the said deed as aforesaid, and acknowledged her signature to the same to her other son, J. E. Du Bose, who was present when the same was signed; there being no other witness present, as above stated. [That at the time of the signing of the said deed the plaintiff noticed that there was no consideration or purchase price made therein, the space therefor being left blank, and that she has no knowledge or information by what means the consideration thereon, as now appears of record, was ascertained or placed there] nor has she received any consideration therefor from the defendant or any one else, and that her equity of redemption under the first mortgage stated has never been purchased from her by any one. That said tract of land was of the value of about \$10,000 then (1897) and is now worth about \$16,000. That the plaintiff is informed and believes that the defendant soon thereafter, by a mortgage executed by him, obtained the necessary money to pay off the first mortgage aforesaid, which was about the sum of \$1,700, as the plaintiff is informed and believes, though it might be that the same should have been a small amount if the defendant had properly applied all of the net proceeds of the crop thereon prior thereto which he had received. That the defendant's brothers, the plaintiff's other sons, to wit, Junius, Albert, and Oquin, after the signing of the said instrument by the plaintiff, continued to work crops upon said lands, either for wages or under share crop contracts with the defendant, year after year; it being understood by all concerned that the net proceeds were to be applied to the indebtedness on said plantation. That the defendant has continued to receive all of the proceeds from said farm from year to year, being about 40 bales of cotton per annum, besides tobacco and provision crops, and has never accounted therefor to the plaintiff, but, on the contrary, now refuses to account for the same, or for any

other income that he has received therefrom, and claims an absolute fee-simple title to said premises, denying that the plaintiff has any right or interest therein.

"(4) That the said Dorsey G. Du Bose left a life insurance policy of \$1000 for the benefit of his wife and children, but left a chattel mortgage on his horse and some of his cattle to one John McSween. That the defendant was duly appointed the general guardian of the six minor children of the plaintiff, and obtained possession, not only of their shares of the money under the life policy, but of the plaintiff's share as well. That she signed a receipt for the same, but never received the money; the same being paid to the defendant. That, by an understanding with the plaintiff, the defendant undertook to pay, and did pay, off the said chattel mortgage, using the plaintiff's share of the money for that purpose, as far as it would go, which, as plaintiff is informed and believes, was not quite sufficient to pay off the entire amount of the chattel mortgage; but the defendant took charge of the personal property covered thereby, traded off the horse, but for many years left the cattle on the farm, to be used by the plaintiff, until the 30th of March, 1904, he came to the plaintiff's home and took away all of the cattle, being four head, covered by said chattel mortgage, and their increase, and converted the same into his own use, and should account for all of the same.

"(5). That shortly after the plaintiff made said deed the defendant wrote to his next oldest brother, Junius, who was then in a western state, and simply stated that he had the mortgage matter arranged. That soon afterwards Junius returned to plaintiff's home, and upon meeting the defendant there, he acknowledged to him that he had arranged the matter by borrowing the money from the Scottish Loan Company, but that he intended to give his mother 100 acres where the dwelling house is located, to use for her lifetime, and at her death the same to be turned over to him for his share of the plantation, but that the rest of the plantation he intended to divide up among all of her other children in equal shares. Of this the plaintiff is informed by her son Junius and believes the same to be true.]

"(6) That, in addition to all the crops since his father's death, the defendant has also received the proceeds of about 200 acres of pine timber on said tract of land, which was manufactured into lumber by the defendant by and through his contract with some person managing a sawmill, and which he had put upon said land about the year 1900. That the said pine timber was thick and of good quality, and well worth at least the sum of \$10 per acre aggregating \$2,000, all of which the defendant converted to his own use, and should account for the same. That the defendant also had manufactured on said plantation, since he has had control of said tract of land, 60,000 cypress shingles of the value

of about \$250, and sold therefrom, also, 2½ sticks of square timber, and should account for the same.

"(7) That by and through the efforts of her son, since the defendant has had control of said premises, the plaintiff has procured to be cleared upon said land 55 acres of new land, and made suitable for cultivation in crops, and has also built several houses and tobacco barns, in the confidence that she and her children would receive the benefit thereof in the improvement of the plantation, which she hoped to be able to divide among them. [That some of her younger children are now of age and need the land, which she desires to distribute among them.]

"(8) That the plaintiff is informed and believes that the defendant has paid off, or nearly paid off, the mortgage indebtedness aforesaid upon said tract of land, and, whether the same has been paid or not, she alleges that he has received more than a sufficient income therefrom to pay off the same, and should account therefor.

"Wherefore the plaintiff prays judgment that the alleged deed by the plaintiff to the defendant be adjudged illegal, fraudulent, null, and void. That the defendant be required to account for the mortgage debt, and to account for the rents and profits received by him from said plantation, and the live stock and personal property thereon, since the death of his father in 1891. That the income be applied to the payment of the debt, and that the plaintiff have judgment against the defendant for excess, and for such other relief as may be just and proper, and for costs."

1. Section 181 of the Code of Civil Procedure of 1902, provides: "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby." "An allegation is irrelevant when the issue formed by its denial can have no connection with, nor effect upon, the cause of action." Pom. Code Rem. § 551; Smith v. Smith, 50 S. C. 67, 27 S. E. 545. An allegation is irrelevant when it has no substantial relation to the controversy. Nichols v. Briggs, 18 S. C. 473. "Irrelevant matter is necessarily redundant, and though redundant matter—as statements of evidential facts—may pertain to the cause of action, yet they are sometimes called irrelevant as well as redundant." Bliss on Code Pl. § 214. "Matter which has no connection with the cause of action is irrelevant, while the statement of evidential facts is unnecessary. The latter may be very pertinent. They may all relate to the case, yet their statement is uncalled for, and violates as well the rule against pleading evidence, and therefore embodies redundant matter." Same author, § 423. This author gives as his seventh rule for the statement of a cause of action that "no fact should be stated which is not pertinent and whose statement is not necessary." In section 163 of the Code of Civil Proce-

dure of 1902, it is provided that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." The facts thus required to be stated are the basic, ultimate facts, as distinguished from facts which are merely evidentiary. These general rules sustain the action of the circuit court in striking out.

2. On the other hand, this is a cause in equity, and in *Smith v. Smith*, 50 S. C. 54, 68, 27 S. E. 545, the court quotes approvingly from *Pom. Code Rem.* 527, showing that "in the legal action the issuable facts are few. In the equitable suit the material facts upon which the relief depends, or which influence and modify it, are generally numerous and often exceedingly so. In the former they are simple, clearly defined, and certain. In the latter they may be, and frequently are, complicated, involved, contingent, and uncertain." From this distinction there must exist somewhat more latitude in such cases in stating the facts and circumstances upon which plaintiff depends for the relief sought. The court should be liberal in indulging a statement of facts which may be material to the relief sought, in whole or in part. This is especially true when fraud is alleged, as in this case, for, both in law and in equity, it is essential that the facts and circumstances which constitute fraud should be set out clearly. 9 *Enc. Pl. & Pr.* 684; *Gem Chemical Co. v. Youngblood*, 58 S. C. 59, 36 S. E. 437. In such cases it is not reversible error to refuse to strike out matters which are "directly or remotely relevant to the matter sought to be established." *Allen v. Cooley*, 60 S. C. 370, 38 S. E. 622. Under these principles, we find no material reversible error, in so far as he refused to strike out. On the whole we do not see that either party is prejudiced in any material manner by the action of the court.

The exceptions are therefore overruled, and the judgment of the circuit court is affirmed.

The CHIEF JUSTICE did not participate in this opinion, because of illness.

(73 S. C. 45)

ROBERT BUIST CO. v. LANCASTER MERCANTILE CO.

(Supreme Court of South Carolina, July 11, 1905. On Rehearing, Nov. 7, 1905.)

1. PRINCIPAL AND AGENT — AUTHORITY OF AGENT—QUESTION FOR JURY—INSTRUCTIONS.

On conflicting evidence as to the limitation of an agent's authority, it is not proper to charge that the agent was without authority in the premises.

[Ed. Note.—For cases in point, see vol. 40, *Cent. Dig. Principal and Agent*, § 724.]

2. EVIDENCE—SIMILAR ORDERS.

On the issue whether an order for goods was given or not, the salesman who is claimed to have taken the order may not testify that he took an order of the same kind from another

company managed by the alleged purchaser and that such order was accepted.

3. PRINCIPAL AND AGENT — EVIDENCE — DECLARATIONS OF AGENCY.

The declarations of an agent, when taken in connection with the ratification of his acts by the principal, are competent to show agency.

[Ed. Note.—For cases in point, see vol. 40, *Cent. Dig. Principal and Agent*, § 40.]

4. SAME—CONTRACTS OF AGENT—QUESTIONS FOR JURY.

Whether a salesman sold goods under an agreement that his principal should pay the freight *held*, under the evidence, which was conflicting, a question for the jury.

5. TRIAL — DIRECTED VERDICTS — WHEN PROPER.

It is improper to direct a verdict, where there is competent evidence in support of the issues raised in the case.

[Ed. Note.—For cases in point, see vol. 46, *Cent. Dig. Trial*, § 338.]

6. NEW TRIAL—GROUNDS—SUFFICIENCY OF EVIDENCE.

Where there is evidence in support of the issues in a case, it is not error to refuse a new trial.

[Ed. Note.—For cases in point, see vol. 37, *Cent. Dig. New Trial*, §§ 142-145.]

7. SALES—ACCEPTANCE OF GOODS—EFFECT.

The fact that a purchaser accepts a part of a bill of goods sold and pays for them, with the freight thereon, does not estop him to deny his liability to pay freight on the balance of the bill.

8. SAME—TERMS OF CONTRACT—EVIDENCE.

On an issue as to whether the seller of goods contracted to pay the freight, evidence of a decline in the market, subject to which the order was taken, is admissible.

Appeal from Common Pleas Circuit Court of Lancaster County; Watts, Judge.

Action by the Robert Buist Company against the Lancaster Mercantile Company. From the judgment rendered, plaintiff appeals. Affirmed.

R. E. & R. B. Allison, for appellant.
Green & Hines, for respondent.

POPE, C. J. This action has been on appeal once before. See 68 S. C. 523, 47 S. E. 978. There were two points decided on that appeal, to wit: (1) That it was the duty of the jury to accept the charge of the circuit judge and return a verdict in accordance therewith, and upon a failure to do so that this court will order a new trial. (2) That where a contract is silent as to whether the shipper of a consignee shall pay the freight on the shipment the presumption of the law is that the consignee will pay the freight of shipment, but that this presumption of law may be rebutted by parol or other testimony that the shipper was to pay freight from the point of shipment to the destination of such shipment. 21 A. & E. *Ency. of Law*. 1094. Trial de novo was therefore ordered. The new trial took place before Judge Watts and a jury. The verdict was for plaintiff for the sum of \$97.40. A motion for a new trial upon the minutes of the court was then made by the plaintiff. After argument the circuit judge refused the

motion. Upon entry of judgment, the plaintiff alone appealed.

The following were the exceptions of the plaintiff:

"(1) It is respectfully submitted that the testimony, especially the refusal of the defendant to accept and pay for the potatoes at the price specified in the order (a) for the purchase, all show that the contract was over the freight charge; and the circuit judge having charged the jury that the said order in writing for the purchase raised the presumption that the defendant was bound to pay the freight, unless the defendant by some direct positive proof, parol or written, could show that the plaintiff had agreed to pay said freight, and no such agreement by plaintiff or any authorized agent having been shown, the circuit judge erred in refusing the motion for a new trial.

"(2) The Supreme Court having held at the former hearing in this case that the written order for the purchase raised the presumption that the defendant was liable to pay the freight, unless the defendant could show by parol testimony outside of that order that the plaintiff had positively agreed to pay the freight; and no such parol or other testimony to establish such agreement having been produced, the jury failed to follow the law as given by the circuit judge, it was error in the judge to refuse to set aside the verdict.

"(3) It being admitted that the order in writing for the purchase was sent up, both in the answer and the admissions on the trial, this was an established fact which could not be contradicted; and the presumption of law raised thereby that defendant was bound to pay the freight, and, no testimony having been adduced to rebut this presumption, the circuit judge erred in refusing a new trial.

"(4) Because the circuit judge erred in allowing L. C. Lazenby, who purchased the potatoes, to testify that John Mahan sold him the potatoes delivered in Lancaster, without showing that John Mahan was authorized by the Robert Bulst Company to do so, and to testify before the jury that the order in writing for the purchase of the goods was not the order of the defendant, against the protest of the plaintiff.

"(5) Because the circuit judge erred in allowing L. C. Lazenby to testify before the jury that John Mahan, in making the contract for the purchase, acted as the agent of the Robert Bulst Company, without showing that he was authorized by the plaintiff to make the contract contended for, and without showing that John Mahan was acting within the scope of his authority.

"(6) Because, the circuit judge having ruled on the trial and in his charge to the jury that it was incumbent on the defendant to prove, outside of the written order for the purchase, that the plaintiff, Robert Bulst

Company, had agreed to pay the freight, and that it was incumbent on the defendant not only to prove that John Mahan was the agent of the plaintiff, but also that he was acting within the scope of his authority, and the jury disregarding this instruction, having found a verdict against the plaintiff without such proof, the circuit judge, it is submitted, erred as a matter of law in refusing a new trial.

"(7) Because the circuit judge in his order refusing a new trial erred in holding that the testimony was sufficient to support the verdict, when there was no testimony at all that the plaintiff agreed to pay freight, and no competent testimony whatever to show that John Mahan had authority to bind the plaintiff to pay the freight. The whole testimony in the case shows that John Mahan was merely a soliciting agent for the plaintiff, without authority to make a binding contract, and such was his own testimony.

"(8) Because the written order for the purchase of the potatoes was sent up by the defendant through the mail to plaintiff at Philadelphia for acceptance or rejection, wherein was made no mention of freight charges for transportation; and the defendant having failed to offer, on the trial below, any legal or competent testimony, oral or written, to show that plaintiff or any authorized agent had ever agreed to pay freight charges on the shipment from Philadelphia to Lancaster, S. C.; and these facts having been brought to the notice of the circuit judge when the motion for a new trial was made before him, he, it is respectfully submitted, erred as a matter of law in refusing the motion for a new trial.

"(9) Because the written order of the defendant for the purchase of the potatoes raised the presumption of law that the defendant was to take them at the invoice price and pay for their shipment to Lancaster, unless there was some oral or further agreement between plaintiff or some authorized agent and the defendant to the effect that plaintiff would pay the freight charges; and no legal or competent testimony, parol or written, of any such agreement having been offered in evidence on the trial, the circuit judge erred in not considering this point and in refusing a new trial.

"(10) Because the circuit judge erred in not following the ruling made by the Supreme Court in this case. *Robert Bulst Co. v. Lancaster Mercantile Co.*, 68 S. C. 523, 47 S. E. 978. The Supreme Court held 'that it was competent for the defendant as purchaser to rebut the presumption that he was to pay the freight, and to show by parol testimony that the plaintiff agreed to do so'; and, the circuit judge reviewing the minutes of the trial after the verdict and seeing that no competent parol testimony had been offered at the trial to show that plaintiff had agreed to pay the freight, it is submitted that he

erred in refusing the motion for a new trial.

"(11) Because, the circuit judge having ruled and instructed the jury that the onus of rebutting the presumption raised by the written order or contract for the purchase rested on the defendant to show by positive testimony that the plaintiff had agreed to pay the freight on the shipment, and it having been made to appear when the motion for a new trial was made that no such testimony had been offered, the circuit judge erred in refusing to grant a new trial.

"(12) Because there was no testimony offered to show that plaintiff had authorized John Mahan to make an agreement to deliver the potatoes in Lancaster free of charge, and it was not competent for defendant to prove by the declarations of Mahan that he had such authority. The relation between John Mahan and plaintiff was that Mahan was only a soliciting agent of plaintiff, without authority to make a binding contract, as the provisions of the written order for the purchase of the goods and plaintiff's acceptance of the same and the testimony of John Mahan clearly show. And it is submitted that the circuit judge erred in allowing the defendant to attempt to prove by the witnesses Lazenby, Brown, and Carnes such alleged agency by the declarations of John Mahan, and the plaintiff should have a new trial.

"(14) Because the circuit judge erred in allowing L. C. Lazenby, the general manager of the defendant, and other witnesses in their testimony to disown the very order for the purchase of the goods which the defendant had admitted to have made and sent up, as this was an established fact, not to be contradicted.

"(15) Because there was not a particle of legal or competent testimony to show that Robert Buist Company, plaintiff, ever agreed to pay the freight charges on the potatoes, and the circuit judge would have been justified in directing a verdict at least for the price of the 50 barrels of potatoes and the direct freight on the whole shipment, and he erred in refusing a new trial.

"(16) Because the consolidated order (a) in writing being admitted, and being silent as to who shall pay the freight, and there being no testimony whatever that plaintiff promised or agreed to pay the freight, and the defendant having refused to accept the 75 barrels of potatoes on the sole ground that plaintiff would not deduct the freight charges on the same from the invoice price thereof, the circuit judge could have legally directed a verdict for plaintiffs for the invoice price of 50 barrels of potatoes, with the direct freight on the 75 barrels shipment added; and, this being so, the circuit judge erred in refusing a new trial.

"(17) Because the contract in writing for the purchase being silent as to freight charges raised the presumption that the purchaser was bound to pay the freight, and, the defendant having signally failed on the trial

to show by parol or otherwise that plaintiff had agreed to pay the freight, the verdict of the jury was clearly erroneous and not responsive to the instructions of the presiding judge.

"(18) Because, the defendant having accepted and used the 8 barrels of onion sets and beans, being a part of the 50-barrel shipment, and having paid the freight thereon without making any objection, it was a ratification of the contract contended for by plaintiff, and defendant should be made to pay the freight on the entire shipment.

"(19) Because, the defendant having refused to pay the contract price of the potatoes on the sole and only ground that it was not bound for the freight, and the purchaser having testified that the market for Eastern-grown potatoes was higher at the time of the shipment than it was at the time the purchase was made, the defendant should be confined to the issue made as to who should pay the freight, and not be allowed to contradict itself by making a pretense that it could buy potatoes cheaper, especially as all the testimony showed that the market price had risen.

"(20) Because the circuit judge erred in permitting L. C. Lazenby, the purchaser, to testify that John Mahan claimed to be an agent of plaintiff and that he purchased the potatoes from him, without first proving by some competent testimony that Mahan was an agent and acted within the scope of his authority.

"(21) Because John Mahan was a soliciting agent for plaintiff to take orders to be sent up to plaintiff for acceptance or rejection, and he acted in this instance as the agent of the defendant in sending up the consolidated order; and the circuit judge could very well have instructed the jury that there was no competent evidence offered to prove that John Mahan was authorized to bind plaintiff to pay the freight on the potatoes.

"(22) Because the circuit judge erred in excluding the following testimony of John Mahan, offered in reply, as a part of his deposition, to wit: 'About the time I sent an order from the Kershaw Merchantile & Banking Company, Kershaw, S. C., to [his] house for 25 barrels of same kind of potatoes and at the same price, and the order was accepted, the goods were shipped and were paid for, freight and all, and no question was made about freight; and he was surprised to hear of the objection made by the defendant after their goods were shipped in this case, and they are understood to be run by the same man, only in a different town.'

"(23) Because the circuit judge erred in excluding a part of the depositions of H. C. Stabler, offered in reply, on the same point as that of Mahan's excluded."

It now becomes our duty to pass upon these exceptions. We will do so by grouping them as hereinafter indicated. We might premise our remarks by stating that the sole ques-

tions which are presented here relate to the \$36 for freight on 50 barrels of potatoes and \$108 for freight on 75 barrels of potatoes from Philadelphia to Lancaster and the return thereof from Lancaster to Philadelphia; it being conceded that the plaintiff is entitled to its judgment for \$97.40, which sum the defendant has several times tendered to the plaintiff.

1. As to the twenty-first exception: There was a question raised by the testimony, not that John Mahan was a soliciting agent for the plaintiff, but that his authority as such agent was limited. Both parties addressed themselves in their testimony to this question. It was therefore not proper for the circuit judge to say to the jury that John Mahan was not authorized to bind plaintiff to pay the freight on the potatoes. This exception must be overruled.

2. As to the twenty-second exception: When the circuit judge excluded the testimony of John Mahan relating to the order he had sent from the Kershaw Mercantile Banking Company, and the order was accepted, and the goods shipped, he did not err. It was no part of the case then before the court, and should have been excluded. This exception is overruled.

As to the twenty-third exception: We might decline to pass on this exception, as it is not complete in itself; but, apart from that, the witness H. C. Stabler resided in the city of Philadelphia, and his testimony related to transactions with other parties who had no possible connection with the defendant here. It was entirely extraneous. There would be no end if, in an endeavor to unravel one transaction with the defendant, the plaintiff, through his witnesses, should endeavor to put in testimony every other transaction of the plaintiff with all its customers wholly disconnected with the defendant. This exception is overruled.

3. We will next notice exceptions 4, 5, 12, 14, and 20, referring as they do to the alleged errors of the circuit judge during the taking of the testimony. When we held, in disposing of the first appeal in this case, that it was competent for the defendant, as purchaser, to rebut the presumption that he was to pay the freight, and to show by parol testimony that the plaintiff agreed to do so, such decision by this court bound both parties to the suit, and therefore, when the second trial came on, it was competent for the defendant to introduce such parol testimony. This he attempted to do by Lazenby, Brown, and Carnes. Each of those witnesses testified that the plaintiff, through his agent, John Mahan, agreed to place the potatoes at Lancaster, S. C., for the prices set up in the order. It is true that the plaintiff was acting through its agent, John Mahan, and it is necessary, when such agency is set up, that the extent of such agency should appear, as is well said by Mr. Justice Jones, in *McGhee v. Wells*, 57 S. C. 280, 287, 35 S. E. 529,

532 (76 Am. St. Rep. 567): "The power of the agent may be general or it may be special. It is general when the agent is empowered to do a particular thing, or many things, in any way necessary or proper to accomplish the end. It is special when the agent is empowered to do a particular thing, or many things, in a limited way. The jury must determine the character of the agency from the testimony. If general, the principal is bound if the agent exceed his authority, and the other party did not know it. If special, the agent must follow his instruction, else the principal will not be bound." It is useless to multiply quotations of the law on the subject of agency. Now, here is John Mahan, as a stranger to the defendant, solicited orders from such defendant. He disclosed his principal to be Robert Buist Company. He undertook to sell for his principal. He made a contract for the sale by his principal, of the barrels of potatoes in question, at a particular price for each variety sold. He wrote out the order himself, though signing the name of the defendant, and on the order the name of John Mahan appears. The order was dated October 24, 1900. A reply in the following words was received by the defendant: "Philadelphia, Nov. 2, 1900. Lancaster Mercantile Co., Lancaster, S. C.—Gentlemen: We are in receipt of your valued order, through our Mr. Mahan, which we accept, and will forward at the proper time as agreed. Yours very truly, Robert Buist Co." Here we have the agency of Mr. Mahan asserted by himself for the defendant, and validated by the plaintiff itself. The agency of Mr. Mahan, therefore, is established. He was authorized by the plaintiff to sell its potatoes. The sale of the article was for a particular price. Whether the articles so sold were to be free of freight to the defendant was a legitimate part of the agency of sale. Here the testimony diverges. The plaintiff and its witnesses insisting that freight was to be paid by the defendant, but the defendant and its witnesses testify that the plaintiff was to pay the freight. It is therefore a question squarely presented to the jury. These exceptions are overruled.

4. We will next consider the fifteenth and sixteenth exceptions; these two exceptions, complaining as they do of the circuit judge's failure to direct a verdict for the plaintiff. Whenever there is any competent testimony, it is the duty of the judge to submit the issue to the jury. An examination of the testimony shows that there was testimony in this case. Therefore it was not error for the circuit judge to submit the whole issue to the jury. These exceptions are overruled.

5. We will next consider exceptions 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, and 17, referring as they do to the alleged error of the court in refusing plaintiff's motion for a new trial. The record here discloses that the motion for a new trial was made on the minutes of the court. It is established by repeated de-

cisions in this court that the circuit judge is clothed by law with a wise discretion in disposing of motions for a new trial. This court only grants a reversal of the circuit judge when there is no testimony on an issue holding that in such an event that an error of law arises. A careful perusal shows that there was testimony on all the issues. It was not error for him to refuse the new trial. These exceptions are therefore overruled.

6, 7. We will next pass upon exceptions 18 and 19. We see no error charged against the circuit judge in the eighteenth exception; but, even if there had been, we would feel obliged to overrule the exception. And as for the nineteenth, we will remark that when the plaintiff shipped the 75 barrels of potatoes he made no offer to reduce the price because said potatoes had fallen in the Eastern market. No doubt the jury considered this matter in making up their verdict. These two exceptions are overruled.

It is the judgment of this court that the judgment of the circuit court be, and is, hereby affirmed.

On Rehearing.

PER CURIAM. After careful consideration of the petition for a rehearing, the court is satisfied that no material question, either of law or fact, has been disregarded or overlooked. Hence there is no ground for a rehearing.

It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(73 S. C. 60)

STATE v. WALDROP.

(Supreme Court of South Carolina, Oct. 23, 1905. On Rehearing, Nov. 9, 1905.)

1. CRIMINAL LAW—EVIDENCE—WRITTEN INSTRUMENTS—PROOF OF EXECUTION—NECESSITY.

The execution of a written instrument, introduced merely to prove a collateral fact, need not be formally proven.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1028.]

2. PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S ACT.

It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act.

3. WITNESSES—RIGHT TO IMPEACH—SURPRISE.

In homicide, the state may be permitted to interrogate its witness as to his evidence at the coroner's inquest, in order to show that the state was taken by surprise by the witness' evidence.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1096.]

4. HOMICIDE — SELF-DEFENSE — THREATS AGAINST HABITATION.

A threat by deceased to attack defendant's habitation is not a threat against defendant's person, within the law of self-defense.

5. SAME—DEFENSE AGAINST ASSAULT.

A person upon whom a simple assault is made may not stand his ground and take the

life of his assailant in order to prevent the simple assault from being carried into effect.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, § 169.]

6. CRIMINAL LAW—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Instructions inapplicable to the evidence in a criminal case are properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1979.]

7. SAME—APPEAL—RESERVATION OF ERROR BELOW.

Where the presiding judge errs in stating the issues raised by the pleadings in a criminal case, it is the duty of accused to call his attention to that fact, if he intends to rely upon the error as a ground of appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2646.]

Appeal from General Sessions Circuit Court of Greenville County; Gary, Judge.

John Waldrop was convicted of murder, and appeals. Affirmed.

Indictment against John Waldrop. From sentence on verdict, the defendant appeals on the following exceptions:

"(1) Error in allowing the state to introduce in evidence the contract between D. L. Donald and S. L. Maddox; the said contract not having been proved in the manner required by law.

"(2) In allowing the witness D. L. Donald to testify that he rented the premises in dispute to Mr. Maddox, the deceased, through Mr. Ellison, acting as his agent; the agency not having been proved, and the witness admitting that he was not present at the said time, and there being no proof that the owner of said premises authorized the said Ellison to make the said contract or ratified the same.

"(3) Error in allowing the state to interrogate its witness Seawright as to his testimony at the coroner's inquest, to the effect that, 'just before Mr. Maddox began to undo his overcoat, he said, "I have a written contract for rent of this place in my pocket," and started to put his hand to his pocket to get his contract, and at this time Mr. Waldrop shot him'—it being respectfully submitted that it was not shown that the said witness was hostile, and the state therefore had no right to contradict him or lay the foundation therefor. Again, it was error to allow this testimony taken by the coroner to go to the jury, inasmuch as the defendant was not there at the time, and any statement made therefor, under such circumstances, would not be competent in the trial of this case.

"(4) Error in refusing defendant's sixth request to charge, which was as follows:

"(6) That where a person is assaulted by one who has threatened to kill him, in such a manner as to give him reasonable cause to believe that such threat will be carried out, he is not bound to run and escape in that particular instance, if he would thus increase

his danger by encouraging his assailant to repeat the attempt when he will perhaps be less prepared to resist"—the said request containing a sound proposition of law and applicable to the case, in that the defendant testified that before he fired the first shot the deceased ran his hand into his right overcoat pocket, from which he had seen the deceased just before that time draw his pistol, and at the time the defendant fired the deceased was apparently trying to draw the pistol from the said pocket.

"(5) Error in refusing to charge defendant's eleventh request to charge, which was as follows: '(11) An assault is an attempt unlawfully to apply any, the least, actual force to the person of another, directly or indirectly; the act of using a gesture towards another, giving him reasonable ground to believe that the person using such gesture meant to apply the actual force to his person. A person assaulted under such circumstances is not bound to retreat and thereby escape the assault, leaving the danger still impending and perhaps increased by the very act of retreating'—the said request containing a sound proposition of law and applicable to the case, in that the defendant claimed that he was assaulted by the deceased at the time he fired the first shot, and his testimony in that regard should have been submitted to the jury under the charge of the court as to what constituted an assault.

"(6) Error in refusing to charge defendant's twelfth request to charge, which was as follows: '(12) That if the deceased had threatened the life of the defendant, and the defendant honestly believed that the deceased intended to carry out the threat by taking his life or doing him some serious bodily harm, and the jury, viewing the circumstances from the standpoint of the defendant at the time of the fatal encounter, conclude as a reasonable man of ordinary reason and firmness he was justified in the belief, then the defendant was entitled to be more watchful and to interpret the acts of the deceased more harshly than he otherwise would have been justified in doing'—the said request containing a sound proposition of law and applicable to the case, in that the defendant offered testimony to the effect that the deceased had said just previous to the fatal encounter that on the 1st day of January he was going into the house if he had to break the door down with an axe, and whether or not this testimony partook of a threat should have been submitted to the jury.

"(7) Error in refusing to charge defendant's thirteenth request to charge, which was as follows: 'If a person be in the bare possession of a house claiming it as his home, he has a right to protect it against all forcible intrusion offered by any person, except an officer of the law authorized by the order of some court to dispossess him. Ejectment proceedings in some form or other before a

civil court is the legal method to test the right of possession to land'—the said request containing a sound proposition of law and applicable to the case, in that the defendant offered testimony tending to show that he had rented the house in question for the year 1905, and had gone into possession, and that, when ordered to leave the said premises at the time of the fatal encounter, the deceased refused to do so, and made an effort to draw his pistol. In this connection, error in refusing the request because 'the defendant in his narrative of the homicide did not seek to excuse the act in defense of his habitation, but in self-defense'—it being respectfully submitted that the defendant testified as to the facts in connection with the entire transaction, and was entitled to whatever benefits such facts would entitle him to under the law.

"(8) Error in refusing to charge defendant's fourteenth request to charge, which was as follows: 'If a person in the possession of a house order another person to leave the house, then it is the duty of such person so ordered to leave to do so, and to resort to a court of law for the enforcement of any right claimed by such person in the house'—the said request containing a sound proposition of law and applicable to the facts of the case, in that the defendant offered testimony tending to show that he was in the legal possession of the house in question, and just before the fatal encounter ordered the deceased to quit the premises, which the deceased not only refused to do, but made an effort to draw his pistol in a threatening manner.

"(9) Error in refusing to charge defendant's fifteenth request to charge, which request was as follows: 'If the jury believe that D. L. Donald, as the agent for his wife, the owner of the land mentioned in the testimony, made a verbal contract with the defendant, Waldrop, for the possession of the land for the year 1905, and if the jury believe that said Waldrop went into possession of said land in pursuance of said contract, then such possession would be valid as against the world for the space of one year'—the said request containing a sound proposition of law and applicable to the facts of the case, in that the defendant offered testimony tending to show that he rented the premises in dispute for the year 1905 from D. L. Donald, the husband and agent of the owner of the said premises, and had gone into possession thereof, and, being in possession, his right to defend his person and his habitation would be much higher and more sacred in the eyes of the law than if he were there as a trespasser.

"(10) Error in refusing defendant's sixteenth request to charge, which request was as follows: 'Delegated power cannot be delegated. If the jury believe that D. L. Donald, as the agent of his wife, the owner of the

land, asked J. A. Ellison to assist him in securing a tenant for the year 1905, then J. A. Ellison had no legal authority to make a contract for the lease of the land, and no person could derive any right in said land by any attempted exercise of any such power on the part of J. A. Ellison—the said request containing a sound proposition of law and applicable to the facts of the case, in that there was testimony tending to prove the facts upon which the said request was predicated.

“(11) Error in refusing defendant’s seventeenth request to charge, which was as follows: ‘While a verbal contract for the future possession of land, so long as it remains executory, cannot be enforced to give the right of possession, yet if the lessee, under such verbal contract, actually go into possession of the land, it is valid to give the lessee a lease in the land for the space of one year as against the world’—the said request containing a sound proposition of law and applicable to the facts of the case, in that it showed defendant’s right, if the jury believed the facts upon which it was predicated, to the occupancy of the said premises and his right to defend his person and the said occupancy as against any person not possessing an equal right.

“(12) Error in charging ‘the defense the defendant has set up is self-defense; it being respectfully submitted that the defendant’s plea was ‘not guilty’ of the charge alleged in the indictment.

“(13) After having charged that the defendant’s plea was self-defense, error in charging that upon the occasion in question the defendant would have to show, among other things, that there was ‘no other probable means of escaping but to shoot,’ and that, if he had failed to prove this, his defense would fall to the ground; it being respectfully submitted that if the defendant was in the lawful occupancy of said house he was not bound to retreat, but had the right to stand his ground and defend his person or his property against any threatened danger.”

McCullough & McSwain, for appellant.
The Attorney General, for the State.

GARY, A. J. The appellant was indicted for the murder of S. L. Maddox, and the jury rendered a verdict of guilty, with a recommendation to mercy. The homicide took place on the 31st of December, 1904. The defendant appealed upon exceptions, which will be set out in the report of the case; and in considering the questions presented by them reference will be made to the exceptions by numbers.

1. First exception: The appellant’s attorneys conceded that the writing was admissible in evidence, for the purpose of showing the contents found in the pockets of the deceased, but contend that it was inadmissible as a contract unless “proved legally.” There

was no subscribing witness to the writing, and the objection to the testimony did not specify in what manner it was to be proved. If, however, the defendant intended to object to the introduction of the writing in evidence, unless there was testimony as to the signatures of the parties, still the ruling of his honor, the presiding judge, was not erroneous. It was not the object of the state to prove the contents of the writing further than to show that a contract was entered into between the parties by which the deceased became the lessee of the land for the year 1905. This was a mere collateral fact that did not render necessary formal proof of the execution of the instrument. *Lowry v. Pinson*, 2 Bailey, 324, 23 Am. Dec. 140; *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905.

2. Second exception: The record discloses the following during the examination of D. L. Donald: “Who owns the Seawright place where Maddox was said to have been killed? My wife. Who manages the place? I do. To whom was it rented for the year 1905? To Mr. S. L. Maddox. By Mr. McCullough: When did you rent it to Mr. Maddox? I rented it through my agent, Mr. Ellison, acting as my agent. Were you there? No, sir. By Mr. McCullough: I ask, then, that your honor strike that testimony out.” The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.

3. Third exception: The testimony was intended merely to show that the state was taken by surprise. The conduct of a case must, necessarily, be left in a large measure to the discretion of the presiding judge, and there was no abuse of discretion in this instance.

4. Fourth exception: In refusing the sixth request set out in this exception, his honor, the presiding judge, said: “This request is refused for the reason that, while admitting it to be a correct abstract proposition of law, there is no evidence in the case that would make such a charge applicable.” One witness testified as follows: “Q. Did Mr. Maddox ever tell you his intention about moving any negroes into that house? A. Yes, sir. Q. What did he tell you? A. He told me that when New Year’s day came, regardless of who was in there, that he was going to take his axe down there and break the door down, and move in on them.” Another witness testified as follows: “Q. Did you ever hear Mr. Maddox say anything with reference to the place in dispute? A. Yes, sir. Q. When was it? A. It was some time before Christmas. Q. What did he say? A. Well, we were just laughing and talking, me and Mr. Maddox, and I said: ‘It seems that you are going to get in trouble about that place?’ and he said: ‘I think not, but it don’t matter a damn who is in that house when the new year comes, I am going to put Andrew Madison in there.’ Q. Did

you state that to Mr. Waldrop before the killing? A. Yes, sir." While this testimony unquestionably tends to prove that the deceased threatened to attack the habitation, there is not a particle of testimony tending to establish threats to take the life of the defendant or to do him any bodily harm. In 1 Arch. Cr. Pr. & Pl. 693, it is said: "If a person, by violence or surprise, attempt to commit a felony upon the person, habitation, or property of another, the latter may repel force by force, and if, in the conflict, he happens to kill the offender, the homicide is justifiable"—thus recognizing the distinction between felonies committed upon the person and upon the habitation. This exception does not involve the question whether a person has the right to defend his habitation, but the question under consideration is whether a threat against a habitation is a threat against the person. In our opinion it is not.

5. Fifth exception: The request set out in the exception was inapplicable to the facts of this case, and its tendency was to mislead and confuse the jury, by seemingly recognizing the doctrine that a person upon whom a simple assault is made is not bound to retreat, but may take the life of the assailant to prevent the simple assault from being carried into effect.

Sixth exception: In refusing the request mentioned in this exception, the presiding judge said: "Refused for the reason that there is no testimony even tending to show that the deceased ever threatened the life of the defendant." This exception is disposed of by what was said in considering the other exceptions.

6. Seventh, eighth, ninth, tenth, and eleventh exceptions: In refusing the requests mentioned in these exceptions, the presiding judge assigned the following reasons: "Refused for the reason that the defendant, in his narrative of the homicide, did not seek to excuse the act in defense of his habitation, but in self-defense. While it may be true that the quarrel or difficulty grew out of a discussion of the right of possession, still there is nothing in the case that would tend to show that the deceased was making any effort to dispossess defendant. On the contrary, the defendant in his testimony states that he invited the deceased to come in." In considering whether the requests were properly refused, it will be necessary to refer to the testimony showing the relation in which the parties stood to each other. D. L. Donald, a witness for the state, testified as follows: "Who owns the Seawright place, where Mr. Maddox was said to have been killed? My wife. Who manages it? I do. To whom was it rented for the year 1905? To Mr. S. L. Maddox. So you did rent it to Mr. Maddox? Yes, sir; when the contract was drawn I was present. When was the contract drawn? I don't remember the date, you have it there.

Do you know Mr. Waldrop? Yes, sir. Did you ever have any conversation with him about renting the place? Yes, sir. At what time? The same day it was rented. The same day Mr. Ellison rented it? Yes, sir. You were not there? I was not there when the trade was made between Mr. Ellison and Mr. Maddox. What day was it you had a conversation with Mr. Waldrop about renting it? I don't remember the date. At that time had you heard that Mr. Ellison had rented the place to Mr. Maddox? No, sir. So you had a conversation with Mr. Waldrop before you knew what Mr. Ellison had done? Yes, sir. So you rented it to Mr. Waldrop? We agreed on the price. What was the contract? We agreed on a contract and he was to come over to my place the next day and sign a written contract. What other things were to go in to that contract? Similar as to what is in that one. What other things did you and Mr. Waldrop discuss? I told him that I would have to have a written contract. What else was to go in that contract, except what was discussed between you and Mr. Waldrop? I don't remember that anything was. And was that to be reduced to writing? Yes, sir. When was it to be reduced to writing? The next day or the day after he was to come to Williston, and we were to reduce the contract to writing. At that time had you heard nothing from Mr. Ellison? No, sir. When did you hear from Mr. Ellison? About a half an hour after that. When did you see Mr. Waldrop after that? This is the first time. Were you ready to execute the contract if he had come? No, sir; I was not. I had learned that Mr. Ellison had rented it to Mr. Maddox, and I wrote him a note to that effect. When? As soon as I could drive to Mr. Moon's. So, if he had come the next day, you would not have entered into the written contract with him? I could not have; Mr. Maddox had a prior claim. The fact is, on that day, as the agent for your wife, you made the contract verbally with Mr. Waldrop, and the contract was to be subsequently reduced to writing? We specified what was to be in the contract." On the evening of the day when said negotiations took place the defendant did some plowing on the land. On the day preceding the homicide the defendant, about dark, moved certain articles of furniture into the house and spent the night there. Wiley Seawright was then in possession and agreed with Waldrop to move away the next day, but there was testimony tending to prove that he had not surrendered the premises to Waldrop when the difficulty occurred. The defendant stated in his testimony that he extended an invitation to the deceased to come into the house. Wiley Seawright testified: "I heard Mr. Maddox say, 'As soon as Wiley gets out, I am going to move Anderson Madison in, and Mr. Waldrop said 'If you have the law to move a damn negro in on me, put me out' and Mr. Maddox said, 'I have the law in

my pocket,' and Mr. Waldrop said 'Get out of my house,' and about that time I looked and Mr. Waldrop had his pistol out to shoot, and did shoot, and Mr. Maddox staggered and made for the front door."

It will thus be seen that the testimony tended to show (1) that the deceased had the superior right to the possession of the premises; (2) that, while both the defendant and the deceased were in the actual and peaceable possession, Wiley Seawright had not formally surrendered his right of possession to either; (3) that the deceased did not enter the house as a trespasser, but upon the invitation of the defendant; (4) that, although the deceased was notified to get out of the house, he was immediately shot. Under these circumstances the requests were inapplicable to the facts of this case. *State v. McIntosh*, 40 S. C. 349, 18 S. E. 1033.

7. Twelfth exception: If the presiding judge erred in stating the issues raised by the pleadings, it was the duty of the defendant to call his attention to such fact, if he intended to rely upon it as a ground of appeal.

Thirteenth exception: This exception is disposed of by what was said in considering the other exceptions.

It is the judgment of this court that the judgment of the circuit court be affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

On Rehearing.

PER CURIAM. 8. After careful consideration of the petition herein, the court is satisfied that no question of law or of fact has been either overlooked or disregarded. It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(73 S. C. 71)

SEEGERS BROS. v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Nov. 18, 1905.)

1. CONSTITUTIONAL LAW—CLAIMS AGAINST CARRIERS—UNIFORMITY.

24 St. at Large, p. 81, § 2, providing that every claim for loss or damage to property in possession of a common carrier shall be adjusted and paid within a specified time, and if not then paid the carrier should be liable to a penalty, is not unconstitutional as in violation of the equality clause of the fourteenth amendment of the United States Constitution, and a similar clause of Const. S. C. art. 1, § 5.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 702.]

2. APPEAL—REVIEW—FINDINGS.

A finding of a magistrate as to amount of damages, affirmed by the circuit court, cannot be reviewed on appeal, if there is any evidence to support it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4348.]

Appeal from Common Pleas Circuit Court of Chesterfield County; Watts, Judge.

Action by Seegers Bros. against the Seaboard Air Line Railway. From a judgment reversing the judgment of a magistrate, plaintiffs appeal. Reversed.

W. P. Pollock, for appellants. Stevenson & Mathison and Edward McIver, for respondent.

JONES, J. This action was commenced in a magistrate court for the county of Chesterfield to recover \$1.75 for loss or damage to freight, a bunch of bananas, shipped August 31, 1903, to plaintiffs at McBee, S. C., from Columbia, S. C., over defendant's line, and for \$50 penalty for failure to adjust and pay the said loss or damage within 40 days, as required by the statute. The magistrate rendered judgment for the whole amount claimed, including the penalty. On appeal to the circuit court, Judge Watts modified the judgment of the magistrate by reducing the amount to \$1.75 and costs, holding that the statute imposing the penalty is unconstitutional, under the rule stated in *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. From this judgment, plaintiffs appeal, and the main question presented is the constitutionality of said statute.

1. The statute in question is entitled "An act to regulate the manner in which common carriers doing business in this state shall adjust freight charges and claims for loss or damages to freight," and was approved February 23, 1903. 24 St. at Large, p. 81. Section 2 of said act, which more particularly concerns the present controversy, is as follows:

"Sec. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with in-

terest as aforesaid: Provided, further, that no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina, 1902."

This section was under consideration in the case of *Best v. Seaboard Air Line Railway*, 72 S. C. 479, 52 S. E. 223, filed October 20, 1905, in which the question presented was whether an action could be maintained for the penalty alone, when there had been voluntary payment and receipt of the loss or damage before suit, but after the expiration of the time named in the statute. This court held that such action could not be maintained. The court used this language: "The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims; the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary." Under this view the common carrier is made liable for a penalty only in the event of a refusal to pay a claim for loss or damage to goods while in his possession; the bona fides and justice of the claim being established by a court of competent jurisdiction. The present controversy requires the court to go more fully into the consideration of the purpose of the legislation in question, with a view to ascertain the reasonableness of the classification of common carriers as objects of this particular legislation. Common carriers receive from the state the right to carry on business in the state as such. They are by the state endowed with special powers and privileges—which call for special duties and obligations to the public. It is a duty which a common carrier owes, not only under his contract, but under general law, to promptly and safely deliver goods consigned to him for transportation, and he is liable for all loss or damage to such goods while in his possession, not occasioned by the act of God or the public enemy. The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end. Whether the adoption of such means is wise, politic, or adequate, is exclusively a legislative question, for the courts have nothing to do with the policy, wisdom, or expediency of legislation. A

statute cannot be declared void unless it manifestly violates some constitutional principle.

This statute is assailed as violative of the equality clause of the fourteenth amendment to the Constitution of the United States, and a similar provision in article 1, § 5, of the Constitution of this state. The respondents in argument here, and the circuit judge, relied on the *Ellis Case*, supra, to sustain the position that the statute is unconstitutional. The Texas statute which was declared void in that case was as follows:

"Section 1. Be it enacted by the Legislature of the state of Texas, that after the time that this act shall take effect, any person in this state having a valid bona fide claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this state, and the amount of such claim does not exceed \$50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees: Provided, he has an attorney employed in his case, not to exceed \$10, to be assessed and awarded by the court or jury trying the issue." *Laws 1889, p. 131, c. 107.*

The difference between the Texas statute and our statute is manifest. The Texas statute subjects railway companies to a penalty, when successfully sued "on a claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company," etc. The relation of the railroad company to those who render it services or labor is the ordinary relation of employer and employe, and it may with some reason be said that there is no sufficient ground for making a distinction, such as would compel a railroad company to pay such ordinary claims for services within a given time under penalty, when no such obligation is imposed upon other employers to whom similar services are rendered. So the claims for damages may include claims not substantially differ-

ent from claims for damages against individuals and corporations generally. So, also, when there was no statute in Texas requiring railroad companies to fence their track against stock, it may be that it would be unreasonable to impose a liability for such acts different from, or greater than, the liability which should attach to the injury of stock by any other person or class. But we venture to say if the Texas statute had been confined to the regulation of some duty which particularly appertains to common carriers as such, and imposed a penalty as a means of securing the performance of that duty, the decision of the court would have been different. The Supreme Court of Texas had considered the statute as a whole, and had declared it was intended to compel the payment of debts. So, considering it as a whole, the court treated it simply as a statute singling out railroad corporations alone, and imposing upon them a penalty for failure to pay certain debts.

In the case of *Atchison, etc., Railway Co. v. Matthews*, 19 Sup. Ct. 609, 610, 174 U. S. 96, 43 L. Ed. 909, the court held that a Kansas statute requiring reasonable attorney's fee for the plaintiff, in a recovery against the railroad company for damages from fire caused by operating its train, did not violate the fourteenth amendment. In the *Matthews Case* the court reviewed the *Ellis Case*, and called attention to the fact that the Texas statute was treated as a whole by the Texas court, and was so treated by the Supreme Court of the United States. The court said: "It is true, that the *Ellis Case* was one to recover damages for the killing of a colt by a passing train. And so it might be argued that the protection of the track from straying stock, and the protection of stock from moving trains, would, within the foregoing principles, uphold legislation imposing an attorney's fee in actions against railroad corporations. We were not insensible to this argument when that case was considered, but we accepted the interpretation of the statute and its purpose given by the Supreme Court of Texas, as appears from this extract from our opinion: 'The Supreme Court of the state considered this statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts.'" The court further said: "So that, according to the interpretation placed upon the Texas statute by its Supreme Court, its purpose was generally to compel the payment of small debts, and the fact that among the debts so provided for was the liability for stock killed was not sufficient to justify us in separating the statute into fragments, and upholding one part on the theory inconsistent with the policy of the state, while, on the other hand, the purpose of this statute is, as declared by the Supreme Court of Kansas, protesting against fire—

a matter in the nature of a police regulation." The court further said: "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the Legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says, in effect, that, if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit, it must pay, not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock, it could, under no circumstances, recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality. Our conclusion in respect to this statute is that for the reasons above stated, giving full force to its purpose, as declared by the Supreme Court of Kansas, to the presumption which attaches to the action of a Legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the Supreme Court of Kansas is affirmed.

In the case of *Erb, Receiver, v. Morasch*, 20 Sup. Ct. 819, 820, 177 U. S. 584, 44 L. Ed. 897, it was held that an exception of a dummy railroad operated by steam, or of an electric railroad, from an ordinance limiting the speed of railroad trains within the city, does not make an unreasonable classification in denial of the equal protection of the laws. Responding to the suggestion that there was testimony that the operation of the street railway was in fact more dangerous than the operation of the railroad in the hands of plaintiff, receiver, the court said: "It is not a question to be settled by the opinion of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necessary to uphold the ordinance is that there is a difference, and, that existing, it is for the city council to determine whether separate regulations shall be applied to the two. * * * Given the fact of a difference, it is a part of the legislative power to determine what difference there shall be in the prescribed regulations."

In the case of *Fidelity Mut. L. Ass'n v. Mettler*, 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922, over a strong dissenting opinion by Mr. Justice Harlan, in which Mr. Justice Brown concurred, pointing out that the decision was in conflict with the *Ellis Case*, the court, nevertheless, held that a Texas statute imposing upon life and health insurance companies, upon failing to pay a loss within the time specified in the policy, after demand therefor, a liability to the holder of the policy, in addition to the amount of loss, of 12 per cent. damages and reasonable attorney's fees, did not deny the equal protection of the law to such life and health insurance companies, although such an obligation was not imposed upon other classes of insurance companies or associations. This decision was reviewed in *Iowa Life Ins. Co. v. Lewis*, 23 Sup. Ct. 133, 187 U. S. 335, 47 L. Ed. 204, and the court expressed satisfaction with the case and its reasoning. In the *Mettler Case* the court said: "The ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statute, is not an arbitrary classification, but rests on sufficient reason. The Legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to define as to the distribution of such profits), and lodges and associations of a mutual benefit or benevolent character, having in mind, also, the necessity of the prompt payment of the insurance money in very many cases, in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured."

It appears to us that there is even stronger reason for sustaining a classification of all common carriers of freight for legislation with respect to their quasi public duties as such, having also in mind the necessity of the prompt payment of losses sustained by failure to perform said duty, as in many cases such losses represent food, raiment, and other necessities of life. In the case of *Farmers' and Merchants' Ins. Co. v. Dabney*, 23 Sup. Ct. 585, 189 U. S. 301, 47 L. Ed. 821, the court held valid a Nebraska statute allowing a reasonable attorney's fee to a plaintiff in case of an unsuccessful defense by an insurance company of a suit on a policy of insurance covering real property wholly destroyed by fire. We quote the following from that case as a complete answer to the suggestion of inequality in the case at bar in the classification of common carriers for special legislation of the kind in question, and the suggestion of inequality because the penalty falls upon the common carrier when unsuccessful in the suit, but not upon the claim-

ant when he is unsuccessful in the suit. The court said: "All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsuccessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the fourteenth amendment are embraced in the following propositions. First, because it arbitrarily subjects insurance companies to a liability for attorney's fees, when other defendants in other classes of cases are not subjected to such burden; second, because, whilst the obligation to pay attorney's fees is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies, where the suit on a policy is successfully defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property, or where there has not been a total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generally considered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance, as between themselves, may not be classified separately, depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. But the unsoundness of these propositions is settled by the previous adjudications of this court"—citing cases.

The case of *Missouri, Kansas & Texas R. Co. v. May*, 24 Sup. Ct. 638, 194 U. S. 267, 48 L. Ed. 971, is an interesting and striking case. In that case the court held that a Texas statute imposing a penalty in favor of contiguous landowners against railway companies for permitting Johnson grass or Russian thistle to mature and go to seed upon their road does not deny such railway companies the equal protection of the law. It might be suggested that Johnson grass is a curse or a blessing, according to the view point—a curse as to crops requiring clean cultivation, a blessing when hay is the thing wanted; or it might be suggested that Johnson grass could easily be communicated to the railway company's land or right of way by streams from bottom lands above, or that it might be propagated from seed dropped upon the ordinary highways from wagons hauling such hay, thence to lands adjoining, thence to the railway company's lands, thence to contiguous lands, but no such penalty applies against other carriers, against those in charge of ordinary highways, against a contiguous landowner, in favor of the railway company, or as between contiguous landowners. It will be further observed that the

legislation affected the railway company in its capacity as owner or occupant of the land or right of way. But the court was guided in the decision of the case by these sound principles. "When a state Legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the fourteenth amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. * * * Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that Legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

This court, in *Simmons v. Telegraph Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, held that the statute making telegraph companies liable for mental anguish is not violative of the fourteenth amendment, or article 1, § 5, of the state Constitution, and in *Johnson v. Spartan Mills*, 68 S. C. 355, 47 S. E. 695, this court held that section 2719, Civ. Code 1902, making it lawful for any corporation, person, or firm to issue, pay out, or circulate for payment for the wages of labor any order, check, memorandum, token, or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, except upon conditions specified in the act, did not violate the fourteenth amendment, and was upon a reasonable classification, even though it contained a proviso that said section shall not apply to agricultural contracts or advances made for agricultural purposes. In the case of *Porter v. Railway Co.*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, this court held that the act (22 St. at Large, p. 443) imposing a penalty on common carriers for failure to pay or refuse to pay damages, etc., to freight within 60 days, does not violate those sections of the state and federal Constitutions providing for equal protection to all. This court distinguished that case from the *Ellis Case* in two particulars, viz.: (1) that the South Carolina statute of 1897 applied to all common carriers, while the Texas statute, condemned in the *Ellis Case*, was limited to one class of common carriers, railway corporations; (2) that the South Carolina statute was limited to such claims as were peculiarly incident to the business of a common carrier, but the Texas statute was not so limited. The statute considered in the *Porter Case* was, in *Johnson v. Southern Ry.*, 69 S. C. 322, 48 S. E. 260, held to be repealed by the act of 1903, which is now under consideration. But the principle decided in the *Porter Case* is just as applicable in the present case. A valid distinction cannot be based upon the difference between a requirement "to pay or refuse to pay" within a given time, as provided in the act of 1897, and a requirement "to pay" with-

in a given time, as required in the act of 1903, for if it be unlawful to require the latter, under penalty, it must also be unlawful to require the former, since no other person or class is required "to pay or refuse to pay" under penalty. The decision rests upon the reasonableness of the classification of common carriers for particular legislation with respect to the performance of their duty as such, thereby subserving an important public purpose within the police power of the state.

From this review of the decisions of the Supreme Court of the United States and of this court, we think it is clear that the statute is not unconstitutional.

2. The respondent, in the event of the above conclusions being reached, has, upon notice and exceptions taken, asked that this court consider whether the judgment of the circuit court should not be affirmed upon the ground that the magistrate erred in finding judgment for the penalty, when the testimony showed that the claim filed by plaintiff for \$1.75 was made up of two items, to wit, \$1.50, the value of the property alleged to have been lost or damaged while in possession of defendant, and 25 cents, freight paid by plaintiffs for same. The magistrate having found as a fact that the amount of the loss or damage was \$1.75, as claimed, and this conclusion having been affirmed by the circuit court by sustaining the magistrate's judgment to that extent, we have no power to review or reverse such conclusion of fact, unless there was absolutely no evidence tending to sustain it. It was shown that the cost of the bunch of bananas in Columbia, S. C., was \$1.50, and the freight thereon to McBee, S. C., was 25 cents. This was certainly some evidence that the value of the bananas to plaintiffs at McBee was at least \$1.75, and that such was the amount of their loss. The magistrate having adjudged the loss to be as claimed by plaintiffs, judgment for the penalty was proper.

The judgment of the circuit court is reversed, and the judgment of the magistrate's court is affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(124 Ga. 748)

THOMAS v. GAINESVILLE & D. ELECTRIC RY. CO.

(Supreme Court of Georgia. Jan. 13, 1906.)

STREET RAILROADS—COLLISION—CONTRIBUTORY NEGLIGENCE.

In an action of a traveler upon a highway against a railway company for damages resulting from a collision between a car of the company and the vehicle in which the traveler was riding, it is error to charge the jury that "the plaintiff's contributory negligence in such a case defeats recovery, and your verdict must be for the defendant."

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 219, 220.]

(Syllabus by the Court.)

Error from City Court of Hall County; W. B. Hollingsworth, Judge.

Action by J. A. Thomas against the Gainesville & Dahlonega Electric Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. A. Thomas brought suit against the Gainesville & Dahlonega Electric Railway Company, and alleged that while riding in his buggy in the city of Gainesville the buggy was struck by a car of the defendant, running at a high rate of speed through a crowded portion of the city, no bell having been rung, nor warning of any kind having been given, and petitioner was thrown from his buggy and injured and damaged in the sum of \$10,000. The defendant denied the negligence alleged against it, and pleaded a settlement with the plaintiff, alleging that it had paid Thomas and the owner of the buggy \$3.75 as a full accord and satisfaction for the injuries to Thomas and to the buggy. The plaintiff made a motion for a new trial, which was overruled, and he excepted.

W. B. Sloan and H. H. Perry, for plaintiff in error. H. H. Dean, for defendant in error.

COBB, P. J. (after stating the foregoing facts). One of the grounds in the motion for a new trial complained of the following extract from the charge of the court: "If the plaintiff was guilty of any act of negligence which directly contributed to his injury, or was guilty of any failure of ordinary care on his part, whether the act be a question of only omission to do what he ought to have done under the circumstances or an act of commission in doing something he should not have done and without which the accident would not have happened, then you should go further and apportion the injury; but the plaintiff's contributory negligence in such case defeats recovery, and your verdict must be for the defendant." This charge was erroneous, inasmuch as it instructed the jury that the plaintiff's contributory negligence would defeat recovery, and the verdict, if such contributory negligence were found, must be for the defendant. The instruction should have been qualified by the principles of law as laid down in Civ. Code 1895, §§ 3830, 2322. The charge was in other respects inaccurate, but it is needless to discuss at length these inaccuracies, as they will doubtless be corrected on another trial.

The evidence was of such a character as to authorize the submission to the jury of the question whether the plaintiff had received any amount in settlement of his claim for damages, and whether the receipt, purporting to have been signed by him by his mark, he being an illiterate, was binding upon him. The charge on this subject, which was complained of, correctly set forth the law as laid down in East Tenn., Va. & Ga. Ry. Co.

v. Hayes, 83 Ga. 553, 10 S. E. 350, and was appropriate, for the reason that this was the defendant's theory of the case. But, under the plaintiff's theory, the rule as laid down in Butler v. Richmond & Danville Ry. Co., 88 Ga. 594, 15 S. E. 668, was applicable, and the judge should have instructed the jury on both theories of the case.

Judgment reversed. All the Justices concurring.

(124 Ga. 482)

MERCHANTS' & MINERS' TRANSP. CO. v. MOORE & CO.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. TROVER AND CONVERSION—WHAT CONSTITUTES.

Any distinct dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it, is a conversion. It is unnecessary to show that the defendant applied it to his own use, if he exercised dominion over it in defiance of the owner's right, or in a manner inconsistent with it. It is in law a conversion, whether it be for his own or any other's use.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 1, 84.]

2. SAME—EVIDENCE—DEMAND.

In an action for the recovery of damages on account of a conversion, proof of a demand and a refusal is only required as evidence of the conversion; and, where the conversion is shown by other evidence, such proof is not essential.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 58, 60.]

3. CARRIERS—CONVERSION OF GOODS—WRONG DELIVERY.

A carrier is chargeable with a conversion at the instance of the consignee or his assigns if he deliver the goods to any other person; and this is true, notwithstanding the carrier acts in entire good faith, and the wrong delivery is the result of an innocent mistake on the part of another carrier, from whom he received the goods.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 357.]

4. SAME—LIMITATION OF LIABILITY.

When a carrier is guilty of a conversion resulting from a wrong delivery, he cannot take advantage of a stipulation in a bill of lading which provides that "claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property, and if delayed more than 30 days after delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

5. SAME—MEASURE OF DAMAGES.

In an action of tort against a carrier for the conversion of goods consigned to the plaintiff, the carrier cannot take advantage of his own wrong in lessening the measure of his liability by invoking a stipulation in a bill of lading that, in the event of loss, the measure of damages shall be the value of the property at the time and place of shipment.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Moore & Co. against the Merchants' & Miners' Transportation Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Moore & Co. brought suit in trover against the Merchants' & Miners' Transportation Company for 301 sacks of oats. An agreed statement of facts was submitted to the court, which, in brief, is as follows: On October 21, 1903, Joseph Gregg shipped from Chicago to Savannah, over the Baltimore & Ohio Railroad, 301 sacks of oats, consigned to the order of Joseph Gregg, with direction to notify Moore & Co. The bill of lading was issued to Joseph Gregg, who indorsed it and attached it to a draft on Moore & Co. for \$579.50, which draft was paid by Moore & Co., who thus obtained the bill of lading. The oats were billed to Moore & Co. for \$699.83; the freight being \$112.80, and brokerage \$7.53. The Baltimore & Ohio Railroad Company transported the oats to Baltimore, and there delivered them to the defendant, but by an error delivered them upon a waybill directing delivery to Ganahl & Saussey, at Jacksonville, Fla. The defendant brought the oats to Savannah, where they were recognized by a clerk of Moore & Co. as the shipment for which Moore & Co. had received the bill of lading. Moore & Co. so notified the defendant, but, pending an investigation, the defendant delivered the oats to the Seaboard Air Line Railway, to be carried to Jacksonville, as per waybill.

Garrard & Meldrim, for plaintiff in error.
Osborne & Lawrence, for defendant in error.

COBB, P. J. The foregoing statement of facts makes out a clear case of conversion upon the part of the Merchants' & Miners' Transportation Company. That it acted in good faith in delivering the oats in accordance with the direction of its principal, the Baltimore & Ohio Railroad, is no defense against the true owner of the property. "An agent who, for and in behalf of his principal, takes the property of another without the latter's consent, is, as to him, guilty of a conversion, although, being ignorant of the true owner's title, the agent may have acted in perfect good faith; and such agent may be sued in trover for the property, even after his delivery of it to his principal." *Miller v. Wilson*, 98 Ga. 567, 25 S. E. 578, 58 Am. St. Rep. 319, approved in *Flannery v. Harley*, 117 Ga. 485, 43 S. E. 765. Nor do we think in such a case a demand is necessary before the institution of suit. In *Miller v. Wilson*, supra, Chief Justice Simmons says: "When an actual conversion is shown, no demand is necessary; evidence of demand and refusal being required only as evidence of a conversion." See, also, *Rushin v. Tharpe*, 88 Ga. 782, 15 S. E. 830.

But it is claimed that a demand is necessary in the case at bar by reason of a stipulation in the bill of lading that "claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property, and if delay-

ed for more than 30 days after delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event." A suit in trover is not an action for loss or damage to property, but an action for conversion of property. The conversion on the part of the carrier is an abandonment by it of its contract of shipment. It cannot repudiate this contract and then hold the shipper to its terms. Further, we do not think the terms of the contract cover such eventuality. It was never contemplated by either party that a claim for damages should be presented to the carrier for the result of its voluntary act. It was the purpose of the contract to provide a procedure for the adjustment of damage suffered by reason of some occurrence for which the carrier was liable, but which it did not willfully bring about. There would be no reason in demanding that a claim be presented for damages flowing from an act which by its very commission denies any right in the claimant.

For the same reasons, a stipulation in the bill of lading that the amount of any loss or damage shall be computed at the value of the property at the time and place of shipment is not binding upon the plaintiffs in this action. See *Savannah Ry. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219; *G. S. & F. Ry. Co. v. Johnson*, 121 Ga. 233, 48 S. E. 807; *Central Ry. Co. v. Chicago Portrait Co.*, 122 Ga. 11, 49 S. E. 727.

The plaintiffs elected to demand a verdict for damages alone, and were entitled to the highest proved value of the property converted, between the date of conversion and the date of the trial. Civ. Code 1895, § 3917. See *Holmes v. Langston*, 110 Ga. 866, 36 S. E. 251, and citations. The verdict rendered gives this amount to the plaintiffs after deducting what would have been the freight charges.

No sufficient reason has been shown for reversing the judgment, and it is accordingly affirmed. All the Justices concurring.

(124 Ga. 746)

POSTAL TELEGRAPH CABLE CO. v. PEYTON.

(Supreme Court of Georgia. Jan. 13, 1906.)

1. EMINENT DOMAIN—ERECTION OF TELEGRAPH LINE—DAMAGES.

In a proceeding to assess damages flowing to a landowner by reason of the construction across his premises of a telegraph line under the power of eminent domain, compensation may be awarded both for the land actually taken by the telegraph company and for all consequential damages arising from the erection and maintenance of its poles, wires, or other fixtures; but, before a recovery can be had for consequential damages, proof must be adduced which discloses the nature and extent thereof and furnishes data from which a reasonable and proper estimate of the amount of compensation to which the landowner is entitled may be made.

2. SAME—AMOUNT OF DAMAGES.

The verdict returned by the jury in the present case was excessive; there being no evidence authorizing a recovery of consequential damages, and the amount awarded being far above the highest proved value of the land actually appropriated by the telegraph company.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by John T. Peyton against the Postal Telegraph Cable Company. Judgment for plaintiff. Defendant brings error. Reversed.

The Postal Telegraph Cable Company instituted condemnation proceedings against John T. Peyton for the purpose of acquiring the right to construct one of its lines over a tract of land in Habersham county, of which he was the owner. In the notice served upon him the statement was made that "the said Postal Telegraph Cable Company desires to construct a single line of poles along, upon, and across" the above-mentioned tract of land, by "the erection of poles about 25 feet long, 1 foot in diameter at the base, and planted 5 feet in the ground, with such anchors and guy wires as may be necessary to hold the same firmly in position, with one or more cross-arms, 8 feet in length, fastened near the top of said poles, with insulators thereon, along and upon which will be strung wires sufficient in number to quickly and accurately transmit all messages that may be intrusted to it by the government of the United States to the state of Georgia and their officers and agents and the public. Said poles will be erected about 167 feet apart," and only one square foot of land "will be taken or occupied by each post. Said company will cut and trim out trees, timber, and undergrowth as may be necessary for the construction, maintenance, and operation of said telegraph line, and none other. The land between the poles and under the wires will not be taken by the telegraph company, but can be used hereafter for all purposes" for which the owner may "have heretofore used it, and it will be used by the telegraph company for the purpose only of its agents and employes going thereon in order to construct and keep the same in repair; and only an easement for such right and privilege is desired or will be taken by said telegraph company." An award of \$150 in favor of Peyton was returned by the assessor selected to fix the compensation to be made to him by the company. Being dissatisfied with the amount of this award, the company entered an appeal to a jury in the superior court. The jury, upon the hearing in that court, fixed the amount of compensation to be paid at \$250. Thereupon the company filed a motion for a new trial, upon the general grounds that the verdict was contrary to the evidence and without evidence to support it, etc. The presiding judge declined to grant a new trial, and the case

comes to this court upon a writ of error sued out in behalf of the telegraph company.

Felder & Rountree and Howard Thompson, for plaintiff in error. J. B. Jones and J. C. Edwards, for defendant in error.

EVANS, J. (after stating the facts). A jury cannot be left to roam without any evidence in the ascertainment and assessment of damages. The damages which the law allows to be assessed in favor of a landowner whose property has been taken under the right of eminent domain are purely compensatory. The land actually appropriated by the telegraph company amounted to only a fraction of an acre; and, while it appeared that the construction and maintenance of the telegraph line would cause consequential damages to the plaintiff, no proof was offered from which any fair and reasonable estimate of the amount of damages thereby sustained could be made. The jury should have been supplied with the data necessary in arriving at such an estimate. *Swift v. Broyles*, 115 Ga. 887, 42 S. E. 277, 58 L. R. A. 390. In the absence of this essential proof, a verdict many times in excess of the highest proved value of the land actually taken must necessarily be deemed excessive.

Judgment reversed. All the Justices concurring.

(124 Ga. 490)

BREWER, Sheriff, et al. v. AMERICAN MISSIONARY ASS'N.

(Supreme Court of Georgia. Dec. 21, 1905.)
TAXATION—EXEMPTIONS—CHARITIES.

A corporation, organized and conducted purely for charitable purposes, owned real estate and buildings which were used solely in conducting a school. Nominal fees were charged for tuition and board, but the income thus derived fell far short of the expenses of the institution, and the deficit was supplied by donations collected by the corporation. The school yielded no profit, and the corporation declared no dividends, nor were profits or dividends in contemplation in the conduct of either. *Held*, that the property was exempt from taxation under the provisions of section 762 of the Political Code of 1895.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 389, 394-402.]

(Syllabus by the Court.)

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action by the American Missionary Association against A. B. Brewer, sheriff, and others. Judgment for plaintiff, and defendants bring error. Affirmed.

This case comes up on exceptions to the overruling of the defendant's demurrer to the petition. The petition was, in substance, as follows: The plaintiff is a New York corporation, whose sole business, occupation, and purpose is receiving money by donations from charitably inclined persons and distributing the amounts thus received among various charities in which it is engaged in

different parts of the United States; its chief charity being that of education. Plaintiff owns certain real estate in Liberty county, Ga., known as the "Dorchester Academy," which is delivered over to one Fred W. Foster for the purpose of operating and conducting a school for the education of negro youths. No profit or income is derived by plaintiff from said school; but, on the other hand, a very large deficit is incurred each year by the person operating it, and this deficit is paid each year by plaintiff. The average attendance of the school during the year preceding the filing of the petition was 415 pupils, and a tuition fee of \$1 per student per month was charged. No other sums are derived from or paid on account of the institution, except a small amount for board, which is fixed at \$7 per student per month, not more than three-fifths of which is paid in money, the remainder being paid in labor, which is not needed by plaintiff, but which is accepted out of charity and as a part of plaintiff's scheme of teaching, in which self-sustenance and self-reliance are in this manner taught. At the end of each scholastic year, or from time to time as there may be need, the person in charge of the school notifies plaintiff of the difference between the expenditures necessary for the operation of the school and the amounts received from board and tuition, and this deficiency is paid by plaintiff without further recourse upon any one. The deficiency thus incurred will average from \$4,000 to \$4,500 per year. During no scholastic year has there failed to be a deficiency, and plaintiff has never derived any profit or benefit from the school, save the work accomplished in carrying out its scheme of education. The tax collector of Liberty county has assessed this property for taxation at a designated valuation, and is about to turn over to the sheriff an execution to be levied thereon for the amount of the taxes assessed. The assessment and execution are illegal, in that the property taxed is an institution of purely public charity, "and, further, because all of its buildings were erected for, and are used as, a college, incorporated academy, or other seminary of learning, and none of said property is used either for private or corporate profit or income." The execution is a cloud upon plaintiff's title, and plaintiff is likely to be harassed by many such executions in future, unless the tax collector and sheriff are enjoined from proceeding in this case. Therefore plaintiff prayed for an injunction.

The grounds of the demurrer were: (1) General; (2) that sufficient parties have not been made to entitle plaintiff to the relief sought; (3) that plaintiff had an adequate remedy at law; and (4) that the declaration shows that one Fred W. Foster is con-

ducting a school for profit and income, which school is sought to be released from taxation. By an amendment to the demurrer it was contended that the property claimed to be exempt was not sufficiently described in the petition, and that certain allegations in the petition relative to the ownership and use by the plaintiff of properties in other parts of the United States were superfluous, impertinent, and irrelevant. In the order overruling the demurrer it was stated that the first and third grounds of the original demurrer were abandoned.

Beckett, Norman & Beckett and A. S. Way, for plaintiff in error. Du Bignon & Alston and Adams & Adams, for defendant in error.

CANDLER, J. (after stating the facts). It is clear that if the decision of this court in the case of *Linton v. Lucy Cobb Institute*, 117 Ga. 678, 45 S. E. 53, is followed, the judgment in the present case must be affirmed. On the allegations of the petition the case at bar is even stronger than the *Lucy Cobb Institute Case*, for it is inferable that in the latter case the fees from tuition and board exceeded the actual operating expenses of the school, the excess being applied to repairs and improvements on the school and its buildings; while here it appears that the fees charged are merely nominal and quite inadequate to meet the running expenses of the institution, the deficit being supplied by purely charitable donations. The facts alleged clearly differentiate the case from the cases of *Mundy v. Van Hoose*, 104 Ga. 292, 30 S. E. 783, and *Brenau Association v. Harbison*, 120 Ga. 929, 48 S. E. 363. The contention of counsel that it appears that the school is being conducted by Foster for his private gain is not supported by the allegations of the petition; for it is, in effect, definitely alleged that Foster is merely the plaintiff's agent, and that whatever he does in the premises is done for it. It was argued in the brief of counsel for the plaintiffs in error that the plaintiff below is not entitled to the exemption claimed, because it is a nonresident corporation, whereas, the exemption is allowed only to individuals and corporations domiciled in Georgia; but this contention, even if meritorious, cannot be considered, because it nowhere appears to have been urged in the court below.

The grounds of demurrer which have not been considered in the foregoing discussion were not insisted upon in this court, and therefore will be treated as having been abandoned.

Following the ruling in the *Lucy Cobb Institute Case*, supra, the judgment of the court below is affirmed. All the Justices concurring.

(124 Ga. 494)

LEE et al. v. GILES et al.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. TRUSTS — POWERS OF TRUSTEES — PRIVATE SALE — DEED — CONSENT OF BENEFICIARY.

A deed of bargain and sale made by a trustee as such, who has no interest in the premises conveyed otherwise than as trustee, will serve to execute a general power of private sale conferred upon him by the trust deed over the specific property described in his deed, though no reference to the power is therein made. Where the consent of one of the beneficiaries of the trust to an exercise of the power by the trustee is required, it is not necessary that such person should join with the trustee in making the deed, or indorse thereon a written approval of the sale and conveyance; but such consent may be evidenced by a written assent to the sale entered upon an application for leave to sell, presented by a trustee to a judge of the superior court, who, though without jurisdiction to decree a sale of the property independently of the power of sale conferred upon the trustee by the deed of trust, gives his sanction to the proposed sale of the property for the purpose of reinvestment, agreeably to the power of sale conferred upon the trustee.

2. APPEAL — HARMLESS ERROR — TENDER OF EVIDENCE — WRITTEN INSTRUMENTS.

Although several writings so correlate that all are necessary for the effective consummation of the act sought to be established, each instrument should be separately tendered in evidence, in order that opportunity for inspection and objection may be afforded the opposite party; but their collective tender and allowance in evidence over timely protest is not such an irregularity as will require a new trial, where it appears that all of the papers were admissible, and that the opposite party was given full opportunity to urge his objections to each instrument.

3. BOUNDARIES — EVIDENCE — DEEDS.

Deeds originating from the same grantor, though covering a different tract of land from that in dispute, may be introduced in evidence for the purpose of showing what particular parcel of an entire tract formerly held by him was intended to be conveyed by a deed made to one of the parties litigant, when relevant for this purpose.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 160, 161.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Thomas Lee and Sarah Sheffield against Mrs. John Giles and Andrew Giles. Judgment for defendants, and plaintiffs bring error. Affirmed.

A complaint for land was brought in Bibb superior court by Thomas Lee and Sarah Sheffield against Mrs. John Giles and Andrew Giles; the property which was the subject-matter of the suit being described in the plaintiffs' petition as "one and one-half acres of land lying in South Macon, on the new Houston Road; in said county, and bounded as follows: East by the new Houston Road; south by lot recently owned by Thomas Bunkley, now by Avery; west by lot of Mrs. John Giles; north by a street running into the new Houston Road, called — street." Plaintiff alleged that they and the defendants claimed the land under a common grantor, John A. Sloan. The ab-

stract of title set forth was a deed from Sloan to William Lee, as trustee for his wife, Nancy R. Lee, for her life, with a remainder to her children at her death, under which deed William Lee and Nancy Lee went into possession. She died in November, 1900, and plaintiffs were her only children living at the time. The defendants set up title by prescription, growing out of the exclusive and adverse possession for a period of 40 years under deeds duly recorded, and alleged that they had made valuable improvements on the premises, in good faith believing they had the legal title thereto. They also set forth the following facts as matter of defense: The deed from John A. Sloan to William Lee, as trustee for his wife, conferred upon him power to sell the land with her consent, and invest the proceeds in other property. On February 17, 1863, he, as trustee, presented a petition to Hon. Osborne A. Lochrane, judge of the superior courts of the Macon district, praying that an order be passed authorizing him to sell the land and invest the proceeds in other property, subject to the same trust. To this petition was annexed the consent of Nancy R. Lee, and on March 26, 1863, his honor passed an order granting the prayer of the petition, and decreeing a sale of the land to the party therein named as the person to whom the trustee desired to sell at a stipulated price. On the same day William Lee, as trustee for his wife and children, made a deed to the property to Mathew S. Anderson, the proposed purchaser just referred to, which deed was properly recorded on May 1, 1863. The defendants averred that the sale and conveyance to him was an execution of the power of sale conferred upon the trustee by the deed from John A. Sloan, and passed title out of the trustee and Nancy R. Lee and her children, and into Mathew S. Anderson, whose grantees are entitled to hold the property as against the plaintiffs, the children of Nancy R. Lee. On the trial of the case the petition by William W. Lee, as trustee for Nancy R. Lee and children, for leave to sell the trust property, together with the accompanying written consent of Nancy R. Lee to the proposed sale and reinvestment, and the order passed by the judge of the superior court granting the prayer of the petition, were introduced in evidence. This order contained the recitation that leave was granted to the trustee to sell the land described in his petition, "it appearing by the deed hereto attached that said William Lee has power to sell with the consent of the said Nancy." His conveyance, executed on the same day, which was also offered in evidence, recited that it was an indenture made "between William Lee, trustee, of the county of Bibb, of the one part, and Mathew S. Anderson, of the same county, of the other part, and that 'William Lee, trustee for his wife and children,' had grant-

ed and did thereby convey unto Anderson, his heirs and assigns, "all that tract or parcel of land bounded as follows: Joining lands of Bryce on the north, lands of Miller on the south, lands of Daly on the east, and Houston Road on the west; also adjoining lands of Monroe Sheffield, and formerly part of same lot, containing one and one-quarter acre, more or less." The deed was signed: "W. W. Lee, Trustee for Wife and Children." The defendants introduced other deeds, made by Anderson and his grantees, for the purpose of tracing title to the land in dispute into John Giles, in whose will they were named as sole beneficiaries. The plaintiffs relied on the trust deed from John A. Sloan to William Lee. The case was submitted to the jury, and a verdict in favor of the defendants was returned. A motion for a new trial, presented to the court, in behalf of the plaintiffs, was overruled, and exception is taken to the judgment rendered on this motion. It contains, aside from the general grounds directed against the verdict, various assignments of error upon rulings made during the progress of the trial, as well as specific complaints of certain instructions given in charge to the jury.

M. G. Bayne, for plaintiffs in error. M. Felton Hatcher and R. Curd, for defendants in error.

EVANS, J. (after stating the facts). 1. The deed of trust from John A. Sloan to William Lee was made on January 7, 1863, and was in all essential particulars identical, as to language and legal effect, with the trust deed which was constructed by this court in *Luqure v. Lee*, 121 Ga. 624, 49 S. E. 834. The trust covered only the life estate, and the trustee was not clothed with the title to the legal estate in remainder. As to this proposition, counsel for the respective parties entirely agree. The case hinges upon a determination of the question whether or not there was a valid execution of the power of sale conditionally conferred upon William Lee by the deed in which he was named as trustee. It recited that the land therein described was thereby conveyed "with full power to said William Lee, with the consent of the said Nancy R. Lee, to sell said property and invest the proceeds in other property." It did not provide in what manner or by what means the consent of Nancy R. Lee, if procured by the trustee, should be evidenced. It did not even stipulate that her consent had to be in writing. Assent by her, rather than the mode in which she expressed her approval of a sale by the trustee, was the essential thing needed by him to put the power in execution. Her assent was the substance, the form of its expression the mere shadow, of any authority which he could derive from her to exercise the conditional power conferred upon him by

the grantor. It was by no means necessary that she should join with him in the execution of any conveyance to the land which he should undertake to make under the power of sale. She might properly, by writing her approval of his act upon his deed, signify her assent to a sale. *Dykes v. McVay*, 67 Ga. 502. Or she could evidence her consent in other ways equally effective. Writing her assent to a sale for reinvestment upon a petition presented by the trustee to the judge of the superior court with a view to procuring judicial approval of a contemplated sale by the trustee would be altogether a proper mode of expressing her willingness to an exercise by him of the power with which he was clothed. *Trammell v. Inman*, 115 Ga. 878, 42 S. E. 246. That judicial approval was nonessential would not affect the question whether, in point of fact, the trustee had procured her consent before attempting to sell, though, in the interest of certainty and with a view to establishing a clear title of record, the plan adopted in *Headen Case*, 92 Ga. 223, 18 S. E. 543, of joining with the trustee in making the conveyance and indorsing upon it assent to and approval of the sale, is much to be commended. While William Lee did not, under the terms of the trust deed, acquire title to the legal estate in remainder, yet it cannot seriously be doubted that the grantor contemplated, in the event of a sale for reinvestment, that the land itself should be sold, and not merely the life estate therein or any estate less than the fee. *Headen v. Quillian*, 92 Ga. 222, 18 S. E. 543.

We now reach the question whether the deed from Lee, trustee, to Anderson was, under the facts in the record, a good execution of the power conferred on the trustee by the Sloan deed. It will be borne in mind that Lee had no individual interest in the realty. As trustee he was merely the repository of the naked legal title to the life estate, with power to sell the whole property—both the life estate and the estate in remainder—conditional on the assent of his wife. As we have shown, the wife's written consent was indorsed on the application for leave to sell, which not only disclosed the intent and purpose of the trustee, as such, to sell the property, but also that the sale was to be made to the particular individual to whom the sale was actually made. The deed from Lee, trustee, to Anderson made no reference to the power of sale given to the former by the trust deed; but as Lee, the grantor, had no private interest in the land, his deed is to be construed as an execution of the power to sell the land over which the power extended. As was said by Bleckley, C. J., in *Terry v. Rodahan*, 79 Ga. 289, 5 S. E. 43, 11 Am. St. Rep. 420: "Every purchaser of realty for value takes the risk of his vendor being clothed with power to sell at the time of the sale, and by the mode of sale adopted; but he is not bound to know from whence the power is derived, or whether it springs from ownership or by delegation in trust. It is enough

that there be authority to sell and convey when and how the sale is made and the conveyance executed. If the vendor actually sell and convey, his intention to do so is manifested, and whether, in his own mind, he means to do it in one character or another, the purchaser need not know nor inquire, provided only that the sale and conveyance be such as the vendor has a legal right to make." No efficacy was imparted to the deed by the order of the chancellor, but that very order expressly recognized the power of the trustee under the trust deed to make the proposed sale. That he was without jurisdiction to decree a sale independently of this power residing in the trustee cannot affect the question whether or not the trustee, acting under the express approval of the chancellor or irrespective of the order passed by him, executed the power agreeably to the terms of the trust deed. To be a good execution of such a power, it is not essential that reference to the power be made in the conveyance, where the grantor has no interest in the land conveyed, save that derived from the instrument creating the power. "If the grantor has no interest in the land, his deed will be insensible and a mere absurdity, if not intended as an execution of the power. Therefore it will be held to be an execution of the power, if it refers to the subject-matter of the power, or describes the land over which his power extends. It will be seen that this last conclusion is a presumption of law. This presumption may be more or less strong, according to all the circumstances of the case and the condition of the property. If all the words of a deed or will can have an effect given to them, and an operation upon property or rights, without being taken as the execution of a power, they will not be an execution of such power. If a man has several powers, and refers to some and not to others, the execution will exclude those not referred to. From these propositions it may be seen why a conveyance of specific property, or a specific devise of property, will generally operate as the execution of a power, if the grantor or testator has no other interest in the property but the power, although he makes no reference to the power in his deed or will." 2 Perry on Trusts, § 511c, quoted in Terry v. Rodahan, supra. The various charges complained of were adjusted to the foregoing propositions, and were not erroneous for any of the reasons assigned.

2. On the trial, counsel for the defendants tendered in evidence, collectively, the application of William W. Lee, as trustee, for leave to sell the land, upon which was indorsed Mrs. Nancy R. Lee's consent, the order of the judge of the superior court, and the deed from Lee, trustee, to Anderson. Objection was made to this collective tender of several documents, and counsel for the plaintiffs invoked a ruling of the court that each document be severally offered. Whereupon the court remarked: "I will not treat them as separate instruments. I cannot do

that." Error is assigned upon this remark, which was made in the presence of the jury, and on the refusal of the court to require a separate tender of each document. Objection was further urged to the admissibility of the petition and order because the land was not described and the order did not affect the estate in remainder, and objection was made to the deed being received in evidence, on the ground that no consent of Mrs. Lee to the sale of the land appeared from the deed, nor any authority on the part of the trustee to sell. These objections were overruled, and the various documents admitted in evidence. It appeared from the evidence that these papers were found among other papers of J. B. Giles, under whose will the defendants claim as legatees, and that they had the appearance of being glued together at one time. It would have been more regular for the judge to require the separate tender of each of the writings, in order that opportunity for inspecting them and urging objection to each might be afforded the opposite party. But the different instruments so correlated that all were necessary to establish the execution of the power of sale by Lee, as trustee, and it seems that counsel for the defendants did make this objection to their introduction in evidence, and had each of these various objections passed on by the court. Each of the papers was admissible in evidence if offered singly, and their simultaneous tender being only an irregularity, the ruling of the court was not such an error as will require a new trial of the case. The application for leave to sell did, in point of fact, set forth a description of the land therein referred to; and there was no merit in any of the other objections, as has been made to appear from the discussion of the legal questions dealt with in the preceding division of this opinion.

3. Complaint is made that the court erred in allowing in evidence two deeds (one from Sarah M. Sheffield to Reuben C. Wilder, and the other from the heirs of Reuben C. Wilder to Sarah G. Goodyear) purporting to convey an acre of land, and giving as the northern boundary the lands of J. B. Giles, under whom defendants claim title. The objection urged against the admission of these deeds was that they were irrelevant. The land conveyed by the Sloan deed was therein described as containing $2\frac{1}{2}$ acres, and having certain named boundaries. Prior to the execution of the conveyance to Anderson, under whom the defendants claim that their testator held, W. W. Lee, as trustee, had conveyed to Monroe L. Sheffield one acre of the land described in the Sloan deed. This deed was admitted in evidence without objection. It appeared that Sarah M. Sheffield was the widow of Monroe Sheffield, and that the land described in her conveyance was assigned to her as a year's support, and was the same land conveyed by W. W. Lee, trustee, to her husband. The deeds objected to were rele-

vant. In that from Lee, trustee, to Anderson, the eastern and western boundaries were confused, and the two deeds objected to (one of which was executed by one of the plaintiffs), by the description of the land thereby conveyed, tended to identify the lot of land in dispute as the land described in the deed from Lee, the trustee, to Anderson.

The evidence supports the verdict, and we see no error of law requiring the grant of a new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 538)

WARNER et al. v. MAXWELL.

(Supreme Court of Georgia. Dec. 21, 1905.)

WATERS AND WATER COURSES—ERECTION OF DAM—INJUNCTION.

A riparian owner filed an application for injunction against named individuals, alleging that they were engaged in constructing a dam in a stream below his property which would have the effect of injuring his land by overflow, seepage, and possibly by both. The defendant answered that they were the officers and employees of a corporation in whose behalf the work of construction was being done, and that it was not the intention of the corporation to construct a dam of such a height as that the plaintiff's property would be at all injured. At the hearing there was evidence from which the judge could find that the dam sought to be constructed would have the effect of injuring the plaintiff's property, and an order was passed enjoining the defendants from obstructing the stream. The defendants excepted, and assigned as error that the injunction should have been in such a modified form as to authorize the construction of a dam of such a height as would not injuriously affect the plaintiff's property. *Held*: (1) As the corporation constructing the dam was not a party to the case and would not be bound by the judgment, the discretion of the judge below in granting the injunction will not be controlled. (2) If hereafter the corporation should see fit to make itself a party to the case, the judge would be authorized, upon a hearing had at its instance, to determine at what height a dam could be erected without injury to the plaintiff's property, and authorize the work of construction of such a dam to proceed.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action by E. D. Maxwell against A. J. Warner and others. Judgment for plaintiff, and defendants bring error. Affirmed.

E. D. Maxwell brought a petition for injunction against A. J. Warner, John Sargent, and John Yonce, and alleged: Petitioner is the owner of about 50 acres of land on the Chattahoochee river. The defendants are preparing to obstruct said river below petitioner's property at Wilson's Shoals, and the dam proposed to be erected will cause an overflow of said river upon the most valuable portion of petitioner's property, and by seepage and percolation render the bottom land not actually covered by water too wet for cultivation, and unless defendants be enjoined from erecting said dam petitioner will be irreparably damaged, will be forced to bring a multiplicity of suits, and will be greatly

harassed and annoyed. It is further alleged that defendants are insolvent. Defendants answered, and set up that they were only the agents and employees of the North Georgia Electric Company, which owned the Wilson Shoals in fee simple, and which proposed to erect the dam sought to be enjoined, and that the height of the proposed dam had not then been determined, but it was denied that any dam would be erected which would cause an overflow to the damage of the plaintiff. Plaintiff introduced in evidence, over objection of defendants, certified copies of a mortgage from the North Georgia Electric Company to the Knickerbocker Trust Company of New York to secure bonds up to \$250,000 for erecting a dam upon Wilson's Shoals, pledging the property known as the "Wilson's Shoals Water Power," and a second mortgage between the same parties to secure bonds amounting to \$200,000, pledging the Dunlap Shoals. After the introduction of evidence from both sides, the injunction was granted as prayed, and to this judgment, and the ruling of the court admitting in evidence the mortgages above referred to, the defendant excepted.

H. H. Dean, for plaintiff in error. H. H. Perry, G. H. Prior, Saml. C. Dunlop, Howard Thompson, and Fletcher M. Johnson, for defendant in error.

COBB, P. J. (after stating the foregoing facts). One acting as the agent or servant of another may plead in justification of a completed act alleged to be trespass that he acted in such a capacity and that the principal or master was authorized to do the act. In a similar way he may justify an act about to be performed or which is to be performed in the future. He cannot, however, bind his principal or master as to the manner of the performance of a future act, or as to its performance at all. He may plead the authority of his principal or master as to any act which the latter would have the right to do in his own behalf, but if the master or principal is not a party to the case he would not generally be bound by a judgment in favor or against the agent or servant. In the present case the defendants are mere officers or employees of a corporation. The corporation is not a party to the case. There was evidence from which the judge could find that a trespass upon the property of the plaintiff was threatened. But it is said that there was evidence that the corporation that owned the property and was constructing the dam did not intend to construct a dam of such a height as that injury would result therefrom to the plaintiff's property, and that the injunction should have been limited so as to prevent those acts which would have resulted in injury to the plaintiff, and permit work of such a character to be done as would have resulted in no injury. If the corporation had been a party to the case and had been before the court, so as to have been bound by its judgment, this would have been a proper

judgment to have been rendered. But with the corporation absent, and only officers and employes parties who would be bound to respect the judgment, such defendants were not in a position to complain that the judgment affected the rights of the corporation. Their connection with the corporation might be severed at any time. Other officers, agents, servants, and employes might take charge of the work, and in behalf of the corporation commit the wrongs which the plaintiff alleges were threatened, and might claim immunity from punishment. With the parties before the court at the time the injunction was granted, and under the evidence as it appears in the record, we do not feel justified in interfering with the discretion of the judge in granting the injunction. If the corporation in whose behalf the defendants were acting hereafter sees proper to make itself a party to the case, so that it might be bound by any judgment that might be rendered, the judge would have authority to reopen the case, and at their instance frame an order enjoining the erection of such a dam as would injure the plaintiff's property; that is, if it appear from the evidence to the satisfaction of the judge that a dam of a given height could be erected which would not result in any injury to the plaintiff's property, then an injunction could be granted simply enjoining the corporation from erecting a dam of a greater height than that which the evidence discloses would affect the plaintiff in the enjoyment of the property in the condition in which it now exists. Under the view which we have taken of the case, the rulings upon the admissibility of evidence, even if erroneous, were not of such a material nature as to require a reversal of the judgment.

Judgment affirmed. All the Justices concurring.

(124 Ga. 529)

WOODWARD et al. v. WESTMORELAND et al.

(Supreme Court of Georgia. Dec. 21, 1905.)

HEALTH—STATE BOARD OF HEALTH—POWER TO SUE.

The act of 1903 (Acts 1903, p. 72), creating the state board of health, not declaring that board to be a corporation, and not conferring upon the board as such, nor its members, the right to sue, no suit can be brought, in the names of the members of the board in alleged representative capacity, relating to matters within the jurisdiction of the board.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Health, § 17.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. F. Westmoreland and others against J. G. Woodward and others. Judgment for plaintiffs, and defendants bring error. Reversed.

W. F. Westmoreland and others, suing in their representative capacity as the state board of health for the state of Georgia, brought a petition for injunction against J.

G. Woodward and others, composing the local board of health of the city of Atlanta, and alleged that on September 2, 1905, the petitioners were informed that yellow fever was prevalent in the state of Louisiana and other states of the United States, and it became the duty of the petitioners, under the act creating the state board of health, to adopt such rules and regulations quarantining the state of Georgia against infected districts as would effectually prevent the spread of yellow fever into this state. The rules and regulations so adopted are set out as an exhibit. It was further alleged that the local board of health of Atlanta "sought to impede, prevent, and destroy" the efficiency of the quarantine declared by the petitioners, and did various acts in defiance of the rules and regulations adopted by the petitioners. They prayed that the defendants be individually, and in their representative capacity as the local board of health of Atlanta, enjoined from interfering with the enforcement of the rules and regulations of the state board of health. A demurrer to the petition was interposed by the defendants upon the grounds that no reasons were shown for granting the relief prayed, that the state board of health is not a corporation, but only an agency, of the state, and, if any right to maintain this petition exists, it must be brought in the name of the state, and by authority of the state; and that the defendants cannot be sued in their representative capacity, but, if any action lies by reason of any acts done by them, it should be brought against the city of Atlanta. An answer was also filed by the defendants, and upon a hearing the injunction was granted as prayed. To this judgment the defendants excepted.

J. L. Mayson and W. P. Hill, for plaintiffs in error. Jno. C. Hart, Atty. Gen., and J. S. Kilpatrick, for defendants in error.

COBB, P. J. The state board of health was created by an act approved August 17, 1903. See Acts 1903, p. 72. The act declares that a board, to be known as the "State Board of Health," is established "and made one of the public institutions of the state." The number of members constituting this board, the manner of appointment, and their powers and duties are set forth in the act. The board is given supervision of all matters relating to the preservation of the life and health of the people of the state. The act does not in terms declare the state board of health to be a corporation, nor does it provide that the board, as such, or its members, may bring suit. The board is created simply as an agency of the state government, to have supervision and control over all matters relating to the public health. There are always a number of these agencies for the control of certain matters relating to public affairs, and the authority of such

agencies, or of the individuals composing the same, to bring suit in behalf of the public, depends upon the terms of the act creating the agencies and defining their limits and powers. If the act creating the board in express terms authorizes suits to be brought by it for the purpose of enforcing the rights of the public which will be subserved by the action of the board, then, of course, the board would have authority to bring suit in its own name, if a name were given to it in the act creating it, or in the name of its members, if there was no name provided in the act in the nature of a corporate name. If the board were declared by the act to be a corporation, and the act was silent as to its right to sue and be sued, the right to sue in behalf of the public in reference to matter within the jurisdiction of the board would seem to be implied. But if the act creating the board does not declare it to be a corporation, and does not in terms authorize a suit to be brought by it or its members, then suits cannot be brought by the members in their individual capacity. *Gardner v. Board of Health*, 10 N. Y. 409; *People v. Supervisor*, 18 Barb. (N. Y.) 587; *Buckstaff v. Oshkosh (Wis.)* 66 N. W. 707. As individuals they have no more interest in the matter than other citizens of the state, and their right to sue as individuals would be dependant upon the rules governing the right of other individuals to file suits in behalf of the public. It follows that the members of the state board of health had no right to bring the suit in their individual names, and under the act there was nothing authorizing them to bring the suit in a representative capacity. The demurrer which was filed, raising the objection that the suit was not brought in the names of parties authorized to bring the same, was sufficient cause for a refusal to grant the injunction, and the judgment must therefore be reversed, without reference to the merits of the case, upon the ground that the petition was defective for want of proper parties plaintiff.

The demurrer, so far as it raises the question of parties as to the defendants, was not well taken. The theory of the plaintiffs' case was that the defendants, although members of the local board of health, were doing things in excess of their jurisdiction, and it was not an attempt to enjoin a local board of health, but an attempt to enjoin individuals claiming to act in a public capacity, but not authorized to do the acts complained of, and who were therefore ordinary wrongdoers and trespassers. This was the theory of the plaintiff's case, and on the demurrer this must be taken as the truth of the case; the demurrer having been the cause shown against the grant of the injunction. We do not mean to hold that the public would be without a remedy if either individuals or local boards of health should fail to obey the lawful regulations of the state board of

health, or interfere with the state board of health in the lawful exercise of its powers. Our holding goes simply to the extent that the state board of health cannot, as such, nor can its individual members, bring suit for the purpose of enforcing its rules and regulations or preventing persons from interfering with them in the discharge of their duties. The Constitution declares that the Governor shall take care that the laws be faithfully executed, and, although there be no express statutory provision which in terms authorizes the Governor to cause suits to be instituted in the name of the state in matters relating to the public health, under the general powers conferred by the Constitution upon the Governor, and on account of its peculiar relation to the affairs of the state, he has the power to authorize the Attorney General to bring a suit in behalf of the state, either at law or in equity, whenever the interests of the public or of the state would be subserved by an appeal to the courts. It may be that the Attorney General himself, without express authority from the Governor, could bring a suit of this character in the name of the state. In *Trust Co. of Georgia v. State*, 109 Ga. 746, 35 S. E. 326, 48 L. R. A. 520, Mr. Justice Lewis said: "We are inclined to the opinion that the Attorney General has the power to institute suits necessary to the protection of the interests of the state—in case, for instance, where the state's property is involved, or where public rights are jeopardized, without direction from the Governor." If the Attorney General has this power in reference to mere property rights of the public, how much more should he have it where the public health and safety are involved.

There are numerous boards with varied interests which are creatures of the General Assembly, each of which deals with matters relating to the public interests. Some of them have been declared to be corporations; some have been given the express power to sue; and others, like the state board of health, have not had the power to sue conferred upon them. This silence of the Legislature in reference to the state board of health, as well as a similar silence in reference to other boards that have been created, indicates that there was a legislative intention that, so far as these boards were concerned, the question whether the time had arrived that the public required that an appeal should be made to the courts has to be determined by the Governor or Attorney General, and not by the members of the board itself, and, as there was nothing in the act with reference to the name in which the suit should be brought, that it should be brought by the Attorney General in the name of the state, or possibly by the Attorney General in his representative capacity, as is the practice in some jurisdictions.

Judgment reversed. All the Justices concurring.

(124 Ga. 574)

CHAPMAN v. BATTLE.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. SLANDER—PRIVILEGED COMMUNICATIONS.

Upon grounds of public policy, communications which would otherwise be slanderous are protected as privileged, if made in good faith in the prosecution of an inquiry regarding a crime which has been committed, and for the purpose of detecting and bringing to punishment the criminal. Statements likewise made in the prosecution of efforts to recover property which has been stolen are also protected as privileged communications.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 118, 130.]

2. SAME—EVIDENCE.

There was evidence to sustain the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Warren County; H. M. Holden, Judge.

Action by Sterling Chapman against Amelia Battle. Judgment for defendant. Plaintiff brings error. Affirmed.

Sterling Chapman brought suit against Amelia Battle for falsely saying of him the following: "These men (meaning petitioner as one of them) were the robbers who got their money" (meaning the money of Amelia and Mary C. Battle), or other words to that effect. Defendant denied the allegations of the petition, but admitted that she and her sister were robbed, and that during the investigation following she thought she recognized the voice, apparel, and face of the parties committing the robbery, and told officers of the law and parties seeking information concerning them of her suspicions against the plaintiff. She pleaded that this was a privileged communication, made in the performance of a public duty, and made from a bona fide intent to protect her own interests, and was free from malice. The case was tried, and a verdict returned for the defendant. The plaintiff filed a motion for a new trial upon the general grounds, and upon the ground that the court erred in charging as follows: "I charge you, if defendant did make the statement or statements alleged and set out in this petition, and if they were made in connection with a prosecution or contemplated prosecution of the alleged theft, and if she made the statement with a bona fide intent to protect her own property or to prosecute the party for the alleged theft, and in good faith, the plaintiff is not entitled to recover anything, and a verdict for the defendant should be rendered." The motion for the new trial was overruled, and to this judgment the plaintiff excepted.

L. D. McGregor and S. H. Sibley, for plaintiff in error. E. P. Davis, for defendant in error.

COBB, P. J. The charge of the court excepted to sets out a correct statement of the

law. "Statements made with the bona fide intent on the part of the speaker to protect his own interest in a matter where it is concerned" are deemed privileged communications. Civ. Code 1895, § 3840, subd. 3. The other principle contained in the charge, that statements made in good faith in the prosecution of an inquiry regarding a crime which has been committed, are privileged communications, is in accordance with the ruling of this court. In the case of *Ventress v. Rosser*, 78 Ga. 539, where the defendant was sued for slander, the slander being his accusation that the plaintiff had committed larceny, this court said: "The declaration sufficiently shows, as does the evidence had on the trial, that the alleged slanderous charge was made in the performance of a public as well as a private duty, both legal and moral; and the jury by their verdicts have found that it was made bona fide. It was therefore a privileged communication." See, also, *Newell on Slander and Libel* (2d Ed.) 500 et seq.; *Townsend on Slander and Libel* (4th Ed.) 421 et seq. To hold otherwise would be to raise a barrier between a criminal and detection, and impose a silence upon those whose knowledge might, and often does, lead to the arrest and conviction of the wrongdoer. Where a charge of the character involved in the present case is made against a person, and injury results therefrom, his right of action does not depend solely upon his innocence, but depends upon the motive of the person uttering the charge and the circumstances under which it was made. The law gives an ample protection to a person maliciously or recklessly slandered in such a manner, but does not demand that the charge be sustained to save the accuser from liability for damages.

2. There was evidence to sustain the verdict of the jury, and there was no error in refusing to grant a new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 742)

SOUTHERN RY. CO. v. RUMSEY.

(Supreme Court of Georgia. Jan. 13, 1906.)

APPEAL—REVIEW—NEW TRIAL.

There were no errors of law complained of. The questions as to the negligence of the defendant and the diligence of the plaintiff were peculiarly for the jury. The evidence made a case which was at best close and doubtful. The amount of the verdict indicates that the jury treated the case as one in which an apportionment of damages was proper. As the finding of the jury has been approved by the trial judge, this court will not control his discretion in overruling the motion for a new trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3864.]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by J. T. Rumsey against the South-

ern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Jno. J. Strickland, for plaintiff in error.
J. B. Jones, for defendant in error.

COBB, P. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 732)

TYE v. GAISSERT.

(Supreme Court of Georgia. Jan. 13, 1906.)

CONTRACTS—LIABILITIES OF THIRD PERSONS.

The petition was demurrable, and the court did not err in refusing to allow the proposed amendment thereto.

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Action by P. F. Tye against L. Gaisert. Judgment for defendant, and plaintiff brings error. Affirmed.

R. H. Lewis, for plaintiff in error. W. H. Burwell, for defendant in error.

FISH, C. J. In an action brought by P. F. Tye against L. Gaisert the substance of the petition was: H. T. Allen purchased from the Scottish-American Mortgage Company a described parcel of land, giving his notes for the purchase price and going into possession. After the maturity of his notes Allen paid them with money loaned to him by Tye for that purpose, and to secure the loan executed to Tye a transfer of such notes, together with all the interest and title which Allen had in the land. Subsequently Gaisert, with notice of Allen's purchase and without his knowledge, bought the land from the Scottish-American Mortgage Company, entered into possession, and, on demand, refused to pay Tye the amount of money he had loaned to Allen. The prayers were for a judgment for the amount of money so loaned by Tye to Allen and paid by him as the purchase price for the land, and for a special lien on the land for the amount of the money judgment. Copies of the notes and of the transfer referred to were attached to the petition. Each note states that it "is given for rent as per lease contract." A general demurrer was filed to the petition. Plaintiff offered an amendment to the petition, alleging: "Said sums of money so paid by petitioner being a part of the purchase money of said tract of land, the benefit of which was received by said Gaisert in the purchase of said land [by him], and the said Gaisert took title to said land with full knowledge of the terms and circumstances under which petitioner paid said sums of money, and of the contract of H. T. Allen with petitioner." The court refused to allow the amendment, sustained the demurrer, and dismissed the petition. To these rulings plaintiff excepted.

The court did not err in either ruling. It does not appear from the petition that Gaisert

was in any way connected with the transaction between Allen and the mortgage company, or with the transactions between Allen and Tye, and therefore we cannot understand how there could be any legal obligation or duty devolving on Gaisert to pay Tye the money which he loaned to Allen for the purpose of taking up the notes which he had given to the mortgage company for the purchase price of the land, although Gaisert subsequently bought the land from the mortgage company with notice of Allen's purchase and without his knowledge. There was not enough in the petition to amend by, and, even if the amendment had been allowed, the petition as so amended would not have set out a cause of action. In view of the allegations of the petition, the general allegation of the amendment, that the sums "paid" by Tye to Allen were part of the purchase money of the land and that Gaisert received the benefit of the same in his purchase, was the mere conclusion of the pleader, and, as we think, an erroneous one. Nor did the fact, set out in the amendment, that Gaisert, at the time he purchased the land, knew of the terms and circumstances under which Tye let Allen have the money, help the case made by the petition.

Judgment affirmed. All the Justices concurring.

(124 Ga. 733)

HARRISON v. HARRISON.

(Supreme Court of Georgia. Jan. 13, 1906.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

This being the first grant of a new trial, it will not be disturbed, as it does not appear that there was any abuse of discretion by the court below. Civ. Code 1895, § 5585.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 3862, 3863.]

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Action between M. L. Harrison and N. D. Harrison, administrator. From an order granting a new trial, M. L. Harrison brings error. Affirmed.

R. H. Lewis, for plaintiff in error. Howard & Jordan and Wm. H. Burwell, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 717)

C. S. HIRSCH & CO. v. MELDRIM.

(Supreme Court of Georgia. Jan. 13, 1906.)

PRINCIPAL AND SURETY—CONSTRUCTION OF CONTRACT—RELEASE OF SURETY.

An undertaking in writing, whereby one binds himself, as surety, to repay an "advance" to be made to his principal, cannot be regarded as authorizing the latter, and the party invited to make the advance, to enter into an arrangement whereby such party releases his lien on

property belonging to the other, thus enabling him to sell it for a sum in excess of the amount of a pre-existing debt he owes to the lienor, to discharge a portion of that debt, and to retain part of the proceeds of the sale in lieu of the advance which the surety authorized to be made.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by C. S. Hirsch & Co. against P. W. Meldrim. Judgment for defendant, and plaintiff brings error. Affirmed.

On May 25, 1903, William Fawcett was indebted to the firm of Charles S. Hirsch & Co. in the sum of \$4,000. To secure the payment of this debt, he had previously delivered to that firm an unrecorded deed or lease held by him, covering the timber on what was known as the "Woodstock Plantation," in the county of Chatham. Across the back of this instrument Fawcett had written his name, and had authorized Hirsch & Co. to write above it any transfer or conveyance of the timber that might be necessary. On or about the date above mentioned he negotiated a sale of the timber to the Denton Bok & Lumber Company for the sum of \$6,000, but could not convey the title to that company without securing a surrender of the instrument delivered to Hirsch & Co. and getting that firm to release its lien on the timber. Hirsch & Co. declined to surrender this security unless its demand against him was first satisfied. He was not prepared to pay the debt in full, and desired to secure a surrender of the deed or lease upon payment of \$1,500 out of the proceeds of the proposed sale of the timber; himself retaining \$2,500 of the amount necessary to discharge the indebtedness. Hirsch & Co. would not agree to this arrangement, unless Fawcett furnished other adequate security, and he thereupon procured and delivered to that firm a writing, of which the following is a copy: "Savannah, May 25th, 1903. Messrs. Chas. S. Hirsch & Co., Savannah, Ga.—Dear Sirs: In consideration of your advancing to Mr. William Fawcett twenty-five hundred dollars, to be paid by him out of the proceeds of such lumber as he may ship to you, said payments to be made by the retention by you of twenty-five per cent. of the net sales of such lumber to be applied to the advance of twenty-five hundred dollars, I hereby guaranty the payment by William Fawcett to you of such advance. This guaranty to be limited to November 1, 1903. Respy. P. W. Meldrim." On the faith of this guaranty Hirsch & Co. surrendered to Fawcett the deed or lease held as security for its demand against him, upon the understanding with him that he should sell the timber on the Woodstock plantation, pay the firm \$1,500, and retain the balance of \$2,500 due to it, out of the proceeds of the sale as an advance of the \$2,500 contemplated by the written guaranty signed by Meldrim. Fawcett subsequently sold the timber in accord-

ance with this understanding, received the purchase price, paid Hirsch & Co. \$1,500 thereof, and retained \$2,500 of the amount so received as an advance from Hirsch & Co. under the terms of their agreement. The timber so sold was located 15 miles from Fawcett's mill, was not being cut by him at the time, and could not have been used by him as long as his mill remained at the place where it was then located. At that time he had the right to cut other timber, which was sufficient to last him till after November 1, 1903, without using the Woodstock timber. At various times subsequent to the sale of that timber Fawcett shipped lumber to Hirsch & Co., and 25 per cent. of the net proceeds thereof was applied to the demand against him, which was in this way reduced to \$1,605.81 principal. The payment of this balance of the \$2,500 indebtedness was afterwards demanded of both Fawcett and Meldrim, but payment thereof was refused. Fawcett is unable to pay his indebtedness, and has no property out of which the debt can be collected. On October 27, 1904, Hirsch & Co. instituted suit against Meldrim with a view to holding him liable for the payment of the balance of the principal and accrued interest owing by Fawcett; the plaintiff alleging that Meldrim had guarantied payment of an advance to him of \$2,500 made by that firm. The defendant demurred to the plaintiff's petition upon both general and special grounds. By way of amendment the plaintiff recited the foregoing facts concerning the circumstances under which the alleged advance to Fawcett was made; and, to meet the defendant's special objection that the petition contained no allegation that the plaintiff had informed him that the guaranty would be accepted and acted on, the following additional allegations were made: Fawcett was a relative of Meldrim, and one of the considerations moving the latter to sign the guaranty was the natural love and affection he bore for his kinsman. He was himself the draftsman of the contract of guaranty, which was in his handwriting, and since its delivery to plaintiff he has never undertaken to secure its return from either the plaintiff or Fawcett. The plaintiff did not request Meldrim to give this guaranty, but he signed it as a volunteer, so far as the plaintiff was concerned, at the request of Fawcett, and the plaintiff neither concealed nor misrepresented anything to Meldrim, had no communication with him with reference to the guaranty, and was under no duty to hold any communication with him. That Meldrim, prior to the sale of the Woodstock timber, had knowledge of the understanding between the plaintiff and Fawcett that \$2,500 of the proceeds of the sale should be treated as an "advance" to him, was not claimed by the plaintiff. The court below sustained the general demurrer to the petition as amended, and overruled the special demurrer thereto. Exception is taken by

the plaintiff to the judgment in so far as it was in the defendant's favor.

Osborn & Lawrence, for plaintiff in error.
Adams & Adams, for defendant in error.

EVANS, J. (after stating the facts). Inasmuch as no consideration flowed to Meldrim, his liability, if any, would be that of a surety, and not that of a guarantor. *Fields v. Willis*, 123 Ga. 272, 51 S. E. 230. The contract of suretyship is always one for strict construction. Ordinarily an agreement to become responsible for an "advance" to be made to a third person is to be construed as presupposing that such third person shall receive in money or property the amount to be advanced. The mere release of a lien of property, so as to enable the principal to sell it for cash, is not such an "advance" as is contemplated by such a contract of suretyship. Upon its face the writing declared on in this case indicates that the surety was to become responsible for a new liability of Fawcett to Hirsch & Co., and not for the payment of an existing debt, in whole or in part. Clearly, by this written undertaking, Meldrim expressed a willingness to become bound for an actual advance of money or property, to be collected out of the proceeds of lumber to be shipped to Hirsch & Co., by Fawcett, and therefore did not thereby authorize Fawcett to enter into an arrangement with Hirsch & Co. whereby he would be enabled to deprive himself of property to which he then had the legal or equitable title, and to which Meldrim, as surety, would have the right to look for reimbursement in the event he was required to pay an advance made to his principal. The statement of facts shows that there was no advance in money or property, but only that a lien was canceled, so as to enable Fawcett to sell certain property belonging to him for a sum in excess of the lien, and to pay over to Hirsch & Co. a portion of the proceeds in part satisfaction of an existing debt he owed to that firm.

Judgment affirmed. All the Justices concurring.

(124 Ga. 721)

HOLLINSHED v. WOODWARD.

(Supreme Court of Georgia. Jan. 13, 1906.)

1. EXECUTORS AND ADMINISTRATORS—SALE OF REALTY—LIEN OF JUDGMENT.

A private sale by an executor, acting under the authority of the provisions of a will authorizing such a sale, will not divest the lien of a judgment against the executor. This is true, though the debt upon which the judgment was founded was a liability of the estate created after the death of the testator.

2. JUDGMENT—LIEN—TRANSFERS OF PROPERTY SUBJECT TO—EFFECT.

The general rule laid down in Civ. Code 1895, § 5424, that, when property subject to a lien is sold in different parcels by the debtor, the part remaining should be first applied to the payment of the lien, and the parcels should be charged in the inverse order of their alienation, is a rule of contribution among the purchasers,

and does not affect the right of the creditor to levy upon any of the parcels subject to his execution.

3. EXECUTION—REFUSAL TO LEVY ON PROPERTY DESIGNATED—EFFECT.

If a levying officer refuses to levy on property pointed out by the defendant in execution, when the same is sufficient to satisfy the execution and is subject to the same, the officer is liable to the defendant in execution for any actual damages he may sustain as a result of a levy upon other property, but the levy upon the other property is not rendered illegal.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Action by one Gano against W. H. Harris. Judgment for plaintiff and execution was levied on certain land, to which W. H. Hollinshed filed a claim. I. T. Woodward, administrator, was made a party in place of plaintiff, deceased. Judgment for plaintiff, and claimant brings error. Affirmed.

An execution in which Gano was plaintiff and W. H. Harris, executor of H. C. Harris, was defendant, was levied on a described lot of land in Ft. Valley, Ga. W. H. Hollinshed filed a claim to the property so levied on. At the trial I. T. Woodward, administrator, was made a party in place of Gano, deceased. The will of H. C. Harris was introduced by the claimant, which gave authority to the executor to sell and transfer the realty of the estate at his discretion, without order of court. A deed from the executor was then introduced, conveying the property levied on to the claimant, and it was shown that this deed was executed prior to the levy of the execution, but after the record of the execution against the executor. The claimant offered evidence to show that there was in the estate of the testator other property besides that levied upon sufficient to satisfy the execution, and that the executor endeavored to have the sheriff levy upon this other property, but upon direction of counsel for plaintiff in execution the sheriff refused to levy as requested, and the property levied on was sold to claimant for the purpose of discharging a debt due by the estate, and the money received from the sale was so applied by the executor. The court, upon objection, ruled out this testimony. The court directed a verdict for the plaintiff in execution, and to this judgment and the judgment ruling out the evidence above set out the claimant excepted.

A. L. Miller and L. L. Brown, for plaintiff in error. H. A. Mathews, for defendant in error.

COBB, P. J. (after stating the foregoing facts). When an administrator sells land under a proper order of the court of ordinary, liens thereon are divested and transferred to the fund. Civ. Code 1895, § 3453; *Herrington v. Tolbert*, 110 Ga. 528, 35 S. E. 687. An administrator cannot sell land without an order of the court of ordinary. Civ. Code 1895,

§ 3450. A sale by an executor under an order of the court of ordinary will divest the lien of an existing judgment, unless the property is under levy at the time the sale is made. *Reed v. Aubrey*, 91 Ga. 436, 17 S. E. 1022, 44 Am. St. Rep. 49. In *Wright v. Zeigler*, 1 Ga. 324, 44 Am. Dec. 656, it was held that, when an executor was authorized by will to sell the property of the testator at private sale for the purpose of paying debts, such a sale would pass a good title to the purchaser, as against the creditors of the estate, provided the purchase was bona fide and without fraud on the part of the purchaser. In this case the question as to whether liens would be divested by such a sale was not involved. In *Harwell v. Foster*, 102 Ga. 38, 28 S. E. 967, it was held that a sale of land by an administrator or executor under an order of the court of ordinary is in the nature of a judicial sale, but that a sale under authority of a power contained in a will, while legal within the limits prescribed, was in no sense judicial in its character; there being none of the qualities of judicial sanction in a sale by an executor independently of the action of the court adjudicating the necessity therefor. The question involved in that case was whether a claim could be interposed to property which an executor was proceeding to sell under the authority of the will without an order of the court of ordinary. It was held that the statute in reference to claims at judicial sales did not apply to sales of this character. The general rule is that only judicial sales will have the effect of divesting existing liens. In *Mutual Loan & Banking Co. v. Haas*, 100 Ga. 111, 27 S. E. 980, 62 Am. St. Rep. 317, it was held that a sale under a power in a mortgage would divest the lien of a judgment against the mortgagee rendered after the mortgage had been duly registered. It was said that a sale under such circumstances was the equivalent of a sale under foreclosure by a court of competent jurisdiction. Mr. Chief Justice Simmons in the opinion said: "A creditor of a mortgagor who obtains his

judgment subsequently to the execution of a mortgage which has been duly registered takes it subject to the rights of the mortgagee; and, the power of sale being part of the security, he takes it subject to the exercise of that power. His judgment attaches merely to the equity of redemption. He stands in the shoes of the mortgagor, and cannot defeat the exercise of the power any more than the mortgagor himself could." It may be stated as a general rule that neither a living person nor the legal representative of a dead person can by the sale of property divest the lien of creditors of the owner, unless the sale was judicial in its nature, or the circumstances were such that the lien creditor would be concluded by the instrument in which the power of sale was created.

2. The general rule laid down in Civ. Code 1895, § 5424, that, when property subject to a lien is sold in different parcels by the debtor, the part remaining should be first applied to the payment of the lien, and the parcels should be charged in the inverse order of their alienation, is a rule of contribution among the purchasers, and does not affect the right of the creditor to levy upon any of the parcels subject to his execution. The section is merely a codification of *Craigmiles v. Gamble*, 85 Ga. 439, 11 S. E. 838, which recognizes the rule above referred to as laid down in *Barden v. Grady*, 37 Ga. 660.

3. A levy is not rendered illegal because the property may be in the hands of one other than the defendant in execution. *Benson v. Dyer*, 69 Ga. 190. The defendant in execution may point out to the officer the property to be levied upon. Civ. Code 1895, § 5429. But, if the officer violates his duty by refusing to levy on the property pointed out by the defendant, he is liable to him for such actual damages as he may sustain as a result of the officer's conduct. But this will not invalidate the levy. *Barfield v. Barfield*, 77 Ga. 83. See, also, *Thompson v. Mitchell*, 73 Ga. 127.

Judgment affirmed. All the Justices concurring.

(186 Va. 33)

STANDARD OIL CO. v. CITY OF FREDERICKSBURG.

(Supreme Court of Appeals of Virginia. March 1, 1906.)

1. LICENSES—POWER TO TAX—CONSTITUTIONAL PROVISIONS.

Const. § 117 [Va. Code 1904, p. cccxxviii], amending existing charters of cities so as to conform to the Constitution; section 168 [p. cclxii], providing that taxes shall be levied and collected under general laws; and section 170, providing that the general assembly may levy license and franchise taxes—do not repeal previously existing special charters of cities which authorize them to levy license taxes, nor require such taxes to be levied solely under a general law.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 5, 6.]

2. COMMERCE—INTERSTATE COMMERCE—WHAT CONSTITUTES.

A corporation engaged in the sale of oil, which brings its oil from a foreign state into this state, and mingles it with the general mass of property in the state, is not in selling oil in the state, either in original barrels or from wagons, engaged in interstate commerce in such sense as to preclude a city of the state from exacting a license tax from it.

3. MUNICIPAL CORPORATIONS—TAXING POWERS—STATUTORY PROVISIONS.

Neither Code 1887, § 1042 [Va. Code 1904, p. 504], authorizing cities and towns to impose a license tax in addition to the state tax, nor Acts March 23, 1871 (Acts 1870-71 p. 267, c. 187, § 7), authorizing the town of Fredericksburg to require a town license for anything for which a state license may be required, repeals Act March 5, 1821 (Acts 1820-21, p. 133, c. 114, § 7), authorizing the town of Fredericksburg to assess a tax on the inhabitants and on property within the actual limits of a town for the improvement, convenience, and well being of the town.

4. LICENSES — PERSONS TAXABLE — MERCHANTS.

An oil company engaged in the business of refining and distributing oil and selling it to local dealers from tank wagons, and not from a fixed place of business, is not a merchant as that term is generally understood, and cannot, by voluntarily paying a state license as a merchant, prevent the assessment of a specific tax against its business.

5. LICENSES — CONSTITUTIONAL REQUIREMENTS—UNIFORMITY.

In order to sustain a tax under the test of uniformity, it must not lay greater burdens upon one person than are laid upon other persons in the same calling or condition, the tax imposed must be the same on all those in the same business, any difference therein must bear a just and proper relation to an attempted classification, and, in case of a municipal ordinance imposing license or business taxes, it must not discriminate against any business or class of business or against nonresidents or persons engaged in the sale of property produced or manufactured outside the municipality.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 8, 9.]

6. SAME.

A municipal ordinance which imposes one license tax on corporations transporting oil to the state in bulk, in tank cars, or through pipes for the purpose of distributing the same in the city, and imposes a much smaller tax on persons who sell oil which has been transported to the city for distribution in barrels

only, is discriminatory, and violates the constitutional requirement of uniformity.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 8, 9.]

7. SAME.

A municipal ordinance which imposes a license tax on any person selling oil to merchants in the city, but provides that it shall only apply to a person or corporation producing or manufacturing the oil which it sells, or to a person or corporation who stores oil in stationary tanks and transports the same by tank wagons or in barrels through the streets of the city for the purpose of distribution or delivery to purchasers, is reasonable in its classification of the persons and corporations taxable thereunder, and does not violate the constitutional requirements of uniformity and against discrimination.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 8, 9.]

Error to Corporation Court of City of Fredericksburg.

Action by the Standard Oil Company against the city of Fredericksburg. There was a judgment in favor of defendant, and plaintiff brings error. Affirmed.

Wm. D. Carter, for plaintiff in error.
St. Geo. R. Fitzhugh, for defendant in error.

CARDWELL, J. This is a writ of error to so much of a judgment of the corporation court of the city of Fredericksburg as upholds the validity of a license tax of \$150, imposed by ordinance of the city upon plaintiff in error, for the year beginning May 1, 1904, and ending April 30, 1905.

The learned judge of the corporation court has in a written opinion, made a part of the record, stated the case fully, and discussed in a very satisfactory manner the principles of law applicable thereto, and we therefore adopt it as a part of this opinion:

"The defendant, the city of Fredericksburg, for the year 1903 levied a license tax of \$150 on the plaintiff, under section 54 of its tax ordinance, which is as follows:

"Any person, firm or corporation who shall engage in the business of selling to wholesale or retail merchants in this city kerosene oil or other illuminating oil, shall pay a license tax of one hundred and fifty dollars (\$150.00), but this shall apply only to any person, firm or corporation who shall transport such oils in bulk, tank cars or through pipes for the purpose of distributing the same in this city. Any person, firm or corporation who shall engage in the business of selling to wholesale or retail merchants in this city kerosene oil or other illuminating oil, the same having been transported for distribution in barrels only, shall pay a license tax of seventy-five dollars (\$75.00.)"

"The defendant for the year 1904 levied a license of \$150 against the plaintiff, under section 73 of its license tax for that year, which is as follows:

"Any person, firm or corporation who shall engage in the business of selling or offering for sale to wholesale, or to both wholesale and retail merchants in this city, kerosene

oil or other illuminating oil, shall pay a license tax of \$150.00. Any person, firm or corporation, who shall engage in the business of selling or offering to sell only to retail merchants in this city kerosene oil or other illuminating oil, shall pay a license tax of \$150.00. Any person, firm or corporation, who shall engage in the business of selling or offering to sell to consumers in this city kerosene or other illuminating oil, shall pay a license tax of \$150.00.

"But this section shall apply only to any person, firm or corporation producing, refining or manufacturing the oil which it sells or offers to sell, or to any person, firm or corporation who stores its oil in stationary tanks within or outside of the corporate limits of the city, and transports the same by means of tank wagons or in barrels through the streets of the city for the purpose of the distribution or delivery of the oil to purchasers thereof at the place of business of such purchaser."

"For the 1903 license the collector of the city of Fredericksburg levied on a team of the plaintiff in the city of Fredericksburg, and by agreement between city and the plaintiff the plaintiff deposited in the National Bank of Fredericksburg, subject to the joint order of counsel for plaintiff and defendant, the money to pay the license, and the levy was released. Just before this deposit of money the plaintiff filed its motion after due notice in this court for relief from the said 1903 assessment, and its motion was duly docketed on the 20th day of January, 1904. The motion for relief from the 1904 license was similarly served, returned, and docketed on June 25, 1904, and the two motions were continued from time to time at the convenience of the counsel, and were argued and heard together by agreement of counsel on the ——— day of ———, 1904.

"The evidence in each case was the same, and, briefly stated, was that the Standard Oil Company, the plaintiff, buys some crude oil and produces large quantities of crude oil; that it refines crude oil so bought and produced; that this refined oil is shipped by the company in barrels or tank cars to its plant in Fredericksburg, Va., where the same is received; that its plant in Fredericksburg is provided with storage tanks or vats of a large capacity, which vats or tanks are used to receive the oil upon its arrival in Fredericksburg; that its local agent has a line of customers and seeks new customers among the merchants of the city of Fredericksburg; that the oil from these storage tanks is run or pumped into a tank wagon of several hundred gallons capacity, which wagon is drawn by a team; that this wagon is driven by the local agent of the company along its regular route in the city of Fredericksburg; that it will be stopped before the store of a merchant who is denominated a 'regular customer'; that the merchant is asked if he wishes any oil, and if he wants as much as 20 gallons

that the agent will draw the same from the tank wagon in cans while the wagon is standing in front of, or near, the merchant's door in the public street, and that the oil in the cans will then be taken by the agent into the merchant's store and emptied into the merchant's can; and that the agent, with his wagon, will proceed from store to store in the like sale or sales of oil; that should any 'regular customer,' when asked if he wished oil, not desire as much as 20 gallons, none will be delivered to him at that time; that payments by the merchants for oil so received are made to the local agent from time to time as demanded; and that the local agent will supply 'new customers' after first receiving their request for oil, and the company or the agent satisfying itself or himself that the 'new customer' is a desirable addition to the number of 'regular customers'; that the company is engaged in the sale of other articles not manufactured by it, but bought or manufactured for it and inducive to a larger sale and consumption of its oils, such as oil stoves and gasoline stoves, etc., and that the company sells the by-products derived from the refining of its crude petroleum.

"Under this state of the facts the company had itself assessed by the commissioner of the revenue of Fredericksburg, acting on behalf of the state, with a merchant's license from the state, and declined to pay the specific tax on a dealer in kerosene and other illuminating oils required by the ordinances set out above.

"The company contended:

"First. That the city has no power under its charter, or under the statute law of Virginia, to levy any such license tax.

"Second. That the ordinance under which the said license tax is demanded is unconstitutional, invalid, and void, because of sections 117, 168, and 170 of the Constitution of Virginia. [Va. Code 1904, pp. ccxxxviii, cclxii].

"Third. That the said license 'is a direct discrimination and contrary to law.'

"Fourth. That the Standard Oil Company cannot be taxed in this state for selling its own product, illuminating oil.

"These contentions are directed against the validity of each license tax, and each and every contention is denied by the city.

"It will be examined in the order set out above.

"The power of the city to levy the licenses in these two cases is denied, because, since the state exacts no such license, and since section 168 of the Constitution provides that the license tax 'shall be levied and collected under general law,' if the city ever had the power under its charter, that power is taken away by section 117 of the Constitution, which amends the charter of the city to conform to section 168 of the Constitution and that such a license could be required only under general law thereto specially authorizing all the cities of the commonwealth to levy such a license tax.

"This contention has been decided against the plaintiff company by the Supreme Court of Appeals of Virginia in *Hicks v. Bristol*, 47 S. E. 1001, and in *Arey v. Lindsey* (Va., Nov. 1904) 48 S. E. 889. In this latter case, the court, speaking by Judge Buchanan, says: 'There is no indication of a purpose to repeal existing laws, valid when passed, whether special enactment or otherwise.'

"The manifest purpose of the authors of the Constitution 'was to meet and obviate the evils attending the passage of special acts,' and that 'the Constitution did not intend to abrogate a charter, or any part of it, because it had been passed as a "special act," but only such features of the charter as were in conflict with the Constitution and to forbid special acts in the future.'

"The power of the city to levy this license against the plaintiff is denied because 'the Standard Oil Company cannot be taxed in this state for selling its own property, illuminating oil'; or, according to contention of the plaintiff, because it is engaged in interstate commerce.

"The contention is without merit. No sales are made of property without this state at the time of sale. On the contrary, the property for the sale of which the license is required is, at the time of sale, within the state of Virginia and the city of Fredericksburg, and is in the barrels or tanks of the company, or in its wagons on the streets of Fredericksburg, at the time of the sale. It has become included with the general mass of property of the state, and whether sold in the original barrels or from the plaintiff's wagons may be taxed, so far as interstate commerce is concerned. This question is disposed of by the case of *Amer. Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538. See, also, *Welton v. State*, 91 U. S. 275, 23 L. Ed. 347; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257.

"There being, therefore, no constitutional inhibition against the exercise by the city of any legitimate taxing power it may have in its charter, notwithstanding this charter be a special act, the question is, has the city of Fredericksburg, in its charter, the power to levy the license in question? Is this license discriminatory, and denying the plaintiff the equal protection of the law?

"By its charter, approved March 5, 1821 (Acts 1820-21, p. 133, c. 114), it is provided (section 7) that the mayor, recorder, and common council shall have full power, and they are hereby authorized, to assess a tax on the inhabitants and property within the actual limits of said town for the purpose of repairing streets and such other expenses and charges as to them may seem necessary and proper, and for the improvement, convenience, and well being of the town.

"This section stands unrepealed, unless, as plaintiff contends, it was repealed by act of March 23, 1871 (Acts 1870-71, p. 265, c. 187), which act provides 'that for the better govern-

ment and well ordering of the town of Fredericksburg. * * *

"Sec. 7. Whenever anything for which a state license is required is to be done in said town, the council may require a town license therefor, and may impose a tax thereon for the use of the town. The council may require, from the person so licensed, a bond with sureties, payable to said town in such penalties and with such conditions as it may think proper and reasonable, and may revoke such license at any time if the condition of said bond be broken.'

"The act of March 5, 1821, confers on the defendant city a general power to tax, similar in its provisions to a like general power conferred upon many cities of the commonwealth by their charters; and it is the opinion of this court that this general power is not repealed or abridged by section 7 of the act of March 23, 1871, as above set forth. This section 7 is but an expression of the general law of the state, similar in its provisions to section 1042 of the Code of Virginia of 1887 [Va. Code 1904, p. 504], which has been the law of the state since 1849.

"As section 1042 has never been held to be a limitation upon the general taxing power of the cities of the commonwealth granted to them in their several charters, so this court will hold that the act of March 23, 1871, similar in its terms to section 1042 of the Code, is not a limitation upon, and to that extent a repeal of, the general power of taxing granted to the defendant city by its charter act of March 5, 1821. *Newport News, etc., Railway & Electric Company v. Newport News*, 100 Va. 157, 40 S. E. 645; *Norfolk v. Griffith Powell Company* (Va.) 45 S. E. 889. These recent cases, cited above, hold that a general power of taxation confers upon the municipality all the powers possessed by the state in respect to the imposition of taxes, and the municipality may then impose taxes in its discretion upon all subjects within its jurisdiction and not withheld from taxation by the Legislature, whether they be taxed by the state or not. *Frommer v. City of Richmond*, 31 Grat. 646, 630, 31 Am. Rep. 746.

"The plaintiff is not a merchant as that term is generally understood, and cannot, by voluntarily paying a state license as a merchant, prevent the assessment of a specific tax against its business. The greater portion of what it sells it does not buy. It has a storage tank and warehouse, it is true, but it has no fixed place of business within the city, a store or shop at which, or from which, it sells its oil. Its sales are made from its tank wagons, and the oil sold is delivered from its tank wagons when, and as, the sales are made. This does not constitute it a merchant within the state law or city ordinance. *Brown's Case*, 98 Va. 369, 36 S. E. 485; 2 Bouv. L. D. 155; *Hirsh Case*, 21 Grat. 785; Acts 1899-1900, p. 857, c. 796.

"In *Brown's Case*, supra, the court says:

'A merchant's license contemplates that the merchant is to have a fixed place of business within a county or city, a store or shop for the sale of goods. This is the common acceptance of the term as given in 2 Bouvier, L. D. 155. The same author defines the word "merchant" in its legal acceptance to mean one whose business it is to buy and sell merchandise, and says that it applies to all persons who habitually trade in merchandise.'

"This court, therefore, holds that the plaintiff is liable for the said license taxes, unless they, or either of them, be invalid because discriminatory, or because they deny to the plaintiff the equal protection of the law.

"If the purpose is within the legal powers of the Legislature and the classification made has reference to that purpose (excludes no persons or objects that are affected by the purpose; includes all persons that are), logically speaking, it will be appropriate, legally speaking, a law based upon it will have equality of operation. *Billings v. Illinois*, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 403.

"The differences must bear a just and proper relation to the attempted classification. *Gulf, C. & S. F. Co. v. Ellis*, 185 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666.

"An ordinance requiring dealers in oils to pay a license of \$250 per year, and providing that this license shall not apply to dealers handling oils on which the license has been paid, is unconstitutional because there is no reasonable ground for classification. (*S. C.* 1903) *Standard Oil Company v. City of Spartanburg* (*S. C.*) 44 S. E. 377.

"No greater burdens shall be laid upon one than are laid upon others in the same calling and condition. *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 924.

"Uniformity must be such as is compatible with the subject-matter, and as to licenses the only uniformity required is that the tax shall be the same on those in the same business. *Commonwealth v. Moore & Goodsons*, 25 Grat. 958.

"If inequality and want of uniformity in the burthen it imposes are stamped upon the face of the law, the law must be pronounced invalid. *Helfrick's Case*, 29 Grat. 849.

"Uniformity must be such as is compatible with the subject-matter; and as to the licenses the only uniformity required is that the tax shall be the same on all those in the same business. *Newport News, etc., R. Co. v. Newport News*, 100 Va. 161, 40 S. E. 645.

"It is not necessary that a statute regulating the sale of goods shall embrace all kinds of property, either personal or real, but it is sufficient if the selection of the articles and property is based on reasonable and just grounds of difference, * * * and applies equally to every citizen and all classes of citizens, and denies to no one a privilege which another is permitted under like circum-

stances to exercise and employ. 8 Cyc. 1069.

"A municipal ordinance imposing licenses or business taxes must not discriminate against any business or class of business, or against nonresidents, or persons engaged in the sale of property produced or manufactured outside the municipality. 21 *Amer. & Eng. Ency. Law*, 784.

"When tested by these rules, * * * that section 54 of the ordinance of 1903 is either invalid or does not apply to the facts of this case. This section applies by its terms 'only to any person, firm or corporation who shall transport such oils in bulk, tank cars, or through pipes, for the purpose of distributing the same in this city.' If the word 'transport,' in this section, applies to the distribution of oil through the city after the same shall have reached the company's storage tanks, then the section does not apply, because, under the facts of the case, the company did not 'transport,' or carry, the oil about the streets of the city for sale 'in bulk, tank cars or through pipes.' If the words 'transport such oils in bulk, tank cars or through pipes,' refers to the method by which the oil is brought from other places into the city for storage in the company's tanks, then the ordinance must be held to be invalid, because it seems such a classification, or attempted classification, is unequal, not uniform, and the \$150 license tax imposed on the sale of it discriminates against the company's business when such a tax, under the language of the section, would not be imposed upon the sale of the oil produced, or manufactured inside the city, or upon the sale of the oil brought into the city in any manner other than in bulk, tank cars, or through pipes. The business sought to be reached by this ordinance is the 'selling to wholesale or retail merchants in this city kerosene or other illuminating oil,' and is not the business of buying and selling oil. The method or manner by which the oil is introduced into the city before a sale can hardly be said to bear a just and proper relation, or, in fact, any relation at all, to the actual sale of the oil after the same shall have been brought into the city and before an actual sale, or offer of the sale, for the same. The business is the selling of oil to wholesale or retail merchants, and the tax of \$150 sought to be levied under this section is not placed upon all who sell to retail or wholesale merchants in the city, but is placed only on those who sell to wholesale or retail merchants in the city, and whose oil, which is the subject of the sale, shall have been transported into the city in tank cars or through pipes. *Commonwealth v. Moore & Goodsons*, 25 Grat. 958.

"This classification rests on no reason of public policy, and there is no substantial difference of situation or circumstances between the oil merchant who sells by wholesale or retail oil not transported into the city in tank cars or through pipes, and the merchant

who does sell by wholesale or retail oil that is transported into the city in tank cars or through pipes.

"There is nothing of difference in the two businesses of selling oil, arising from the method by which the oil was transported into the city, that would naturally suggest the justice or expediency of diverse legislation with respect to the classification attempted in this section. *Rosenbloom v. State* (Neb.) 89 N. W. 1053, 57 L. R. A. 922, and cases cited.

"The ordinance of 1904, when tested by the same rules, is valid and binding. It requires a license of \$150 on those engaged 'in the business of selling or offering for sale to wholesale, or to both wholesale and retail merchants in the city, kerosene or other illuminating oil,' and applies 'to any person, firm or corporation who stores its oil in stationary tanks within or outside said corporate limits of the city and transports the same by means of tank wagons or in barrels through the streets of the city for the purpose of distribution or delivery of the oil to purchasers thereof at the place of business of such purchasers.'

"The manner of distribution of oil through the city and the sale of the same through the city 'by means of tank wagons or in barrels,' it appears, is a reasonable classification.

"Certainly this manner and method of the sale and of the distribution imposes greater burdens on the streets of the city than if the distribution were not made by tank wagons or in barrels; and, again, the distribution of oil through the city in the sales thereof from door to door and the running of oil from the tank wagon to the cans for delivery to the stores in itself renders the sale and delivery of oil in this manner more hazardous than otherwise, and the ordinance of 1904 applies alike to all engaged in the same business. *Newport News, etc., Railway Company v. City of Newport News*, 100 Va. 157, 40 S. E. 645.

"For these reasons, an order will be entered relieving the plaintiff from the license tax assessed against it under the ordinance of 1903, and denying its motion for relief from the license assessed against it under the ordinance of 1904."

As to the power of defendant in error, under its charter, to impose the license tax that plaintiff in error complains of, see, also, *Ould & Carrington v. City of Richmond*, 23 Gratt. 464, 14 Am. Rep. 189, where the authority in the city's charter to impose the tax on the license of Ould & Carrington to practice law complained of was, "for the execution of its powers and duties the city council may raise annually, by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this state and of the United States."

That the act of March 28, 1871, supra, similar in its terms to section 1042 of the Code, is not a limitation upon, and to that extent a repeal of the general power to tax granted to defendant in error by section 7 of its charter (Act March 5, 1821), or section 1042 of the Code, a limitation upon the general taxing power of the cities of the commonwealth, granted to them in their several charters, see *Norfolk v. Norfolk Landmark Co.*, 95 Va. 564, 28 S. E. 959, and *Ould & Carrington v. City of Richmond*, supra.

The fact that only one person, firm, or corporation falls within a class upon which a license tax is imposed does not of itself make the tax amenable to the charge of discrimination.

The judgment of the corporation court is affirmed.

(105 Va. 106)

SWIFT & CO. v. CITY OF NEWPORT NEWS.

(Supreme Court of Appeals of Virginia.
March 1, 1906.)

1. EMINENT DOMAIN—COMPENSATION—ALTERATION OF GRADE OF HIGHWAY.

At common law municipal corporations were not liable to one whose land was not taken for consequential damages arising from the change of grade of a street, although improvements had been made on his lot in conformity to a former grade.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 269, 270.]

2. COMMON LAW—CONTINUANCE IN FORCE.

The common law remains in force in this state, except when changed by statute or the Constitution.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Common Law, §§ 9-12.]

3. STATUTES — CONSTRUCTION — PROSPECTIVE OPERATION.

The Constitution and statutes operate prospectively only, unless the words therein employed show clearly and expressly an intention that they should operate otherwise.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 20; vol. 44, Cent. Dig. Statutes, § 344.]

4. CONSTITUTIONAL LAW — CONSTRUCTION OF CONSTITUTION.

Constitutional provisions in pari materia are, like statutes, to be construed together, and effect is to be given to the policy established by the Constitution.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 9, 11.]

5. SAME.

A fair interpretation is to be given to the language used in the Constitution, and the words thereof are to be construed in their common and ordinary acceptation, unless it clearly appears that they were intended to be used in some other sense.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 11.]

6. SAME—CARRYING OUT OF CONSTITUTION—SELF-EXECUTING PROVISIONS.

A constitutional provision should never be construed as dependent for its efficacy and operation upon the legislative will, and consequently statutes existing when the Constitution was adopted, inconsistent with its pro-

visions, are nullified by the Constitution, even though legislation may be desirable and valuable for the purpose of defining the right conferred by the Constitution and aiding in its enforcement.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 21-30.]

7. SAME — INFRACTION OF CONSTITUTIONAL RIGHTS—REMEDY.

Under Const. art. 1, § 6, and article 4, § 58 [Va. Code 1904, pp. ccix, ccxxii], which provide in effect that property shall not be "taken" or "damaged" for public use without just compensation, whereas the corresponding provisions of the previous Constitution (article 1, § 8, and article 5, § 14) only provided that property should not be "taken" for a public use, one whose property is damaged for a public use may, in the absence of an existing constitutional or statutory remedy, maintain an appropriate action at common law for the redress of the wrong done him.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 233, 694.]

8. EMINENT DOMAIN—COMPENSATION—DAMAGE OF PROPERTY—CONSTITUTIONAL PROVISIONS.

The old Constitution (article 1, § 8, and article 5, § 14) provided merely that property should not be "taken" for a public use without just compensation. A city was, by Acts 1895-96, p. 80, c. 64, § 29, empowered to grade streets without the payment of consequential damages. It accordingly passed a grade ordinance without making provision for the payment of such damages, but did not proceed to carry out the ordinance until the Constitution of 1902 became effective. The latter Constitution provides (article 1, § 6, and article 4, § 58 [Va. Code 1904, pp. ccix, ccxxii]), that property shall not be taken "or damaged" for a public use without just compensation, and also provides (article 8, § 117 [page ccxxxviii]), that municipal charters are amended so as to conform to all the provisions and restrictions of the Constitution. *Held*, that the city could not, after the adoption of the Constitution of 1902, carry out its grading ordinance previously passed without compensating property owners whose property was damaged by the change of grade.

9. APPEAL — REVERSAL — FAILURE TO GIVE NOMINAL DAMAGES.

The failure to award nominal damages, unless it be upon a matter which involves the settlement of a right other than the right to recover damages, is not ground for reversal.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 4553.]

10. EMINENT DOMAIN — RIGHT TO NOMINAL DAMAGES—NATURE OF ACTION.

Under Const. art. 1, § 6, and article 4, § 58 [Va. Code 1904, pp. ccix, ccxxii], providing that property shall not be taken or damaged for public use without "just compensation," the gist of an action for damaging property for a public use is a recovery of substantial damages, and not an invasion of a legal right, and consequently nominal damages, as such, are not recoverable.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 327-331.]

11. SAME—MEASURE OF DAMAGES.

Under Const. art. 1, § 6, and article 4, § 58 [Va. Code 1904, pp. ccix, ccxxii], providing that property shall not be taken or damaged for a public use without just compensation, the measure of damages for damaging property for a public use is the depreciation of the property in value when considered in connection with the benefits conferred, and all the items of damage are consequently to be taken together in determining whether the property has been substantially damaged, and there can be no

recovery for specific items of damage as such, as for the cost of the improvement in the construction of which the property is claimed to have been damaged, disassociated from other elements of damage and of benefit.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 371-377.]

12. EVIDENCE—OPINION EVIDENCE—EXPERTS.

In an action for damaging property for a public use, expert opinion evidence is admissible on the issue of whether the property has been enhanced or depreciated in value by the improvement which is claimed to have caused the damage.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2341.]

Error to Corporation Court of Newport News.

Action by Swift & Co. against the city of Newport News. There was a judgment for defendant, and plaintiff brings error. Affirmed.

The instructions given by the court were as follows:

"(1) If the jury believe, from the evidence, that at some time after 12 o'clock m. of July 10, 1902, and prior to the institution of this action, the defendant city of Newport News changed, or caused to be changed, the grade of Twenty-Third street in front of the premises of the plaintiff, Swift & Co., and raised the surface and grade of said street about seven inches above the surface and grade as it had theretofore existed, thereby leaving the lot of the plaintiff, and the building thereon, which had been built with reference to the original grade, below grade, and so damaged the property of the plaintiff, they must find for the plaintiff.

"(A) The court instructs the jury that in determining, from the evidence, whether or not the plaintiff has been damaged by the change of grade occasioned by the public improvement made in Twenty-Third street in front of the property, they will take into consideration the benefits, if any, derived therefrom as a whole, and likewise the damages, if any, to the said property, as a whole, and not to any specific part thereof; and if they believe, from all of the evidence, that the market value of the said property was as much immediately after the grade in the street had been so changed as it was immediately before, not knowing it was to be so changed, then they will find for the defendant.

"(B) The court instructs the jury that if they believe, from the evidence, that the raising of the grade of Twenty-Third street was occasioned by the city's paving at its own expense the said street in front of the plaintiff's property, and that such improvement of the street did not reduce the market value of said property, you will find for the defendant. By street is meant 'driveway,' not 'sidewalk.'"

Wm. C. Stuart, for plaintiff in error. J. A. Massie, for defendant in error.

CARDWELL, J. This action was brought in the corporation court of the city of Newport News by Swift & Co., a private corporation, to recover of the said city damages alleged to have been sustained in consequence of a change in the grade of a street.

The plaintiff is the owner of two lots, with a frontage of 50 feet, on Twenty-Third street, between Washington and Huntington avenues, in said city, upon which is a costly building, used by the plaintiff in the conduct of a wholesale beef and cold storage business, with a branch depot for the distribution of its beef to purchasers. In this building there is a basement, with windows, around which are light shafts which extend into the sidewalk, which basement is used for the operation of an electric motor and other machinery. The building was erected with reference to the then existing grade of Twenty-Third street, and in front of same was laid a granolithic sidewalk. The defendant city determined to pave this street entirely at its own expense, and in order to do so found it necessary to make a slight change in the grade in front of plaintiff's property, and to raise the surface of the street between four and seven inches. This change of the grade of the street was made, and a contract for paving the street in accordance with the new grade was let, prior to the taking effect of the new Constitution of the state, at 12 m., July 10, 1902, and work was begun under the contract on other parts of the street; but the contractors did not reach the point in front of plaintiff's property until shortly after the new Constitution took effect. In front of plaintiff's premises the city put in what is known as a low or "drive-over" curb, which does not extend above the pavement; but the street, when completed, was several inches higher than the sidewalk theretofore constructed by the plaintiff, and thereupon it proceeded to construct another sidewalk, which is 15 feet in width, bringing it up to the surface of the pavement, at a cost of \$128.

The declaration filed sets out the foregoing acts on the part of the defendant city as wrongful and unlawful, and alleges injury and damage to the plaintiff's property, and depreciation of its market and rental value to the amount of \$400.

Its demurrer to the declaration having been overruled, the city filed its plea of not guilty, and upon the issue joined on this plea the verdict and judgment were for the defendant.

We are asked to review and reverse this judgment because of misdirection of the jury in the giving and refusal of instructions, and because the verdict is contrary to the law and the evidence.

At common law, as has been repeatedly held by this court, municipal corporations were not liable for consequential damages, arising from the change of grade of a street, to one whose land is not taken, although his improvements had been made on his lot in

conformity to a former grade. *Harrisonburg v. Roller*, 97 Va. 582, 34 S. E. 523; *Home Building, etc., Co. v. Roanoke*, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551, and authorities cited.

It is also well settled that the common law remains in force in this state, except when changed by statute or the Constitution, which operate prospectively only, unless the words employed show clearly and expressly the intention that it should be otherwise. *Arey v. Lindsey*, 103 Va. 250, 48 S. E. 889; *Kesterson's Adm'r v. Hill*, 101 Va. 739, 45 S. E. 238; *Cooley's Const. Lim.* 97.

This action, therefore, can be maintained, if at all, only by reason of some right secured to plaintiff in error by a change of some provision or provisions of the old Constitution of the state found in the present Constitution, as it is not alleged that there has been any legislation, and in fact there has been none, on the subject of damages to private property by public improvements since the present Constitution went into effect. There was no taking of property, and the defendant in error had the power, both at common law and by section 29 of its charter (Acts 1895-96, p. 80, c. 64), to grade and improve streets without the payment of consequential damages.

The provision in the Bill of Rights in the old Constitution (section 8, art. 1) that "all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed, or deprived of their property for public uses, without their consent, or that of their representatives duly elected," has been changed by adding in the corresponding section of the new Constitution (section 6 [Va. Code 1904, p. ccix]), after the words "or deprived of," the words "or damaged in," so that the provision of the Bill of Rights contained in the present Constitution is that citizens of the state cannot be deprived of or damaged in their property for public uses, without their own consent or that of their representatives, duly elected, etc.

By the change made in section 14, art. 5, of the old Constitution, which contained the provision that the General Assembly should not enact any law whereby private property might be taken for public uses without just compensation, it is now provided (section 58, art. 4, new Constitution [Va. Code 1904, p. ccxxii]), that the General Assembly "shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation."

Constitutional provisions in *pari materia*, like statutes, are to be construed together, and effect is to be given to the policy established by the Constitution. To that end, a fair interpretation is to be given to the language used, construing words in their common and ordinary acceptation, unless it clearly appears that they were intended to be used in some other sense. *Railway Co. v. Clower's*

Adm'x, 102 Va. 867, 47 S. E. 1003; Funk-jouser v. Spahr, 102 Va. 306, 46 S. E. 378.

It clearly appears, we think, that it was the policy of the framers of the present Constitution, in adopting section 6 of article 1, and section 58 of article 4 [Va. Code 1904, pp. ccix, ccxxii], worded in a similar way that the corresponding provisions in the old Constitution were worded, that it should be unlawful thereafter to damage private property for public use without just compensation, just as it was unlawful theretofore to take private property for public use without just compensation.

This change follows similar provisions in the Constitution of West Virginia, adopted in 1872, which were taken from the Constitution of the state of Illinois of 1870, except that the provision in the two last-named Constitutions is a positive statement that "private property shall not be taken or damaged for public use without just compensation."

It was the design of the amendment to our Constitution under consideration to remove an existing mischief, viz., the damaging of private property for public use without just compensation, and a constitutional provision should never be construed as dependent for its efficacy and operation upon legislative will. 6 A. & E. Ency. L. 913, and authorities cited. So that when the provision of a Constitution, as does ours, no less than the provision in the Constitutions of the states of West Virginia and Illinois, forbids damage to private property, and points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance. 6 A. & E. Ency. L. 913, and authorities cited in note. And all statutes existing when such a Constitution is adopted, or which might thereafter be passed, inconsistent with its provisions, are nullified by such constitutional prohibition, though legislation may nevertheless be desirable and valuable for the purpose of defining the right and aiding in its enforcement. Same authority just cited, and Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 Pac. 3.

In *People v. McRoberts*, 62 Ill. 41, the contention was made that the provision of the Illinois Bill of Rights inhibiting the taking of private property for public use was only prospective, and inoperative without legislative action; but the contrary view was taken, the opinion of the court saying: "The right of property thus intended to be secured cannot depend upon the mere will of the Legislature. The prime object of the Bill of Rights is to place the life, liberty, and property of the citizen beyond the control of legislation, and to prevent either Legislatures or courts from any interference with or deprivation of the rights therein declared and guaranteed, except upon certain conditions. It would be the merest delusion to declare a subsisting right

as essential to the acquisition and protection of property, and make its employment depend upon legislative will or judicial interpretation."

It is contended, however, by counsel for defendant in error here, that notwithstanding our Bill of Rights and Constitution provide that an individual cannot be damaged in his property for public use without either his consent or that of his representatives duly elected, and that where the necessary consent is obtained by means of the passage of an ordinance the Legislature (city council) shall not enact any law whereby private property shall be taken or damaged for public use without just compensation, the passage of such an ordinance, pursuant to authority given in the city's charter, without making provision for just compensation, before the time when the Constitution became effective, is a sufficient and legal justification for doing the work on the street upon which plaintiff in error's property abuts, and causing damage thereto without compensation after the Constitution began to operate, and the constitutional provisions relied on do not apply. In other words, that although the ordinance under which the work is done, if enacted at this time, would be unconstitutional, or at least could not be put into operation by doing the work without providing for just compensation, such an ordinance passed before the present Constitution became operative, which was carried into effect after by bringing the street to the grade established by it and inflicting damage upon plaintiff in error's property, is valid authority for doing the work, because when it was passed it would have been lawful to have performed the work without rendering compensation.

To give a city ordinance passed prior to July 10, 1902, the effect here contended for, would, as it appears clear to us, make the constitutional provisions we have under consideration meaningless.

"A law cannot be enforced in a state, no matter when passed, which contravenes the provisions of the Constitution of the state." *People v. Maynard*, 14 Ill. 419.

The question as to the effect of a new constitutional provision incorporating the word "damage" in the Constitution of Illinois was passed upon by the United States Supreme Court in *Chicago v. Taylor*, 125 U. S. 166, 8 Sup. Ct. 820, 31 L. Ed. 638, and the opinion says:

"Touching the provision in the Constitution of 1870, the court [state court] said that the framers of that instrument evidently had in view the giving of greater security to private rights by giving relief in cases of hardship not covered by the preceding Constitution, and for that purpose extended the right to compensation to those whose property had been 'damaged' for public use; that the introduction of that word, so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organized law

of the state, and abolish the old test of direct physical injury to the corpus or subject of the property affected. The new rule of civil conduct, introduced by the present Constitution, the court adjudged, required compensation in all cases where it appeared 'there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property, in excess of that sustained by the public generally.' * * *

"The conclusion there reached was that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owners of real estate, but if the construction and operation of a railroad or other improvement is the cause of the damage, though consequential, the party may recover. * * *

"Our attention has not been called to, nor are we aware of, any subsequent decision of the state court giving the Constitution of 1870 an interpretation differing from that indicated in *Rigney v. Chicago* (102 Ill. 64), and *Chicago, etc., Rd. Co. v. Ayres* (103 Ill. 511). We concur in that interpretation. The use of the word 'damaged,' in the clause providing compensation to owners of private property appropriated to public use, could have been with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use than was guaranteed by the former Constitution."

We have been unable to find a case where it is held that where an ordinance establishing a grade is passed prior to the adoption of a Constitution affording protection against damage in such cases, and no work of grading was done under the ordinance until after the adoption of the Constitution, the plaintiff cannot recover because the grade ordinance was passed before the Constitution became effective. There are, however, a number of cases to be found taking the opposite view, and among them the following: *Ogden v. Philadelphia*, 143 Pa. 430, 22 Atl. 694; *O'Brien v. Philadelphia*, 150 Pa. 589, 24 Atl. 1047, 30 Am. St. Rep. 832; *Johnson v. Parkersburg*, 16 W. Va. 402, 27 Am. Rep. 779.

In the first-named case, the grade was established on the city plan in 1871, the Constitution of Pennsylvania giving the right of compensation for property damaged for public use was adopted in 1874, and the

opinion of the court, after stating these facts and that when the grade of the street was established there was no right of action for consequential damages to property owners says: "But the Constitution of 1874 (article 16, § 8) gave a right to owners to have compensation for property injured, as well as for property taken, by municipal or other corporations in the construction or enlargement of their works. The right of action which this section gives is clearly for the actual establishment of the grade on the lands. The general rule is that the cause or action arises when the injury is complete and this has been uniformly applied to the taking of property for public use, from the case of *Schuykill Nav. Co. v. Thoburn*, 7 Serg. & R. 411, down to the present day. * * * There is nothing in the constitutional provision which indicates an intent to depart from the general rule under which in the present case, the cause of action could not arise until the actual cutting down or the ground in 1887."

In *Johnson v. Parkersburg*, supra, a case similar in all essential particulars to this, the grade of the street was adopted before the Constitution of West Virginia of 1872, and the work of grading was done after the adoption of the Constitution. Held, where a city in changing the grade of streets permanently injures private property, and thus infringes the explicit provision of the Bill of Rights that private property shall not be taken or damaged for public use without compensation, an action lies for the injury, although no statute has ever been enacted for the enforcement of this constitutional provision." The opinion in that case says: "The private right of the individual was secure under the Constitution. That part did execute itself. It contained a positive inhibition on the part of the Legislature to pass any law by which private property could be taken or damaged for public use without compensation."

In the later case of *Blair v. Charleston*, 43 W. Va. 68, 26 S. E. 341, 342, 35 L. R. A. 856, 64 Am. St. Rep. 837, it is held that "if a street be opened and used upon the natural surface as a grade line, and it is recognized and treated by the city or town as a public street, and owners of lots upon it build with reference to said natural grade line, and it is changed, the city or town is liable to lot owners for damages consequential upon the change of grade, though no grade of the street was ever adopted by the municipality, under section 9, art. 3, of the Constitution. Such natural grade thus became the established grade."

"It is not the making of the paper grade that inflicts the injury, but its application to the ground. It is the direct disturbance of a right which the owner had enjoyed in connection with his property that gives the right of action." See, also, *Jones v. Bangor*, 144 Pa. 638, 23 Atl. 252.

Upon this branch of the case at bar we are of opinion that under the present Constitution proper acts of the Legislature (or ordinances of the city council) for the purpose of both obtaining the necessary consent and providing just compensation are essential to the act of taking or damaging private property for public use, unless in fact the owner of the property taken or damaged himself consents that it be done and waives compensation. In other words, that the provisions of the present Constitution against the taking or damaging of private property for public use, without just compensation, were self-executing, and repealed and displaced all existing laws inconsistent therewith; and that plainly the charter of defendant in error and the city ordinances, in so far as they authorized the change of the grade of streets, resulting in injury to the property of abutting lot owners, without providing just compensation for such injury, are inconsistent with said provisions of the new Constitution, and are to that extent repealed. Section 117, article 8, new Constitution [Va. Code 1904, p. cxxxviii]; 6 A. & E. Ency. L. 919.

The next question for consideration is, what is the true rule for the measure of damages in a case like this?

It is earnestly insisted by counsel for plaintiff in error that, as defendant in error has violated the provisions of the new Constitution which gave plaintiff in error a right of action, it follows that it has suffered damage. In other words, as the action is brought to protect a right secured to the plaintiff in error by the new Constitution, it is at least entitled to recover nominal damages.

If this contention could be maintained, there could never be a verdict for the defendant in such a case, and the great weight of authority is therefore against the contention. "The failure to give nominal damages, unless it be upon a matter which involves the settlement of a right other than the right to recover damages, is not a ground for reversal." *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148.

The new Constitution has not taken from the cities of the state the right to raise or lower the surface of a street when necessity requires, nor made it dependent upon the will of the parties affected thereby, but only provides that just compensation shall be made for the damage done. Therefore, if no damage has been done, no right has been violated, even though the established grade of the street may have been changed.

It is only in cases where damages are not the gist—that is, in cases of forbidden conduct—that nominal damages can be recovered. *Hale on Damages*, p. 25; 8 A. & E. Ency. L. 551.

The action here is for just compensation; the gist of the action is for substantial damages, and not an invasion of a legal right;

therefore, under the pleadings, nominal damages, as such, are not recoverable.

In *Stewart v. Ohio River R. Co.*, 38 W. Va. 438, 13 S. E. 604, the declaration filed was similar to the one in this case, and the opinion says: "Under our view of the pleadings as already discussed, nominal damages, as such, were not recoverable; for the plaintiff did not sue for an invasion or infringement of a legal right, as for a trespass or a nuisance, but for just compensation for damages done to his property."

"Where the suit is for the 'just compensation' guaranteed by the Constitution, the measure of the damages is the depreciation in the value of the property by the causes sued for." 2 *Lewis, Em. Domain*, § 625. The same author, discussing the rule for measuring the damages of a plaintiff who has suffered loss by reason of a public improvement, in section 494, citing numerous cases, says "The correct measure of damages in all such cases is undoubtedly the diminution in the value of the property by reason of the change. The owner should receive such an amount as will make him whole."

In *Stewart v. Ohio River R. Co.*, supra, the opinion of the court in *Springer v. Chicago*, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 600, construing the Illinois Constitution, is quoted with approval as follows: "Where the action is brought to recover damages, where no part of the property is taken, but merely damaged, by a public improvement, the law is well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair cash value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained and no recovery can be had." To the same effect is *Blair v. Charleston*, supra; *Chicago v. Taylor*, supra.

In *City Council v. Schrameck*, 96 Ga. 426, 23 S. E. 400, 51 Am. St. Rep. 146, the same contention was made that is by plaintiff in error here, viz.: that benefits deducted in measuring damages where no part of the property is taken, but merely damaged by a public improvement, must be, as in a case where a part of the property is taken and the action is to recover for damage to the residue, special and peculiar, and cannot include general benefits shared in common with other property in the neighborhood, and that the plaintiff was in any event entitled to recover the costs of adjusting his property to the new conditions brought about by the public improvement; but the court held otherwise and in accordance with the rule sanctioned in the authorities just adverted to; the opinion saying that evidence as to the necessity of filling in the lot and raising the buildings on the lot, with the probable costs of such work was admissible,

not as furnishing a reason for the allowance of such costs as an independent item of special damage, but as a circumstance throwing light upon the general question of the diminution of market value.

It is insisted that the rule established for assessing the damages to the residue, where a part of a tract of land is taken, by the decisions of this court before our Constitution was changed by inserting the word "damaged," should be adhered to, and *Hickman v. Kansas City*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684, is greatly relied on as supporting that view; but while the opinion in that case reaches the conclusion that the change in the Missouri Constitution, made in 1875, by inserting the word "damaged" and coupling it with the word "taken," secured to the property owner the right to compensation when his property is damaged, in the same terms as when it is actually invaded and taken, the later Missouri cases do not follow that view, but approve the rule for the measure of damages, where no part of the property of the plaintiff is taken, that was sanctioned in *Stewart v. Ohio R. R. Co.*, and other cases cited above, viz.: "If the fair market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained, and no recovery can be had."

The opinion by Gantt, P. J., in *Grover v. Cornet*, 135 Mo. 21, 35 S. W. 1143, citing, among other cases, *Markowitz v. Kansas City*, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498, says: "The measure of damages in such cases has been laid down time and again by this court. It is the difference in the market value of the property before and after the grading, and caused solely by the grading."

The same view is taken in *Wolters v. St. Louis*, 132 Mo. 1, 33 S. W. 441, citing a number of cases decided by that court after the change made in the Missouri Constitution by inserting the word "damaged" and coupling it with the word "taken," requiring that thereafter "just compensation" should be made for property "damaged" as theretofore had been made for property "taken."

It is, however, further insisted here that the jury should have been instructed as follows: "If the jury find for the plaintiff, in estimating its damages they should take into consideration the diminution in value, if any, of the said plaintiff's property caused by the change of the grade of the street, the peculiar benefits, if any, derived in respect to this particular property, not in common with the property of other persons along said street, and the actual damage, if any, incurred by the plaintiff in laying a new pavement in front of its premises; and if they find from the evidence that such diminution

in value exceeds in value such peculiar benefits, such excess is to be added to the damage incurred in laying the new pavement; but if the damage by diminution in value of the premises falls short of such peculiar benefits, then the deficiency is not to be charged to the plaintiff, nor deducted from the amount to which the said plaintiff is entitled on account of damage incurred in laying the new pavement, provided that the damages shall not exceed the amount of \$400 claimed in the declaration." In other words, that the jury should have been instructed that in estimating plaintiff in error's damages they should disregard benefits, if any, to its property derived from the improvement "in common with the property of others along said street," and that they should in any event find for the plaintiff in error the sum of \$128, the cost incurred in laying the new pavement, regardless of any benefits.

This independent item of cost incurred in laying the new pavement tended to show damage, and was proper to be considered as such by the jury, yet they could not take separate items, and award damages for them, and add them together, and say that is the damage suffered, nor could there be a recovery for any specific item of damage as such, but all of them were to be taken together as elements tending to show whether the property had been depreciated in value when considered in connection with the benefits. 2 Lewis, Em. Domain, § 494; *City Council v. Schrameck*, supra; *Chambers v. South Chester (Pa.)* 21 Atl. 409.

In the last-named case the following charge to the jury was approved: "You may consider these several matters [special items of alleged damages] as elements in the cause, but you are not to award damages for the building of walls or the filling up of lots as special damages, or for the likelihood of injuring the building, etc. You are not to take up these separate items, and award separate damages for them, and add them together, and say that is the damage suffered. The law has given another rule for the measuring of damages, and that rule is as before stated, and which I will now repeat. The law is this: You will consider the market value of the property before the change and unaffected by it, and its market value with the grade as affected by it. If the establishing of the new grade has added more value to the property than it has depreciated from it, the verdict should be for the defendant. If it has depreciated from the property more than it has added to it, the verdict should be for the plaintiff, and the measure of damages should be the difference between its value before and its value after."

The case of *Blair v. Charleston*, supra, is exactly in point as to the rule for measuring the damages in a case where there is no taking of any part of the property alleged to

have been damaged by a public improvement; and in an elaborate opinion by Brannon, J., citing all of the decisions of this court pertinent to the issue, it is held: "If property is enhanced in value by reason of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to greater or less extent, be likewise specially benefited. In other words, it is not only such benefits as are special, or limited to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value—that is, specially benefited—that are to be considered. If a piece of property is enhanced in value, its enhancement, or, in other words, benefits to the property, cannot be said to be common to any other piece of property specially enhanced in value, and it is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties."

The opinion in that case also disposes of the contention made here that evidence of experts—i. e., opinion evidence—is not admissible on the question whether the property has been enhanced or depreciated in value by the public improvement, and holds that such evidence is admissible.

The rule sanctioned by the authorities we have referred to, and in fact universally recognized, it may be said, in all cases in which recovery was sought for damages where no part of the property is taken, but merely damaged, by a public improvement, is in entire harmony with the rule adopted in a long line of cases where it was held that the damages to the residue of the tract was an amount equal to the difference in the market value of the residue at the time of the taking and its market value after the same had been so taken. If this were not the correct rule, and plaintiff in error's contention could be sustained, damages would be recoverable in every case where the owner of property along the line of a public improvement incurred expense in adjusting his property to the improvement, although his property had been enhanced in value beyond the expense incurred, not because his property has been depreciated in value by the improvement more than benefited, but merely because other property similarly situated had been more or less benefited. Such a result would not only be unjust and inequitable, but would greatly retard the making of such common and necessary public improvements as are here complained of, and many others of like character and importance.

There is no evidence in this case, whatever, of any benefits to the community at

large by reason of the paving of Twenty-Third street upon which plaintiff in error's property, assessed for taxation at \$22,000, abuts; but the evidence was limited solely to the special benefits which enhanced the value of this particular property, both in fee-simple and rental value, tending to show an increase in both respects greatly in excess of the damages claimed as having been sustained by reason of the change in the grade of the street; and it would seem clear that the only inference that could be drawn from the evidence was that the other property in the community not fronting on this paved street was not enhanced in value, as the evidence shows that the fact that the property fronted upon the paved street was the sole cause of the enhancement of its value.

The case is of the first impression in Virginia upon the question of the measure of damages caused by a change of the grade of a street, where no part of the property was taken, and we have considered and determined the principles of the case, instead of discussing in detail the instructions given and refused at the trial, and deem it only necessary to say with reference to the instructions that those given by the learned judge who presided at the trial so clearly and concisely expounded the principles of law applicable to the case, and in accordance with the views expressed in this opinion, that the jury could not have been misled as to their duty in disposing of the questions submitted to them.

Enough has been said of the evidence to warrant, in our opinion, the conclusion that the jury could not have rightly found any other verdict than they did find, and therefore the court below did not err in overruling plaintiff in error's motion for a new trial.

The judgment of the corporation court is affirmed.

(105 Va. 178)

MARBACH v. HOLMES.

(Supreme Court of Appeals of Virginia.
March 1, 1906.)

1. EJECTMENT—EVIDENCE—TITLE.

Where both parties in ejectment claim the land from a common source, it is unnecessary for either to trace title beyond that source.

2. ADVERSE POSSESSION—POSSESSION OF PURCHASER—DISAVOWAL OF VENDOR'S TITLE.

The possession of a purchaser under an incomplete contract of sale does not become adverse until there is a severance of the relation of vendor and purchaser by a distinct avowal on the purchaser's part that he is holding adversely to the vendor, and notice of such avowal is brought home to the vendor.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 343-346.]

3. EJECTMENT—ADVERSE POSSESSION—EVIDENCE.

In ejectment, where the defense was adverse possession, the record of a suit for specific performance brought three years before the commencement of the ejectment action by de-

fendant against his alleged vendor, under whom plaintiff claimed, in which suit the bill was dismissed, was admissible to show that defendant's possession was not adverse at that time.

Error to Circuit Court, Elizabeth City County.

Action by S. Marbach against Henrietta Holmes. There was a judgment for defendant, and plaintiff brings error. Reversed.

S. F. Collier & Son, John W. Friend, and Jones & Woodward, for plaintiff in error. S. J. Dudley and B. A. Lewis, for defendant in error.

WHITTLE, J. In October, 1904, the plaintiff in error brought ejectment against the defendant in error to recover a certain lot situated in the town of Hampton. The defendant relied upon adverse possession under claim of right to defeat the plaintiff's recovery, and at the trial, a jury having been waived and all matters of law and fact submitted to the court, the judgment under review was rendered in behalf of the defendant.

Both plaintiff and defendant claim the land in controversy from a common source (Abraham Holmes), beyond which it is, therefore, unnecessary for either to trace title. *Bolling v. Teel*, 76 Va. 487; *Chesterman v. Bolling*, 102 Va. 471, 46 S. E. 470.

The plaintiff made out a prima facie case, connecting his title by successive conveyances with that of Abraham Holmes; while, as observed, the defendant, who had no deed or other paper title, relied solely upon adverse possession under claim of right. To rebut that contention, the plaintiff offered in evidence the record of a suit in equity, instituted in August, 1902, by C. W. Holmes, through whom the defendant claims, for specific performance of an alleged contract between his father, Abraham Holmes, and himself, for the sale of the lot in controversy. At the hearing the prayer for specific performance was denied and the bill dismissed.

It thus appears that less than three years before the institution of the present action C. W. Holmes, by the allegations of his bill, admitted that his entry upon and possession of the land was under the alleged contract of purchase from Abraham Holmes, and that the relation of vendor and vendee existed between them.

In such case the doctrine is well settled in this state that the possession of an incomplete purchaser only becomes adverse when there has been a severance of the relation of vendor and vendee by a distinct avowal on his part that he is holding adversely and not in subordination to the title of the vendor, and notice of such disclaimer is brought home to the vendor.

In the leading case of *Clarke v. McClure*, 10 Grat. 305, the rule is thus stated: "A vendee, who enters under an executory contract which leaves the legal title where it

was and contemplates a future conveyance, enters in subordination to it, holds under and relies upon it to protect his possession in the meantime. And in such case, as also in the case of lessee, mortgagor, cestui que trust, and the like, where one is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession which could silently ripen into a title by adverse possession under the statute of limitations."

"An entry on land under a parol gift from the owner, and a claim to hold any estate by virtue of the gift, is in its nature a recognition of the continued existence of a subsisting title in the legal owner, and a claim to hold any estate by gift from the legal owner is a claim to hold in subordination to his title." *Id.*

The principal case has been cited and approved in a number of subsequent decisions by this court. *Oreigh's Heirs v. Henson*, 10 Grat. 231; *Nowlin v. Reynolds*, 25 Grat. 137, 141; *Lewis v. Overby's Adm'r*, 31 Grat. 601, 616; *Creekmur v. Creekmur*, 75 Va. 430, 436; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846; *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233; *County of Alleghany v. Parrish*, 93 Va. 615, 622, 25 S. E. 882; *Va. Mid. R. Co. v. Barbour*, 97 Va. 118, 33 S. E. 554; *Neff v. Ryman*, 100 Va. 521, 42 S. E. 314.

In *Chapman v. Chapman*, 91 Va. 397, at page 406, 21 S. E. 813, at page 814 (50 Am. St. Rep. 846), it is said: "Before adverse possession can arise between a vendor and his vendee, or between the grantee of the vendor and such vendee, where the vendor has retained the title, and the statute of limitations commences to run, the vendee must have discovered the privity of title between them by the assertion of an adverse right, and openly and continuously disclaimed the title of his vendor, and such disclaimer be clearly brought home to the knowledge of the vendor or his grantee."

The record in the suit for specific performance was therefore clearly admissible to show the character of C. W. Holmes' possession; and for the error in excluding it the judgment of the trial court must be reversed, and the case remanded for a new trial.

CARDWELL, J., absent.

(105 Va. 170)

SMOKELESS FUEL CO. v. W. E. SEATON & SONS.

(Supreme Court of Appeals of Virginia. March 1, 1906.)

1. CONTRACTS — CONSIDERATION — MUTUAL PROMISES.

Where the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party may have the right to hold the other to a positive agreement.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 345.]

2. SALES—CONSIDERATION—MUTUALITY.

A contract reciting that the first party had sold to the second party from 1,000 to 1,500 tons of coal at a certain price, to be shipped as ordered between the date of the contract and a certain future date, was supported by a valuable consideration and mutuality of engagement.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 31, 54-57.]

3. SAME — BREACH — EXCUSES FOR NONPERFORMANCE—BURDEN OF PROOF.

In an action for breach of contract to deliver coal, the burden was on defendant to show that it was excused, under strike or car-shortage clauses of the contract, from performing the same.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1170.]

4. SAME — STIPULATIONS EXCUSING NONPERFORMANCE—CONSTRUCTION.

A contract for the sale of coal, which provided that the seller would use every possible effort towards completing the contract, "but that it was subject to strikes * * * beyond the control" of the seller, bound the seller to deliver the coal, unless there was a strike which was so far beyond its control as to render performance impossible.

5. SAME—QUESTIONS FOR JURY.

In an action for breach of a contract to deliver coal, whether defendant was prevented from performing its contract by a strike beyond its control, within the meaning of a clause of the contract excusing performance in case of such strikes, *held*, under the evidence, a question for the jury.

6. SAME—DUTY TO PERFORM—RIGHT TO IMPOSE CONDITIONS.

Where a contract for the sale of coal required the seller to deliver coal at a certain price up to a certain amount, as ordered, the seller was not entitled to demand an indemnifying bond as a condition of delivering the coal after the same had advanced in price on the market, and the buyer was under no obligation to comply with such a demand.

7. SAME — DEMAND OF PERFORMANCE — QUESTION FOR JURY.

In an action for breach of a contract to deliver coal up to a certain amount, as ordered, whether plaintiff had demanded delivery of the coal, *held*, under the evidence, a question for the jury.

8. SAME—NECESSITY OF DEMAND.

Where a contract bound defendant to deliver coal to a certain amount, as ordered, it was incumbent on plaintiff to demand the coal as a condition of putting defendant in default for failing to deliver the same.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 357, 1157.]

Error to Circuit Court of City of Richmond.

Action by W. E. Seaton & Sons, a partnership, against the Smokeless Fuel Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Rehearing denied March 9, 1906.

Sands & Sands, for plaintiff in error. Emmett Seaton and H. R. Pollard, for defendants in error.

HARRISON, J. This action was brought by Seaton & Sons, who are coal merchants in the city of Richmond, against the Smokeless Fuel Company, a corporation engaged in selling coal to such merchants, to recover damages for the breach by the defendant of

the following contract, between the parties, which is set out in the declaration:

"This agreement entered into this eleventh day of April, 1902, by and between Smokeless Fuel Company, party of the first part, and W. E. Seaton & Sons, party of the second part, both of the city of Richmond, witnesseth: That the party of the first part has sold to the said party of the second part 1,000 to 1,500 tons New River R. O. N. steam coal from Collins Colliery Company at one dollar and ten cents (\$1.10) per net ton of 2,000 lbs., freight rate to apply on this coal is one dollar and fifty cents (\$1.50) per net ton of 2,000 lbs. from New River District to Richmond, Virginia. We guaranty this rate against any advance, but should there be a reduction of same during life of contract, party of the second part is to have advantage of the reduced rate on all coal shipped after such rate is put into effect. The party of the first part will use every effort possible towards completing this contract in a satisfactory manner to the party of the second part, but it is taken subject to strikes, accidents, shortage of cars, or any other causes beyond the control of said party of the first part. Coal is to be shipped as ordered between this date and April 11th, 1903. In consideration of the above both parties hereby affix their seals in triplicate on the date aforesaid.

"[Signed] Smokeless Fuel Company,

"Wm. Shands, Mgr. [Seal]

"[Signed] W. E. Seaton & Son. [Seal]"

The trial resulted in a verdict and judgment in favor of the plaintiff for \$1,139.

The petition for a writ of error sets forth three particulars in which it is claimed that the lower court erred. The first contention is that the contract sued on should have been held to be invalid for want of consideration and mutuality. This question was raised by demurrer to the declaration, and subsequently by objection to the admission of the contract in evidence, by instructions refused, and lastly by motion in arrest of judgment.

We are of opinion that the demurrer and each of the subsequent motions of the plaintiff, calling in question the validity of the contract, were properly overruled.

The general rule of law is that, where the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound or neither is bound. *Am. Agricultural Co. v. Kennedy*, 103 Va. 171-176, 48 S. E. 868.

We think the contract under consideration meets the requirements of this general rule. It is clear and definite in its terms, between competent parties, and for a valuable consideration, to wit, the promise of the seller to deliver the coal as ordered, within the time prescribed, and the promise of the

buyer to receive the same and pay the price agreed upon. Under the terms of the contract, the plaintiff's were bound to take not less than 1,000 nor more than 1,500 tons. The price to be paid is stipulated in the contract, as is also the time in which the contract was to be performed. There was therefore not only a valuable consideration to sustain the contract, but absolute mutuality of engagement; both parties being bound to perform, and either liable to the other for a breach of the contract.

The second contention is that the circuit court erred in its interpretation of the "strike provision" in the contract sued on.

The contract provides as follows: "The party of the first part will use every effort possible towards completing this contract in a satisfactory manner to the party of the second part, but it is taken subject to strikes, accidents, shortage of cars, or any other causes beyond the control of said party of the first part."

The evidence shows that between the 11th day of April, 1902, and the 7th day of June, 1902, the defendant furnished to the plaintiffs all of the coal ordered by them at the contract price, being 160 tons. On the 7th day of June a strike occurred in the coal district where the Collins Colliery Company was located, from which the coal bought by the plaintiffs was to be shipped. The evidence shows that the expenses of the Collins Colliery Company were increased by this strike, but that it was one of the few coal companies in the district that was not compelled to close operations at any time during the strike, and that the company shipped nearly as much coal between June, 1902, and April 7, 1903 (the period in which the strike occurred), as it did between the same dates of the preceding year when there was no strike.

Upon this subject the court instructed the jury as follows:

"The court, however, instructs the jury that the burden of proof is upon the defendant to show that it was prevented from fulfilling its contract by reason of strikes, shortage of cars, or other causes beyond their control.

"The court instructs the jury that, if they believe from the evidence that after the contract sued on in this case had been made and entered into by the plaintiffs and defendant, there occurred at the mines of the Collins Colliery Company a strike which was beyond the control of said Collins Colliery Company and said defendant, and that this strike lasted during any part of the time of the contract, to wit, from the 11th day of April, 1902, to the 11th day of April, 1903, during the pendency of such strike the defendant was not compelled to deliver coal, and the contract was in abeyance during the time of such strike."

This provision of the contract clearly meant that the defendant should be relieved from

the performance of its part of the contract, if there occurred a strike which was so far beyond its control as to make the performance of the contract impossible. Whether the defendant was prevented from performing its contract by a strike was a question for the jury, and we are of opinion that it was properly submitted by the instructions mentioned.

The third contention is that the defendant was relieved from performing its contract because the plaintiff failed to demand the coal. It is insisted that the only demand for coal was 10 or 12 days before the contract expired, and that the defendant then required an indemnifying bond as a condition of delivery, and that this request for an indemnifying bond was never noticed or replied to by the plaintiff.

This position is wholly untenable. The evidence tends to show that the plaintiffs were continually making demand of the representatives of the defendant company in the city of Richmond for coal to be delivered under the contract, and that if it had been delivered as demanded the whole 1500 tons would have been received; that these demands would be made of the Richmond manager of the defendant company as often as two or three times a week; and that the uniform reply was that he could deliver the plaintiff plenty of coal, but it would be at the advanced price. The order referred to by counsel for the defendant, as given 10 or 12 days before the contract expired, was written directly to the defendant company at Cincinnati, Ohio. The demand in reply for an indemnifying bond as a condition of delivering the coal was without warrant, and the plaintiffs were under no obligation to comply therewith. This question was also one for the jury, and was properly submitted to them by the following instruction:

"The court instructs the jury that under the contract sued on in this case it was incumbent upon the plaintiffs to demand the coal included therein in order for the defendant to be held responsible for a breach in failing to deliver the same or any part thereof, and such demand must be proven by a preponderance of evidence, and cannot be inferred."

After the strike occurred in the coal district where the Collins Colliery Company was located, the price of coal advanced greatly beyond that at which the defendant company had contracted to deliver coal to the plaintiffs; and as early as October 30, 1902, the Richmond manager of the defendant company wrote to the plaintiffs that he had been advised by the "mines" to cancel all orders and contracts that they had with the plaintiffs, offering as an excuse the refusal of the plaintiffs to accept a car of egg coal not ordered by them under the contract here involved. To this letter the plaintiffs replied, saying that they were entirely

justifiable in refusing to accept the car load of egg coal; that the transaction had nothing whatever to do with the contract here involved; and that they would expect the defendant to live up to such contract according to the terms named in it.

Upon the whole case, we are of opinion that the jury was properly instructed, and their verdict was amply sustained by the evidence. For these reasons the judgment of the circuit court must be affirmed.

(106 Va. 858)

HARDING v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 1, 1906.)

1. INTOXICATING LIQUORS — OFFENSES — CHARGE OF OFFENSE—SUFFICIENCY.

Under Code 1904, § 4108, providing that an appeal from a judgment of conviction by a justice in certain cases shall be tried without formal pleadings in writing, a warrant charging the unlawful sale of liquor, and made the basis of the trial in the circuit court on appeal from the justice's judgment, must be clear and specific, so as to inform accused of the offense with which he is charged; but such a warrant, charging that defendant did, on a certain day, in a certain magisterial district, and in a certain county, unlawfully sell certain kinds of intoxicating liquors to a certain person, and to divers other persons, was sufficiently definite.

2. SAME—EVIDENCE—DISTINCT OFFENSES.

In a prosecution for an illegal sale of liquor, where the warrant averred a sale to a certain person, and to divers other persons, on a certain date, evidence of a sale made by defendant on a previous date was inadmissible, although such sale was made during the year preceding the institution of the prosecution, within which, under Code 1904, § 3889, defendant might have been prosecuted for such sale.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 273.]

3. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

In a prosecution for an illegal sale of liquor, the act of the commonwealth's attorney in asking defendant, on cross-examination, whether he did not have a United States license to sell liquor, while objectionable, was not prejudicial, where the court told defendant he was not bound to answer, and instructed the jury that they could not draw any inference against defendant from his refusal to answer the same.

4. INTOXICATING LIQUORS—OFFENSES—PUNISHMENT—STATUTORY PROVISIONS.

Acts 1902-04, p. 224, c. 148, § 143, with reference to the unlawful sale of liquor, provides that a violation thereof shall be punished by fine, and, in the discretion of the court, by imprisonment. Such section also provides (on page 220) that it shall not be construed as repealing any special act prohibiting the sale of liquor in any county or town. Acts 1901-02, p. 601, c. 516, relative to the illegal sale of liquor in Lancaster county, provides that any person violating the same shall be fined not more than \$500, and may be imprisoned until the fine is paid. Held, that the general statute is inoperative in Lancaster county, and one convicted of violating the liquor law in that county cannot be sentenced to confinement in the county jail in addition to a sentence of a fine.

Error to Circuit Court, Lancaster County.

W. O. Harding was convicted of an illegal sale of liquor, and brings error. Reversed.

T. J. Downing, W. B. Saunders, and Jos. W. Chinn, Jr., for plaintiff in error. Wm. A. Anderson, Atty. Gen., for the Commonwealth.

CARDWELL, J. W. O. Harding was tried and convicted by a justice of the peace of Lancaster county upon a warrant charging that he, "on the 29th day of April, 1905 in White Stone magisterial district, in said county, did unlawfully sell to one William K. Powell, and to divers other persons, malt liquors, whisky, brandy, wine, ale, beer, and mixture thereof, alcoholic bitters, bitters containing alcohol, and mixtures, preparations, and liquids which will produce intoxication." By the judgment of the justice a fine of \$300 and imprisonment in the county jail for 10 days was imposed upon the defendant, and from that judgment he appealed to the circuit court of Lancaster county, in which there was a trial *de novo*, and the defendant again convicted by the verdict of the jury and assessed with a fine of \$500, to which the judge added imprisonment in the county jail for a term of 2 days.

The first assignment of error here is that the demurrer to the warrant should have been sustained. This contention is made upon the ground, as it would seem, that the same particularity and technical precision of pleading is required in a warrant as is necessary in an indictment for a criminal offense.

Section 4108 of the Code of 1904, provides that "the appeal shall be tried without formal pleadings in writing, and the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for an offence in said court."

While formal pleadings are by the statute dispensed with on a trial where an appeal has been taken from the judgment of a justice convicting one of an offense, the charge of the offense must be sufficiently clear and specific to inform the accused of the precise offense with which he is charged.

In Arrington's Case, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242, it was held that "an indictment for unlawful liquor selling should describe the offense in such plain and intelligible language that the accused may have notice of the precise offense with which he is charged."

Obviously the reason for the more rigid enforcement of the rule in this class of cases is that every unlawful sale of whisky, whether unlawful because in violation of the revenue laws, the local option laws, or a special act prohibiting the sale of liquor in a particular county or locality, is a separate and distinct offense, and the charge must be so made as not only to apprise the accused of the precise offense with which he is charged, that he may prepare to meet the charge and not be taken by surprise when brought to trial, but that he may plead former conviction or acquittal, as the case might be, and vouch the record of the case, if thereafter he be

put upon his trial for the same offense. 10 Ency. Pl. & Pr. 473, 511, and authorities cited.

The warrant here charges the accused clearly and distinctly with unlawful selling of malt liquor, whisky, etc., to one Wm. K. Powell, and divers other persons, on the 29th day of April, 1905, in White Stone magisterial district, in Lancaster county. While not necessary, the time of the unlawful sale is charged in the warrant, and the place named, though in this case the place was not of the essence of the offense, except that it must have been in White Stone magisterial district, of Lancaster county. *Savage's Case*, 84 Va. 582, 620, 5 S. E. 563, 565; *Arrington's Case*, supra. There could have been no surprise to the defendant when put upon trial on this warrant, as it fully apprised him of the charge made against him; and, had he been convicted of that charge, he could plead the conviction and vouch the record in bar of a subsequent prosecution against him for unlawful sale of liquor, etc., to Wm. K. Powell, or to any other of the divers persons referred to in the warrant, on the 29th day of April, 1905, in White Stone magisterial district, in Lancaster county. To hold, as is contended, that a warrant charging the unlawful sale of liquor must set forth wherein the sale was unlawful, and state all the circumstances which make up the statutory offense, would be to require of a warrant like that in the case here the same formality and definiteness of pleading that is required of an indictment, which would render section 4108 of the Code of 1904, supra, meaningless or of no avail.

We are therefore of opinion that the demurrer to the warrant was properly overruled.

As we have seen, the warrant averred a sale of malt liquor, whisky, etc., to one Wm. K. Powell, and to divers other persons, on the 29th day of April, 1905; and one Clarence Balderson was allowed, over the objection of the defendant, to testify that the defendant sold him whisky on the 11th day of March, 1905.

This was error. It might have been permissible, under this warrant, to prove sales to other persons than Powell on the day named in the warrant, for the reason that other sales on that day would constitute but one and the same transaction, and that the charge of the warrant furnished the defendant with notice that he was charged with the other sales made on the 29th day of April; but evidence of a sale to Balderson on March 11th was that of a separate and distinct transaction, constituting an offense not embraced within the terms of the warrant, and of which it cannot be said the defendant had notice that he would be charged and put upon his defense.

"An indictment for an unlawful selling of ardent spirits to one person will not authorize proof of selling to another." *Taggart's Case*, 8 Grat. 697.

"If proof shows a different offense from

that alleged in the indictment, the variance will be fatal." 11 A. & E. Enc. Pl. & Pr. 551.

Accordingly, it was held in *Savage's Case*, supra, that the proof in such a case (unlawful sale of liquor) must show that the offense was committed in the district mentioned in the indictment; otherwise, a conviction cannot be sustained. See, also, *Richardson's Case*, 80 Va. 124; *Black on Intoxicating Liquors*, § 505.

The fact that the warrant alleges a sale to Powell and divers other persons, and the time of sale offered in proof was within the statutory period prior to the issuing of the warrant, cannot make the evidence of Balderson admissible. It is true that section 3889 of the Code of 1904 limits prosecutions of this character to a period of one year after the offense is committed, and it is also true that the sale to Balderson was made, if at all, within the year preceding the institution of this prosecution, and that the defendant was liable to prosecution for such sale upon a warrant or indictment properly charging that offense; but the question here is not whether the sale to Balderson on March 11th was within the statutory period, or whether the time of the offense is imperfectly stated—the real question being whether or not evidence of an offense which is not alleged at all, either properly or improperly, is admissible. And this question becomes all the more important since the certificate of evidence in this record discloses no evidence upon which the defendant could have properly been found guilty of any sale of intoxicating liquor to Powell or other person on April 29, 1905, and if any sale at all was proven, it was only the sale to Balderson on March 11th, so that only of that sale, not charged perfectly or imperfectly in the warrant, was it possible for the jury to find him guilty. If the defendant were now put upon trial for selling liquor to Balderson on March 11, 1905, a plea of former conviction would not avail him, as the record in this case would not show that he was charged with or tried for that offense. *Justice's Case*, 81 Va. 209; *Page's Case*, 27 Grat. 954.

In *Hudson v. State*, 78 Miss. 784, 19 South. 965, the case came up for trial in the circuit court on appeal from the mayor's court, and the state was permitted to strike out the names of the three persons to whom it was charged in the affidavit the accused sold liquor and he was convicted on the evidence of another person, who was not one of the three named, and who proved a sale to him by the accused when no other person was present besides himself and this witness. The Supreme Court of Mississippi held that the conviction could not be upheld and the case was remanded for a new trial; the opinion saying: "It is true that no averment of the names of the buyers in the affidavit was originally necessary, yet by making that unnecessary averment it became essential as descriptive of the offense charged." See, also, *Bish. Stat.*

Crime, § 1048; State v. Chisnell (W. Va.) 15 S. E. 412.

In the case just cited, the opinion, citing a number of decisions by this court, while holding that an indictment for the illegal sale of liquor may be general, and the state may under such an indictment prove any sale by the defendant within the statutory period, declares that, if the indictment charged a particular sale—i. e., but one transaction—the state would be tied down to that; and where the indictment is general, and the state has given evidence tending to show different sales, at the close of its evidence, before the defendant opens his evidence, the state should be required to elect the particular sale on which it would ask a verdict, and then all evidence relating to other sales should be excluded.

Had the warrant here charged the defendant with having, between the 11th day of March, 1905, and the 29th day of April, 1905, both inclusive, sold to Wm. K. Powell and to divers other persons intoxicating liquors, or had charged generally that the defendant had unlawfully sold intoxicating liquors to Wm. K. Powell and to divers other persons, in White Stone magisterial district, in Lancaster county, evidence of a sale to Balderson on March 11, 1905, would have been admissible, as it would have been within the statutory period limiting the punishment of such an offense. But that is not the case, and the defendant had no notice of such a charge to be made against him, and, in contemplation of law, no opportunity to prepare his defense against such a charge. Therefore the evidence of Balderson as to the sale of liquor to him on March 11, 1905, was clearly inadmissible.

The attorney for the commonwealth was permitted, over the objection of defendant's counsel, to ask the defendant on cross-examination the question, "Is it not a fact that you now have United States license for the retail of liquor?" The court told the defendant that he was not bound to answer the question, and instructed the jury that they could not draw any inference or deduction against the defendant from the fact of his refusal to answer the question.

While the question was, under the circumstances of this case, objectionable, and should not have been asked, in view of the instruction to the jury with respect to it, the defendant, in our opinion, could not have been prejudiced by the propounding of the question to him.

The ruling of the court below sentencing the defendant to two days' confinement in the county jail, in addition to the fine imposed by the verdict of the jury, is assigned as error.

There is no authority for this ruling, unless found in the act approved April 16, 1903 (Acts 1902-04, p. 155, c. 148), where, in section 143, at page 224, with reference to unlawful liquor selling, it is provided: "A violation of the provisions of this section shall be deemed a

misdemeanor, and shall be punished by fine of not less than twenty dollars, and, in the discretion of the court, by imprisonment not exceeding twelve months." But that section, at page 220, contains also the provision "that this section [section 143] shall not be construed as repealing any special act prohibiting the sale or manufacture of ardent spirits in any county, district or town."

By the eighth section of an act approved April 2, 1902 (Acts 1901-02, p. 601, c. 516), which is a special act to suppress "the illegal and unlawful sale or traffic in ardent spirits" in Lancaster county, it is provided "that any person who is found guilty under the provisions of this act shall be fined not less than fifty nor more than five hundred dollars, and may be imprisoned until said fine is paid."

This statute remains in full force, and therefore the act of April 16, 1903, *supra*, was inoperative in the county of Lancaster when this case was tried, so that the court was without the authority to sentence the defendant to confinement in the county jail in addition to the fine imposed by the verdict of the jury.

For the foregoing reasons, the judgment of the circuit court must be reversed and annulled, the verdict of the jury act aside, and the case remanded for a new trial, to be had not in conflict with the views expressed herein.

(105 Va. 166)

NORFOLK & W. RY. CO. v. SCRUGGS.

(Supreme Court of Appeals of Virginia.
March 1, 1906.)

RAILROADS—OPERATION—APPROACH TO CROSSINGS—DUTY TO SOUND WHISTLE.

Acts 1893-94, p. 827, c. 737, required railroad locomotives to sound the whistle at not less than 300 yards before reaching a highway crossing. This act was repealed by Acts 1904, p. 388, c. 253, and the Legislature which repealed it enacted the provisions now found in Va. Code 1904, § 1294d, subsec. 24, which requires railroad locomotives to sound their whistles outside of incorporated cities and towns at a distance of not less than 300 yards from places where the railroad crosses "upon the same level any highway or crossing." Subsection 38 of the same section of the Code declares it to be the policy of the state that railroad crossings over highways shall, wherever reasonably practical, pass above or below the existing structure. *Held*, that a railroad locomotive is no longer required to blow its whistle on approaching a place where the railroad crosses a highway by means of a bridge over the highway.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 993.]

Error to Circuit Court of City of Lynchburg.

Action by T. B. Scruggs against the Norfolk & Western Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

F. S. Kirkpatrick, for plaintiff in error.
Caskie & Coleman, for defendant in error.

HARRISON, J. The declaration in this case alleges, in substance, that at the point where the plaintiff received the injuries complained of the track of the defendant company crosses the public highway on a fill, with an archway therein through which the highway passes; that just east of the fill is a railway cut; that while the plaintiff was traveling along the highway, in a vehicle drawn by a horse, and was about to pass under the railway track, without being aware of the approach of any train or engine, one of the engines of the defendant, known as a "pusher," was by the careless and negligent act of the defendant suddenly, and without notice of its approach, run out of the cut and upon the archway through the fill, causing the plaintiff's horse to become frightened, and resulting in the injury for which compensation is sought in damages.

The demurrer to the declaration calls in question the right of the plaintiff to recover upon the facts alleged; it being contended that the defendant company was under no obligation to give notice of the approach of its engine to a highway not crossed by it at grade or on the same level.

The notice required of railroads in approaching highway crossings is regulated in this state by statute. The history of our legislation on the subject is brief and of comparatively recent date.

The first act relating to the matter was approved March 5, 1894. This statute, so far as pertinent, provides that: "A bell and a steam whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be at least twice sharply sounded, not less than three hundred yards before a highway crossing is reached." Acts 1898-94, pp. 827-828, c. 737.

The last act relating to the subject is to be found in the recent public service corporation act, approved January 18, 1904. This statute provides that: "Every railroad company whose line is operated by steam, shall provide each locomotive engine passing upon its road with a bell of ordinary size, and steam whistle, and such whistle shall be sharply sounded outside of incorporated cities and towns, at least twice at a distance of not less than three hundred yards nor more than six hundred yards from the place where the railroad crosses upon the same level any highway or crossing, and such bell shall be rung or whistle sounded continuously or alternately until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require. And the said company shall be liable for damages which shall be sustained by any person by reason of such neglect." Acts 1902-03-04, p. 986, c. 609, § 24, now carried into Va. Code 1904, § 1294d, subsec. 24.

The same Legislature which enacted this

statute also, by an act approved March 15, 1904 (Acts 1904, p. 368, c. 253), repealed the first-mentioned act of 1894, thus leaving as the only statute on the subject that found in Va. Code 1904, § 1294d, subsec. 24.

The effect of the existing statute, which limits the duty of sounding the whistle or ringing the bell to occasions when the engine is approaching a highway which the railroad crosses upon the same level, is to exempt the railroad company from giving such notice when the engine is approaching a point where it crosses the highway on an overhead bridge. The change from the statute of 1894 to the existing law must mean this, or it would accomplish nothing. The purpose of the Legislature was obviously to encourage the abolition of grade crossings which have proved to be such a constant menace to human life, and to encourage the substitution of crossings either above or below the public highway. This is declared to be the legislative policy by the same act which embraces the existing law with respect to crossings. Va. Code, 1904, § 1294d, subsec. 88.

The great danger of railroads crossing public highways at grade is well understood, and the increase of population is adding daily to the number of those who suffer therefrom. Building bridges over highways by railroads, while expensive, is a matter of vast importance and greatly to be desired in the interest of all concerned, and every encouragement should be given to that end. Where the railroad crosses the highway by means of a bridge over it, the statute wisely refrains from imposing the burden, obstruction, or inconvenience of the regulations and precautions applicable to grade crossings. If the railroad, when it avoids the danger of a grade crossing by erecting a bridge over the highway, is to be still required to ring its bell, blow the whistle, and use all the precautions applicable to grade crossings, there would be little inducement to incur the cost of such constructions in the public interest.

We are of opinion that the declaration does not state a case which, under the statute, entitles the plaintiff to recover. The judgment complained of must therefore be reversed, and the verdict of the jury set aside. And this court will enter such judgment as the lower court ought to have entered, sustaining the demurrer to the declaration and dismissing the case with costs.

BUCHANAN, J., concurs in result, but not in the opinion.

(105 Va. 180)

TIDEWATER QUARRY CO. v. SCOTT.

(Supreme Court of Appeals of Virginia.
March 1, 1906.)

1. ACTION—FORM—WAIVER OF TORT.

The tort involved in a conversion of property may be waived, and the injured party may bring assumpsit for the value of the property

on the wrongdoer's implied contract to pay for the property converted by him.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 198.]

2. SET-OFF—ACTIONS OF CONTRACT—CLAIMS FOR CONVERSION.

Under Va. Code 1904, § 3298, providing that in a suit for debt defendant may prove any payment or set-off, defendant in an action of assumpsit may set off a claim for the conversion of his property by plaintiff.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, §§ 16, 32.]

3. PLEADING—STATEMENT OF DEFENSE—SUFFICIENCY.

Under Code 1887, § 3249 [Va. Code 1904, p. 1709], authorizing the court to order a statement of the particulars of the claim or the ground of defense to be filed, the statement need not set out the particulars of the claim or the ground of defense with the formality or precision of a declaration or plea, but only in such manner as to notify the adverse party of its character, and an itemized account of goods claimed by defendant to have been converted by plaintiff is a sufficient statement of defense under a plea of set-off.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 293.]

Error to Law and Chancery Court of City of Norfolk.

Action by Charles E. Scott against the Tide-water Quarry Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

R. Randolph Hicks, for plaintiff in error.
Edward R. Baird, Jr., for defendant in error.

HARRISON, J. Two questions are raised by this record: (1) Can a defendant in an action at law set off against a liquidated demand the value of goods belonging to the defendant which have been converted by the plaintiff to his own use? and (2) if the value of such goods can be set off, are the items of offset so described in the statement of defense as to entitle the defendant to prove them?

The plaintiff, Scott, brought an action of assumpsit against the defendant quarry company to recover a sum alleged to be due on a note and a balance due on open account.

The defendant filed a plea of nonassumpsit and a notice of set-off. The items of the account of offsets that are called in question were stated by the defendant in his account, filed as follows:

450 tons of crushed stone sold to Charles E. Scott at fifty cents per ton	\$225 00
800 tons of crushed stone sold to same at 15 cents per ton.....	45 00
Three barrels of grease and oil sold to same	60 00
Seven cases of dynamite sold to same..	49 00
One car load of coal sold to same....	200 00

Upon the trial the defendant, to sustain these items of offset, introduced a witness to show that the goods mentioned were upon the premises of the defendant company at the time the plaintiff took possession thereof under a lease, that the goods were worth in the aggregate \$579, and that the plaintiff had taken possession of them and converted them

to his own use. The plaintiff objected to the introduction of this evidence upon the ground that it tended to establish a claim for damages that could not be set off in this suit, and upon the further ground that it related to matters not sufficiently described in the statement of defense.

We are of opinion that it was error to sustain the objection on either of the grounds mentioned.

Section 3298, Va. Code 1904, provides that "in a suit for any debt, the defendant may at the trial prove and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise."

This court has held that this statute should be liberally construed, with a view to the furtherance of its obvious policy, which is to prevent a multiplicity of suits, and, as far as conveniently can be done, to effectuate in one action complete justice between the parties. *Allen v. Hart*, 18 Grat. 722, 729.

For the conversion of its property by the plaintiff an action of tort to recover damages could have been brought by the defendant. This mode of redress, however, the defendant had the right to waive, and to bring indebitatus assumpsit for the value of the goods. The law will imply a contract to pay for property belonging to the defendant which has been taken possession of by the plaintiff and converted to his own use.

The plaintiff insists that the items of set-off which are sought to be established by the defendant constitute an unliquidated demand, which cannot be set off in an action at law against a liquidated demand.

It is well settled that uncertain unliquidated damages cannot be set off to a demand certain. But what are uncertain unliquidated damages?

In *Butts v. Collins*, 13 Wend. (N. Y.) 139, 156, 157, it is said: "They are such as rest in opinion only, and must be ascertained by a jury, their verdict being regulated by the peculiar circumstances of each particular case. They are damages which cannot be ascertained by computation or calculation—as, for instance, damages for not using a farm in a workmanlike manner; for not building a house in a good and sufficient manner; on a warranty in the sale of a horse; for not skillfully amputating a limb; for carelessly upsetting a stage, by which a bone is broken; for not making repairs to a dwelling house; for unskillfully working the raw materials into a fabric; and other cases of like character—where the amount to be settled rests in the discretion, judgment, or opinion of the jury. *Hewlet v. Strickland*, 1 Cowp. 56; *Freeman v. Hyatt*, 1 W. Black 394; *Welgall v. Waters*, 6 T. R. 488; *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562; *Hepburn v. Hoag*, 6 Cow. (N. Y.) 613. In these and like cases there is no data given for computation; nor can the damages

be ascertained by any mode of calculation. It is otherwise as to the amount due on a note, or on a merchant's account, or for work, labor, and services, or for a yard, a piece or a bale of flannel. The damages in such cases can be readily ascertained by calculation." Barbour on Set-Off, p. 82.

In *Waterman on Set-Off*, § 286, it is said: "It is not necessary, in order to constitute a valid set-off, that a price should be agreed upon for an article sold and delivered. Therefore a demand for the value of corn delivered may be set off, though the price of the corn had not been agreed on. The fact that the price had not been agreed on did not make it a case of unliquidated damages, within the sense in which these terms have been used in expounding the English statutes. The defendants' demand was for money, the value of the corn. For its recovery, indebitatus assumpsit could be maintained, and this furnishes a test in favor of its allowance as a set-off." *Smith & Crawford, Ex'rs, v. Hule, Adm'r*, 14 Ala. 201; *Gunn's Adm'r v. Todd*, 21 Mo. 303, 64 Am. Dec. 231; *Norden v. Jones*, 33 Wis. 600, 14 Am. Rep. 782; *Ragsdale v. Buford's Ex'rs*, 3 Hayw. (Tenn.) 192; *Hill v. Perrott*, 8 Taunt. 274; *Allen v. U. S.*, 17 Wall. 207, 21 L. Ed. 553; *Rob. Practice*, vol. 5, pp. 964-965; *Wait on Actions & Defenses*, pp. 482-484; *Sedgwick on Damages*, vol. 2, p. 368.

In the light of these authorities, the defendant had the right to waive its action for damages against the plaintiff for his tortious act in converting the property of the defendant to his own use, and to bring indebitatus assumpsit for the value of the goods appropriated, and therefore had the right to offset the plaintiff's demand with the value of such goods. Set-offs are to be encouraged. They lessen the amount of litigation by preventing circuity of action. There is no reason or propriety in driving these parties to cross-actions, and to compel the claims to be settled in two suits, when full and equal justice can be awarded to each of them in one suit.

We are further of opinion that the contention, that the defendant's demand is not stated with sufficient clearness in its statement of defense, cannot be sustained. The defendant, as it had a right to do, chose to treat the plaintiff as a purchaser of the property he had converted to his use, and to sue for its value. Each item is described with particularity as property sold to the plaintiff, and the form and substance of this statement of defense could not fail to furnish the plaintiff with adequate notice of the defense that would be made on the trial.

The object of the statute (section 8249, of the Code of 1887 [Va. Code 1904, p. 1709]) was simply to give the plaintiff more particular information of the ground of defense than is generally disclosed by a plea, so as to enable the parties to prepare more intelligently for the trial, and to prevent surprises which may and often do result in injustice.

But such statement does not constitute the issue to be tried, and it was not intended that the particulars of the claim, or the ground of defense, should be set forth with the formality or precision of a declaration or plea, but only in such manner, however informal, as would fairly and plainly give notice to the adverse party of its character when the same was not so described in the notice, declaration, or other pleading. *Columbia Accident Ass'n v. Rockey*, 93 Va. 678, 25 S. E. 1009.

For these reasons, the judgment complained of must be reversed, and the case remanded for a new trial in conformity with the views expressed in this opinion.

CARDWELL, J., absent.

(106 Va. 151)

EASTERN STATE HOSPITAL v. GRAVES' COMMITTEE.

(Supreme Court of Appeals of Virginia. March 1, 1906.)

1. LIMITATIONS OF ACTIONS—CLAIMS OF STATE.

Unless the statute expressly so provides, limitations do not run against the state, either as to debts and demands of a personal nature in favor of the state or as to real estate held by it.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 86.]

2. SAME—ACTIONS IN NAME OF STATE.

Where a suit is brought in the name of the state, but the state has no real interest in the litigation, and its name is being used merely to enforce a right in favor of an individual or corporation, the defenses of laches or limitations may be made.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 86.]

3. SAME—ACTIONS FOR STATE.

Where a suit is brought for the sole benefit of the state, the defense of limitations cannot be made, although the suit is not brought in the name of the state.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 86.]

4. PARTIES—REAL PARTY IN INTEREST—DETERMINATION.

The courts will determine who is the real party in interest in an action by reference, not merely to the name in which the action is brought, but to the facts as they appear of record.

5. LIMITATION OF ACTIONS—ACTION BY STATE AGENCY.

Where an insane hospital is created for purely governmental purposes, is controlled by the state, having no stockholders or members, except directors appointed by the Governor, and any loss resulting from its failure to collect charges imposed upon its inmates or their estates is borne by the state, and any recovery of such charges is for the benefit of the state, an action by the hospital to recover for charges in taking care of an insane person cannot be barred by limitations.

Error to Law and Equity Court of City of Richmond.

Action by the Eastern State Hospital against P. T. Winston, committee of Richard O. Graves. There was a judgment for de-

defendant, and plaintiff brings error. Reversed.

C. B. Garnett, for plaintiff in error. J. G. Winston and C. B. Sands, for defendant in error.

BUCHANAN, J. The only question involved in this writ of error is whether or not the statute of limitations runs against the claim sued on, which is for board and medical attention furnished Richard C. Graves as an inmate of the Eastern State Hospital.

It is settled law that the statute of limitations, unless the statute expressly so provides, does not run against the state, and that this exemption applies to debts and demands of a personal nature in favor of the state, as well as to real estate held by it. Wood on Lim. (3d Ed.) § 52; Kemp v. Com., 1 Hen. & M. 85; Nimmo's Ex'r v. Com., 4 Hen. & M. 57, 4 Am. Dec. 488; Levasser v. Washburn, 11 Grat. 572, 578; Buntin v. Danville, 98 Va. 200, 208, 24 S. E. 830, and cases cited; U. S. v. Nashville, etc., R. Co., 118 U. S. 120, 6 Sup. Ct. 1006, 30 L. Ed. 81.

It is also settled that, where a suit is brought in the name of the state, the defense of laches and limitations may be made when its name is used to enforce a right which inures to the benefit of an individual or a corporation, and the state has no real interest in the litigation. Wood on Lim. § 52; U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510, 12 Sup. Ct. 308, 35 L. Ed. 1099; State, etc., v. Halter, 149 Ind. 297, 47 N. E. 665; Miller v. State, 88 Ala. 600, 603, 604.

It is also settled law that where the suit is for the sole benefit of the state, although not brought in its name, the defense of the statute of limitations cannot be made. Com. v. Baldwin, 1 Watts (Pa.) 54, 26 Am. Dec. 38, 86; Glover v. Wilson, 6 Pa. 290, 293; State Bank of Illinois v. Brown, 1 Scam. (Ill.) 106; Wastenev v. Schott, etc., 58 Ohio St. 410, 51 N. E. 84.

It is further well settled that the courts will determine who is the real party in interest by a reference, not merely to the name in which the action is brought, but to the facts of the case as they appear in the record. United States v. Beebe, supra; State v. Halter, supra; Glover v. Wilson, supra.

It was held by the court in Mala's Adm'r v. Eastern State Hospital (the plaintiff in this case), 97 Va. 507, 509, 34 S. E. 617, 47 L. R. A. 577, that said hospital was created and exists for purely governmental purposes, is a public corporation governed and controlled by the state, and acts exclusively as an agency of the state for the protection of society and for the promotion of the best

interests of the unfortunate people of the commonwealth of insane and disordered minds, and that it has no stockholders, no members even, except directors having no interest in it or its affairs, who are appointed by the Governor, by and with the consent of the Senate, and are, in fact, public, rather than corporate, officials, endued with corporate being for a more convenient administration of the duties imposed upon them by law, and are made liable to fines for any failure to perform their duties.

The hospital, being a mere agency of the state, owned and controlled by it, all charges imposed upon its inmates or their estates for taking care of and maintaining them are for the benefit of the state, and when collected go to the support of the hospital as much as the money appropriated out of the public treasury. If not collected, the loss falls wholly upon the state; and, if there is a recovery, it will be for the benefit of the state, and the state alone, not for the benefit of the directors, nor for the benefit of any subordinate division of the state, but for the whole people—the state at large.

This being so, we are of opinion that the statute of limitations did not run against the demand sued on, and that the trial court erred in holding that it did.

This conclusion overrules the case of McClanahan v. Western Lunatic Asylum, 88 Va. 466, 13 S. E. 977, which involved the same question. The overruling of that case whenever the same question should arise again was the necessary and logical result of the decision in the case of Mala's Adm'r v. Eastern State Hospital. The doctrine announced in the former case, that a corporation which has the power to sue and be sued is entitled to make, and is amenable to, the same defenses as pertain to private persons, is not a correct statement of the law when applied to a corporation acting as an agency of the state in the performance of duties which are exclusively for public governmental purposes, and is in conflict not only with the decision in Mala's Adm'r v. Eastern State Hospital, but with principles of law recognized and acted on in numerous cases by this court. See City of Richmond v. Long's Adm'r's, 17 Grat. 375, 94 Am. Dec. 461; Sawyer v. Corse, 17 Grat. 230, 94 Am. Dec. 445; Norfolk City v. Chamberlaine, 29 Grat. 534; Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. 818, 10 Am. St. Rep. 860; Buntin v. Danville, supra; Terry v. City of Richmond, 94 Va. 538, 27 S. E. 429, 38 L. R. A. 834; Jones v. City of Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

We are of opinion, therefore, to reserve the judgment of the court of law and equity, and this court will enter such judgment as that court ought to have entered.

(105 Va. 144)

TOWN OF PHOEBUS v. MANHATTAN SOCIAL CLUB.

(Supreme Court of Appeals of Virginia. March 1, 1906.)

1. LICENSES—RECOVERY OF TAXES PAID—ACTIONS.

In order to entitle a party to maintain an action to recover back a license tax paid by it to a town, it must be shown that the town had no authority to impose the tax, that it actually received the money paid, and that the payment was not made voluntarily.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 68.]

2. MUNICIPAL CORPORATIONS — TAXATION — EXEMPTIONS.

Acts 1902-03-04, pp. 155, 226, c. 148, cl. 144, providing that any social club which shall desire to keep liquors on sale at its clubhouse shall pay to the treasurer of the county or corporation in which the clubhouse is situated \$2 for every person who is a member of the club in lieu of all other taxes for selling liquor to its members, does not exempt social clubs from municipal taxation.

3. LICENSES—TAXES ON CLUBS.

The tax imposed on social clubs by Acts 1902-03-04, pp. 155, 226, c. 148, cl. 144, requiring social clubs which keep liquors on sale to pay \$2 for every member of the club in lieu of all other taxes, is, in view of the provisions of the statute looking to the regulation of such clubs, requiring them to make reports as to their membership, officers, dues, etc., and providing for a forfeiture of their charters for failure to make such reports, a license tax within the meaning of Code 1904, § 1042, authorizing a city or town to impose a tax in addition to the state tax for the privilege of doing anything for which a "license tax" is required within the city or town, and consequently an additional tax may be imposed by the town in which the club is located.

4. TAXATION — RECOVERY OF TAXES PAID — BURDEN OF PROOF.

Payment of taxes is presumed to be voluntary, and the burden is upon one seeking to recover them back to show that the payment was not voluntary.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1013.]

5. SAME — VOLUNTARY PAYMENTS — PAYMENT UNDER PROTEST.

A mere declaration of a taxpayer, indorsed on the stub of the official's taxbook, that payment was made under protest, does not show that the payment was not made voluntarily, in the absence of any proof of pressure to make payment being brought to bear on the taxpayer.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1003-1005.]

Error to Circuit Court, Elizabeth City County.

Action by the Manhattan Social Club against the town of Phoebus. There was a judgment for plaintiff, and defendant brings error. Reversed.

W. H. Power and O. D. Batchelor, for plaintiff in error. S. J. Dudley and B. A. Lewis, for defendant in error.

BUCHANAN, J. The Manhattan Social Club instituted an action of assumpsit against

the town of Phoebus to recover back a license tax.

In order for the plaintiff to maintain its action it was necessary to show: (1) That defendant had no authority to impose the tax; (2) that it actually received the money paid (this is conceded); and (3) that the payment was not voluntarily made.

By section or clause 144 of chapter 148 of an act approved April 16, 1903, known as the "State Revenue Act" (Acts 1902-03-04, pp. 155, 226), it is provided, among other things, that any corporation chartered as a social club, which shall desire to keep on hand at its clubhouse or other place of meeting, wines, ardent spirits, or any mixture thereof, alcoholic bitters, bitters containing alcohol, or fruits preserved in ardent spirits, to be sold directly or indirectly or given away to the members of such corporation, shall on or before the 30th day of April of each year pay to the treasurer of the county or corporation wherein the clubhouse or other place of meeting is situated \$2 for each and every person who is a member of such corporation, which shall be in lieu of all other taxes upon such corporation for selling or giving away to its members ardent spirits or any of the mixtures or materials above enumerated; provided that the tax to be paid by any one club shall not exceed the sum of \$350.

The plaintiff insists that the act imposing the tax on social clubs, by expressly providing that the taxes imposed by the state should be in lieu of all other taxes for the privileges granted, was intended to exempt such clubs from municipal taxation. While the language of the statute is very comprehensive, it does not, in our opinion, sustain the claim of the plaintiff, under the decisions of this court in the cases of Orange, etc., R. Co. v. Alexandria, 17 Grat. 176, and Humphreys v. City of Norfolk, 25 Grat. 97. In those cases, as in this, the language relied on by the parties seeking to escape taxation was sufficiently comprehensive, if regard was paid only to its literal sense, to exempt them from all other taxes, both state and municipal. But the court in both cases was of opinion that the act to which the sections under consideration belonged, respectively, was a general law imposing taxes for the support of the government, and related exclusively to taxes to be paid to the state; and that there were no considerations of reason or justice in either case (as there are not in this) which required that the exemption should be extended to municipal taxes for which no commutation was provided, and which was wholly independent of the tax to the state. The reasoning of the judges delivering the opinions in those cases applies with peculiar force to the case under consideration.

The next contention of the plaintiff is that, even if the act in question does not prohibit such tax, the defendant has no authority under its charter to tax social clubs.

Without discussing the extent of the taxing power of the defendant under the provisions of its charter (Acts 1899-1900, pp. 98-103, c. 98), which are very broad, it is clear, we think, that it has the power to impose the tax in question under section 1042 of the Code of 1904, which provides that: "In addition to the state tax on any license, the council of a city or town may, when anything for which a license tax is so required is to be done within the city or town, impose a tax for the privilege of doing the same and require a license to be obtained therefor. * * *"

While the tax imposed by the state upon social clubs is not called a license tax in the act under consideration, it is so designated in the act approved March 12, 1904 (Acts 1904, p. 214, c. 116), the statute now in force upon the subject. It is sometimes difficult to determine whether a sum imposed by statute is a license fee proper or a tax. In order to determine that question it is generally necessary to ascertain the purpose of the exaction and to determine the power by virtue of which it is made.

One of the latest textbooks on the subject (21 Am. & Eng. Ency. Law [2d Ed.] 773-775) in discussing the difference between a license fee proper and a tax, says that: "Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but, where the fee is exacted solely for revenue purposes, and payment of such fee gives the right to carry on the business without the performance of any further conditions, it is a tax." This statement of the law seems to be fully sustained by the decisions of the courts.

The fee imposed upon social clubs has all the essential elements of a license tax. Its object is to regulate the sale of ardent spirits and intoxicating mixtures. The statute imposing the tax requires compliance with certain conditions to prevent a forfeiture of the charter of such a club; it provides to whom such articles may be sold or given away; that the clubhouse or meeting place of the club shall not be located in a building in which there is a licensed public bar; the hours during which the clubhouse or meeting place may be kept open; for reporting to the clerk of the court of the county or corporation in which the clubhouse or meeting place is located, monthly, a list of its members, and annually a list of its officers for the ensuing year; for the minimum entrance fees and monthly dues which shall be charged and collected; and declares that for a willful or negligent failure on the part of the social club to comply with said requirements it shall forfeit its charter.

But, even if the defendant had no authority to impose the license tax in question, the record does not show that it was not

voluntarily paid. The circumstances under which the plaintiff paid are shown by the facts agreed, which upon this question are as follows: "That it paid the town of Phoebus 'under protest' \$276.74, October 15, 1903, for license commencing October 10, 1903, and expiring April 30, 1904. The 'protest' referred to was in the form of a declaration made by the club to the town recorder at the time the license was issued, and which protest appears noted on stub of license book in recorder's office in these words: 'Paid under protest.'"

The common-law doctrine governing cases of this kind is stated as follows by the Supreme Court of the United States, in *Lamborn v. Dickenson County*, 97 U. S. 181, 24 L. Ed. 926: "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary."

The reasons for this apparently harsh doctrine, and the difficulties which would result from a different rule, are stated by Judges Carr and Tucker with great clearness and force in *Mayor, etc., of Richmond v. Judah*, 5 Leigh, 306. See 2 Dillon on Mun. Corp. (4th Ed.) § 944; 2 Cooley on Taxation (3d Ed.) p. 1499; 27 Am. & Eng. Ency. of Law (2d Ed.) 760, and cases cited; *Lincoln v. City of Worcester*, 8 Cush. (Mass.) 55, 66.

Judge Dillon, in his work on *Municipal Corporations* (volume 2 [4th Ed.] § 940), states that the same principles are applicable to actions for the recovery of money paid for illegal license taxes or fines imposed by a municipal court; and his statement is sustained by Judge Cooley, in his work on *Taxation* (volume 2 [3d Ed.] p. 1499). *Emery, etc., v. City of Lowell*, 127 Mass. 138; *Town Council of Cahaba v. Burnett*, 34 Ala. 400; *Douglas v. Kansas City*, 147 Mo. 428, 48 S. W. 851.

All payments are presumed to be voluntary until the contrary is made to appear. 2 Cooley on Taxation, p. 1499; 27 Am. & Eng. Ency. Law, 762. The burden of proof was therefore upon the plaintiff to show that its payment was not voluntary. The mere declaration of the defendant, when he made payment, that it was made under "protest," does not show that it was not voluntarily made. There is no evidence that the recorder of the town, who issued the license and noted the plaintiff's protest, was authorized to receive the payment made, or that he did receive it, or that he in any way brought any pressure to bear upon the plaintiff to compel payment of the license tax or

had any power to do so, or that any other official of the defendant town demanded payment thereof or was making any effort to collect it.

In *Union Pac., etc. R. Co. v. Commissioners, etc.*, 98 U. S. 541, 25 L. Ed. 196, it was held by the Supreme Court of the United States that the payment of taxes under a written protest, without a demand therefor or an effort to collect the same, did not make the payment a compulsory one in such sense as to give the party paying the right to recover the amount thereof.

In *Douglas v. Kansas City*, supra, it was held that an illegal license tax was not recoverable where there is no evidence of threats or notification to pay. Neither can a party claim that he paid a license tax under compulsion, merely because of liability to fine and imprisonment in the event he did not pay. *Town Council of Cahaba v. Burnett*, 34 Ala. 400.

See, also, *Emery v. Lowell*, supra.

We are of opinion therefore to reverse the judgment of the circuit court, and enter judgment for the defendant town as the circuit court ought to have done.

(105 Va. 64)

WILSON et al. v. LANGHORNE et al.
(Supreme Court of Appeals of Virginia.
March 1, 1906.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—RIGHTS OF ASSIGNEES—COMMISSIONS.

Where the premises conveyed by an assignment for the benefit of creditors are sold by a commissioner appointed by the court in partition proceedings, and not by the trustee named in the deed of assignment, the trustee is not entitled to commissions upon the fund realized by the sale under a clause of the deed entitling him to commissions for the sale of the property by him.

2. SAME—RIGHT TO EMPLOY COUNSEL.

Where the creditors interested in an assignment made by their debtor were *sui juris* and were brought before the court in a suit to partition the assigned property, and the trustee in the assignment, while made a formal party on the ground of his ownership of the legal title, had no real interest in the suit, and the property was sold by a commissioner of the court, and the funds were paid into court by him, so that the trustee was not even entitled to commissions, the trustee could not bind the creditors otherwise represented by counsel of their own choosing by a contract employing counsel to conduct an appeal.

Appeal from Corporation Court of Lynchburg.

Action for partition by Harry S. Langhorne against George W. Langhorne, trustee, etc., and others. The property in controversy was sold by commissioners, the proceeds were brought into court, and certain defendants, viz., W. D. Wilson, Jr., trustee under an assignment for the benefit of the creditors of A. A. Langhorne, F. W. Whitacre, and J. S. Diggs, petitioned for an allowance of commissions and counsel fees. The petitions were answered by the other parties to the

suit, and, the relief prayed being denied, the petitioners appealed. Affirmed.

J. Singleton Diggs, for appellants. Caskie & Coleman, Leon Goodman, Harrison & Long, John H. & L. D. Lewis, and Alfred B. Percy, for appellees.

KEITH, P. The case before us is the sequel to that of *Wilson, Trustee, v. Langhorne and Others*, reported in 102 Va. 631, 47 S. E. 871. The case was then remanded to the corporation court of the city of Lynchburg to be proceeded in, in accordance with the opinion then expressed. A controversy having arisen over the disposition of the fund, a final decree was entered in the corporation court distributing it in accordance with its opinion, which is filed in the record. From that decree this appeal was taken.

As it states in a very satisfactory manner the reasons which control its decision, we adopt the opinion of the court, and affirm its decree:

"This suit was for partition and distribution of an estate held by Geo. W. Langhorne, trustee, for his wife for life, and upon her death to be equally divided among her children. There were a number of liens and claims against the interest of A. A. Langhorne, one of the beneficiaries in said estate, and the subject of this litigation was chiefly as to whether his interest in said estate passed under a deed of trust from A. A. Langhorne & Co. to Wm. V. Wilson, trustee, dated the 13th day of June, 1892.

"All the creditors of A. A. Langhorne and Wm. V. Wilson, trustee, were made parties to this suit, and many of them were represented by counsel. The property was all sold, and the proceeds brought into court by its commissioners. The controversy then arose between the creditors who had declined to release A. A. Langhorne & Co., as provided in said deed, and Geo. W. Langhorne, trustee, and those creditors who had accepted said release clause, over the distribution of the fund in the hands of the court's receiver.

"This court decided that the interest of A. A. Langhorne did not pass under the deed to Wm. V. Wilson, Jr., trustee, but on appeal this court was reversed, and the Court of Appeals held that A. A. Langhorne's interest passed under the deed to Wm. V. Wilson, Jr., trustee.

"The first question raised by the petitions is whether Wilson, trustee, is entitled to commission of 5 per centum on the fund belonging to A. A. Langhorne's creditors. Under said deed Wilson, trustee, would have been entitled to 5 per centum commission upon the fund passing through his hands as trustee from the sale of this property; but as he did not sell the same, it being sold by the commissioner of this court, would he be entitled to such commission? In other words, should the court decree the fund to Wilson, trustee, for distribution when the

creditors are all before the court, in order that he may receive his commissions, and thus make the fund pay a commission to its commissioner and receiver and also to the trustee?

"I think not. Wilson, trustee, did not sell this property, which was a condition precedent to his being entitled to commissions. Besides, it has been the uniform practice of this court and all other nisi prius courts, where there is a deed of trust upon property, and the creditors are all before the court, and the court sells the property by its commissioner, to pay the fund directly to the creditors. A trustee is only the agent for creditor and debtor to act impartially between them in raising and distributing the funds in accordance with the deed; and where the court, by its commissioner, performs those functions, an allowance of commissions to the trustee would be a mere donation, rather than compensation, as said trustee never performed the services for which he was to receive commissions. Where a trustee has title to the whole fund, and the court enforces the trust, it will always execute it through the trustee, unless there is good cause for a different procedure, but whenever it does execute the trust through its commissioners the trustee is never allowed commissions. No case can be found where the trustee has title to only a small portion of the estate, to secure creditors who are before the court, which it is selling and distributing the proceeds among parties entitled thereto, where the fund was decreed to the trustee for distribution. Courts of equity do not go through needless forms. In his answer Wilson, trustee, did not ask the fund to be paid to him, but to the creditors, recognizing thereby this well-established rule of courts of equity. For the reasons above set forth the petition of Wilson, trustee, must be dismissed.

"The next question raised by the petitions is the right of Diggs and Whitaker to one-half of what each person will receive under said deed of trust as their fee for conducting the said appeal.

"Diggs and Whitaker were the purchasers of Mrs. Dirom's \$1,000 claim at \$100, and when they entered into the contract with Wilson, Jr., and took the appeal, and knew at that time that a number of the creditors had employed counsel to protect their interests, they made no mention of said contract or claim for fees, either to said attorneys of record or the creditors. They were not employed by any of the creditors, but by Wilson, trustee, who in his depositions says he never intended to employ them to represent any person who had his own counsel, and he did not consider he had the right to do so. None of the creditors who were unrepresented by counsel are contesting their claim to said fee, but only those who had counsel.

"It is undoubtedly well settled that a trustee,

where there are doubts and difficulties attending the execution of his trust, may appeal to the court for guidance, and as incident to this right, or when legal advice is necessary, or when maintaining or defending the deed of trust in suits in which the cestui que trust is not a party, may employ counsel, and out of the fund pay reasonable counsel fees. The cases of *Cochran v. Richmond & Alleghany R. Co.*, 91 Va. 339, 21 S. E. 664, and *Berkeley & Harrison v. Green*, 102 Va. 378, 46 S. E. 387, certainly fall under the above rule. In the first case the trustees only were parties to the suit, and not the bondholders, except in answer to the petition of Cabell & Smith for more fee. *Cochran* and all the bondholders in 1891 agreed upon the fee, but *Cochran* contended no part thereof should come out of the fund from which he was to be paid. In that case the trustees alone were asserting the rights of the bondholders, and, of course, were entitled to have counsel fees allowed. In the latter case *Green*, trustee, filed a bill asking the aid of the court in the execution of his trust, and therefore had the right to retain counsel for that purpose and pay them a fee out of the fund. But these cases are not analogous to the one at bar. Wilson, trustee, in this case was only a formal party holding the legal title, and all the creditors interested in the deed of trust were sui juris and before the court. He had no interest in the suit, not even for commissions, as the fund was not raised by him. It was not his duty nor had he the right of appeal if the court's view about his commissions is sound.

"A trustee has such a beneficial interest in the trust property that he may maintain an appeal from a decree distributing it or taking it out of his possession, or otherwise affecting it adversely to the interests of his cestui que trust, but where both the trustee and the cestui que trust are parties the trustee cannot maintain an appeal to review rulings in respect to the cestui que trust, who must appeal on his own behalf.' 22 Am. & Eng. Ency. Pleading & Practice, p. 197; *Stewart v. Codd*, 58 Md. 86.

"It is true that in Virginia the Court of Appeals has held that a trustee may appeal, though the amount of no single debt secured in the deed of trust is \$500. But is not this ruling based upon the supposition that the cestui que trust inspired the appeal, or the right which they have to use the name of the trustee to appeal? *Bockes v. Hathorn*, 78 N. Y. 222. The trustee being the agent of both parties, creditors and debtor, and bound to act impartially (*Hudson v. Barham*, 101 Va. 66, 43 S. E. 189, 99 Am. St. Rep. 849), what obligation is there upon him to appeal in a controversy between different creditors of the common debtor, unless urged to do so by some of the creditors, and, if done at the instance of some of the creditors, would he not represent them alone, and not those who desired no appeal? The Court of Appeals has

in a recent case (*Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 68, 30 S. E. 446) held that a trustee in a deed of trust does not represent the creditors secured in proceedings in the courts of this state affecting the trust property. If, then, the trustee is not bound to appeal, and he does not represent the creditors in proceedings in the courts of the state, so that creditors would be bound by his representation, can he make contracts for counsel fees for an appeal when the parties already have counsel of their own choosing? What would be the practical result in this case if this contract were sustained? The creditors who had counsel practically would get nothing after paying their own counsel whom they employed and those whom the trustee employed for them. Some of these creditors would practically be paying one-half of the fund coming to them for the privilege of being beaten, or asserting their rights, as advised by counsel of their own choosing.

Again, Wilson, trustee, does not ask in his answer for any fee for his counsel, so that parties to the litigation might be put on notice as to such claim. Nor is the case of *Howard v. First Nat. Bank* (Va.) 27 S. E. 492, 2 Va. Dec. 513, analogous to this case. In that case Howard, by arduous litigation in the name of the trustee and by direction of the court, through the courts of this and many other states, brought a fund into the circuit court of the city of Richmond, where, in 1888, the bank filed its petition to become a party and prove its debt. Its counsel did nothing but file said petition and prove its claim, which was done without difficulty or much labor, and the court held that it should not receive the benefits of Howard's labors without just compensation therefor.

"It can certainly not be contended that the creditors who refused to release Langhorne, as required in said deed of trust, under advice of counsel, and his individual creditors secured in the third clause of his deed, receive any benefits from the services of Attorneys Diggs & Whitaker, which, upon a quantum meruit, would entitle them to one-half of the small proportion of their debts coming to them. It would be a case of going for wool and being shorn, and at the same time having to pay the shearers."

"The case of *McDonald v. Logan*, etc. (Va.) 34 S. E. 490, was decided upon the construction of a contract, and can have no bearing on this case. The federal courts are excessively liberal on the subject of granting fees to counsel, and no state court, especially in the South, ever follows them."

"For the reasons above set forth, the court does not think Wilson, trustee, is entitled to commissions, and Diggs & Whitaker have no contract for fees binding the creditors; but as to those creditors who were not represented in the suit and are not contesting their fees they may be allowed a fee of one-half of the recovery for each."

(106 Va. 51)

ARAGON COFFEE CO. v. ROGERS.

(Supreme Court of Appeals of Virginia.

March 1, 1906.)

1. BILLS AND NOTES—BONA FIDE PURCHASERS — PURCHASERS FROM BONA FIDE PURCHASERS.

A purchaser of a note from a bona fide purchaser is entitled to stand in the place of the latter in enforcing the note, although he himself has notice of equities existing between the original parties.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 937-943.]

2. SAME—REPURCHASE BY PAYEE.

Where the payee of a note, after selling the same to a bona fide purchaser, repurchases it, he does not thereby acquire any better right against the maker than he possessed in the first instance.

3. EVIDENCE — PRESUMPTIONS — REFUSAL TO TESTIFY.

Where alleged facts are necessarily in the possession of a party, and he, when called as a witness, persistently and without any apparent reason refuses to disclose them, it may be presumed that such facts do not exist.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 95-100.]

4. BILLS AND NOTES—BONA FIDE PURCHASERS — QUESTIONS FOR JURY.

The question of whether a purchase of a note from a bona fide purchaser was made in good faith, or was made as agent for the payee in order to defeat a defense of the maker as against the payee, was for the jury, where the purchase was made four months after the maturity of the note, with the knowledge that it involved a lawsuit and was made at the suggestion of a principal stockholder of the payee, who was closely related to the purchaser, where it involved the disposition of securities by the purchaser, and where the latter, on being put on the witness stand, persistently refused to explain why he made the purchase.

Error to Circuit Court of City of Richmond.

Action by Alfred M. Rogers against J. W. Harrison, doing business under the name and style of Aragon Coffee Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

H. W. Goodwyn and S. A. Anderson, for plaintiff in error. Leake & Carter, for defendant in error.

KEITH, P. J. W. Harrison, doing business under the name and style of the Aragon Coffee Company, of Richmond city, purchased of Hills Bros. Co., a corporation in the city of New York, 500 bags of coffee, for which it made its negotiable note for \$3,727.02, dated January 11, 1904, payable four months after date to Hills Bros. Co., or order, at Planters' National Bank, Richmond, Va. Before the maturity of this note it was indorsed to the National Park Bank of New York, who it is conceded acquired it in the ordinary course of business, and was an innocent holder of it for value and without notice. When the note fell due, payment was demanded and refused, and the note was duly protested. On November 14, 1904, this note was indorsed to Alfred M. Rogers, without recourse, who paid to the National

Park Bank \$3,841.69, the full amount represented by the note, principal, and interest.

In March, 1905, Rogers sued the Aragon Coffee Company upon this note. The defendant pleaded nil debit and a plea of set-off, in which he avers that he purchased of Hills Bros. Co. a certain lot of coffee, which was represented to be sound and as good as the sample of coffee then and there exhibited to the defendant by Hills Bros. Co.; and that he afterwards purchased 500 sacks of the coffee, relying on the promise of Hills Bros. Co. that it was pure and unadulterated, and as good as the sample shown and exhibited to the defendant company. The plea then alleges that the coffee was not sound and free from defects, but was unsound, and that both the sample and the coffee had been tampered with and adulterated, but so skillfully and cunningly that the defendant did not discover the fraud and could not have discovered it without such a careful examination as no man would make unless he had reason to suspect the perpetration of a fraud; that the coffee delivered was so common and inferior, and gave forth such an offensive odor when roasted and made into a beverage, that it could not be used, as to use it in his business would damage his trade and reputation. The plea further avers that Hills Bros. Co. is the real plaintiff in the suit, and that it has formed an unlawful combination with the National Park Bank of New York and Alfred M. Rogers, the object of which was wrongfully and unlawfully and by deceit to cut defendant off and prevent him from showing his rightful and lawful set-offs and equities against said note. In conclusion he claims to have been damaged by the fraud practiced upon him in the sum of \$1,987.10, which sum he seeks to have set off against the note, and the balance of \$1,740.92 was brought into court, which the defendant stated he was ready to pay to the plaintiff.

Upon this plea issue was taken; and, evidence on the part of the plaintiff and the defendant on this plea having been introduced before the jury, the plaintiff demurred to the defendant's evidence, the jury found a verdict subject to the demurrer to the evidence, and the court gave judgment in favor of the plaintiff, to be credited by the amount which the defendant had paid into court.

We observe in limine that there is no occasion to discuss the transaction as between the Aragon Coffee Company and Hills Bros. Co. The evidence is conclusive to show a bald and iniquitous fraud. The only question which we need to consider is whether or not the parties before the court occupy such a relation to the transaction as that, under the law merchant, we must shut our eyes to the truth and close the door upon all investigation.

The National Park Bank, being the holder for value and without notice, could transmit

a complete title to a third person, even though that third person had knowledge of the facts which would have defeated a recovery upon the note in the hands of the payee; the general rule being that, "if a person take with notice purchase from one without notice, he is entitled to stand in the latter's shoes and take shelter under his good faith. If it were not so, the bona fide purchaser without notice might be unable to dispose of the property, and thus its value in his hands be materially deteriorated. A bona fide holder, it is said, is entitled to have the whole world for his market.

But there is an exception to this rule, which is well established: If the payee sell negotiable paper to an innocent third party and repurchase it, he does not thereby acquire any better right against the maker than he possessed in the first instance. Supreme Court of Wisconsin, in *Andrews v. Robertson*, 87 N. W. 190, 54 L. R. A. 673, 87 Am. St. Rep. 870; *Church v. Ruland*, 64 Pa. 432; *Ely v. Wilcox*, 26 Wla. 91; *Elwell v. Tatum*, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434; *Hoye v. Kalashian* (R. I.) 46 Atl. 271; *Tod v. Wick Bros.*, 36 Ohio St. 370.

Judge Cooley, in *Kost v. Bender*, 25 Mich. 515, says: "As a general rule, the bona fide holder of negotiable paper has a right to sell the same, with all the rights and equities attaching to it in his own hands, to whoever may see fit to buy of him, whether such purchaser was aware of the original infirmity or not. Without this right he would not have the full protection which the law merchant designs to afford him, and negotiable paper would cease to be a safe and reliable medium for the exchanges of commerce. For, if one can stop the negotiability of paper against which there is no defense, held by another, it is obvious that an important element in its value is at once taken away. But this rule has never been applied to a purchase by the original payee, and it is not essential to the protection of the innocent indorsee that it should be. It cannot be very important to him that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell to all the rest of the community, the market value of his security is not likely to be affected by the circumstance that a single individual cannot compete for its purchase—especially when it is considered that the nature of the negotiable securities is such that their market value is very little influenced by competition. Nor is there any rule or principle of law that would be violated by permitting the maker to set up his defense against the payee, when he becomes the indorsee, with the same effect that he might have done before it had been sold at all; nor is there any valid reason against it."

In this case, then, it was not sufficient

for the defendant to show that there was fraud in the transaction between him and Hills Bros. Co., for, notwithstanding that fraud, the National Park Bank, being a bona fide holder of the note, could transmit, and Rogers, the plaintiff, could acquire, a title to the note, free from all antecedent equities, unless there was evidence tending to prove that Rogers purchased, not for himself, but for the original payee in the note, Hills Bros. Co., and that this company and not Rogers was the actual beneficial plaintiff. We will therefore consider the evidence in the light of these principles.

The only evidence adduced by the plaintiff was the note upon which he sued. Having read that to the jury, he rested.

The history of that note is given in the record. The National Park Bank acquired it, as we have already said, in due course of business, and is, under the law merchant, to be considered an innocent holder for value and without notice.

On May 16, 1904, the attorney for the National Park Bank wrote to the Aragon Coffee Company the following letter:

"Gentlemen: My client, the National Park Bank, holds your note for the sum of \$3,727.02 to the order of the Hills Bros. Co. which matured on the 11th inst. and has been returned from the bank where it was payable protested. The note has been placed in my hands with instructions to take such steps as may be necessary to collect it, and I have to request that you will send me without delay your check for the amount of the note, with interest to date and \$1.00 protest fees."

To this letter the Aragon Coffee Company replied, through its attorney:

"Richmond, Va., May 24, 1904.

"* * * Your letter of May 16th to the Aragon Coffee Co. has been referred to me, and in reply I beg to state that this note represents the purchase price of coffee bought by the Aragon Coffee Co. from Hills Bros. & Co. The said coffee was not according to sample and that the attention of Hills Bros. was called to this in several letters to them from the Aragon Coffee Co. some time past, but which they refused to consider. My clients are perfectly square people in every particular, but do not propose to pay for coffee that they cannot use. I would suggest that you will probably find your way easier to make this money out of Hill Bros. & Co. than out of the Aragon Coffee Co.

"Very truly yours, H. W. Goodwyn."

It is among the agreed facts in the case that Hills Bros. Co. had to their credit with the National Park Bank during all the period covered by this investigation at least the sum of \$5,000. It appears that one of the principal stockholders in Hills Bros. Co. was the father-in-law of the plaintiff, Rogers; that his brother-in-law was the president of

the company; and that his wife was one of the stockholders in the company. It further appears that the first information Rogers had with respect to this note was derived from his father-in-law; that at his suggestion the plaintiff went to the attorney for the National Park Bank, in whose custody the note was; that he purchased it, paying the full principal and interest due upon the note; that in order to make the purchase he had to raise the money by the sale of stocks; that he took the note from the bank without recourse after it had been protested, and with the knowledge that its collection would involve lawsuit. He was put upon the stand as a witness by the plaintiff in error, and every effort to elicit the truth with respect to this transaction was met with evasion, equivocation, or silence. He was asked if to answer the questions would tend to incriminate him. He replied that it would not. The question again would be put to him, and he would again decline to answer. Why he should have desired to make this investment, when in order to make it he found it necessary to change his investment and dispose of stocks, it is impossible to answer with even a reasonable conjecture. He paid full value for a protested note; he took it without recourse; he knew that it involved a lawsuit; and yet, when called upon to explain, every question was met with a refusal to answer.

In Wigmore on Evidence (volume 1, § 285) it is said: "The consciousness indicated by conduct may be, not an indefinite one affecting the weakness of the cause at large, but a specific one concerning the defects of a particular element in the cause. The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted. The nonproduction of evidence that would naturally have been produced by an honest, and therefore fearless, claimant permits the inference that its tenor is unfavorable to the party's cause."

And continuing this subject, the same author, at section 289, says: "At common law the party-opponent in a civil case was ordinarily privileged from taking the stand; but he was also disqualified; and hence the question could rarely arise whether his failure to testify could justify any inference against him. But since general abolition both of the privilege and the disqualifica-

tion, the party has become both competent and compellable like other witnesses; and the question plainly arises whether his conduct is to be judged by the same standards of inference. This question should naturally be answered in the affirmative."

It seems plain to us that there is a stronger presumption to be raised against a party in whose possession the facts must be, if they exist, by which suspicion would be removed and all question as to the propriety of his conduct be set at rest, who stolidly refuses, without the suggestion of a reason, to aid the court in arriving at the truth. It is within the bonds of possibility that a reason existed why, "as a matter of business," to use his own language, the plaintiff may have thought it desirable to buy a protested note which he knew could only be collected as the result of lawsuit. If such explanatory facts existed, they were in his breast, and his refusal to disclose them warrants the hypothesis that he feared the exposure.

As was said in *Union Bank v. Stone*, 50 Me. 595, 79 Am. Dec. 631: "There was evidence proving or tending to prove that a notice of demand and nonpayment had been given the defendant. He had been notified to produce it, and did not. He was present and not a witness. If he had never received such a notice, he knew it, and, knowing it, would be little likely to omit an opportunity of stating a fact thus conclusively in his favor. The evidence tended strongly to charge him. A word from his lips might exonerate him from all liability. * * * If notice had been received, and the defendant knew it, he might well be silent. The utterances of the truth would establish the plaintiff's claim. * * * If he were a witness, he must either state the truth or a falsehood. If he testified truly, his hope of a successful defense was at an end. The defendant does not offer his own testimony. He prefers the adverse inferences which he cannot but perceive may be drawn therefrom, to any statements he could truly give or to any explanations he might make. He prefers any inferences to giving his testimony. Why? Because no inferences can be more adverse than would be the testimony he would be obliged by the truth to give. The fact of not testifying was obvious to the jury. * * * No court could perceive such a fact without attaching some degree of importance, more or less, to its existence, according to the necessity of the testimony and the emergencies of the defense. No judge exists who would not, if the trial had been before him, regard this as a fact bearing on his decision."

And in *Brown v. Schock*, 77 Pa. 471, it is said: "A man of ordinary intelligence must know that his failing to appear, when he had a strong motive to appear, would be evidence against him; if he relies upon his liability to disprove the motive imputed, he takes the

risk, but he leaves the effect of his conduct, as a matter of evidence for the opposite side, to go to the jury."

In *Bastrop State Bank v. Levy*, 106 La. 586, 31 South. 164, the court said: "Judicial tribunals are established to administer justice between litigants, and the first and most important step to that end is the ascertainment of the truth of the controversies which come before them. It is only when the truth is ascertained that the law can be properly applied in the just settlement of disputes. Litigants owe the duty of assisting in every legitimate way in the elucidation of the truth. When a defendant can by his own testimony throw light upon matters at issue, necessary to his defense and peculiarly within his own knowledge if the facts exist, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the facts do not exist."

These cases are cited, not because of any similitude of their facts to the case before us, but because all of them illustrate and enforce the principle that, when a party can by his own testimony throw light upon the matter in issue and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the facts do not exist.

In the case of *Battersbee v. Calkins* (Mich.) 87 N. W. 760, a firm of Niagara Falls, N. Y., were payees and holders of the note in suit. It was a negotiable promissory note, payable to their order. It was sold before maturity to a savings bank in Detroit, under circumstances which admittedly made the bank a bona fide purchaser. It was sold to this bank by the attorney of the payees, to whom it had been sent for collection. It did not appear whether or not the payees directed such sale. The attorney indorsed the note before sale in blank, as the payees had previously done. The note went to protest for nonpayment, and subsequently it was indorsed to "any bank or order," over the signature of the savings bank, and transferred to a state bank, which sent to the savings bank its check for the amount due upon the note. Plaintiff was the cashier of the state bank, and testified that he was not the owner of the note, and had brought this action for the benefit of the bank. The defendant, who was the maker of the note, sought to show that the note was obtained by fraudulent representations made by an agent of the payees. The attorney for the payees before mentioned, called as a witness for the defendant, testified that he received the note before maturity for collection, and indorsed and sold it to the savings bank, and received payment of the consideration, which he put in the bank to his own credit, and checked out, as he did other money. That he sold the note because he wanted to, and did not know that he was directed to do so by the payees. It was shown that after pro-

test of the note this attorney had a conversation about the note with a stockholder and director of the state bank, who was also its attorney, who said that his bank would take it. The attorney of the payees before mentioned also wrote plaintiff, who was cashier of that bank, about the note, as did also the city bank after the attorney of the payees had told its officers that the state bank, of which plaintiff was cashier, would take the note. The court permitted the jury to find that the purchase of the note by the state bank, of which plaintiff was cashier, was collusive, as agent for the payees, holding that, if it was not a purchaser in the ordinary sense, it would not be entitled to set up the bona fides of the savings bank, and refused to direct a verdict for the plaintiff. In considering this question on a writ of error from a judgment in favor of the defendant, the Supreme Court said: "The plaintiff's counsel say that, being indorsed in blank, the possession of the note was sufficient proof of plaintiff's right to sue, and that it was error to permit the jury to defeat the plaintiff upon this ground, which they may have done under the charge. In the case of *Kost v. Bender*, 25 Mich. 515, it was held that the payee of a note could not avoid the equities in favor of the maker by repurchasing the note from a bona fide holder, to whom he had sold it. This rule should apply in this case, if, as claimed, the transfer to the Crowell bank (the bank of which the plaintiff was the cashier) was colorable only, to cover an actual payment or repurchase by Myers & Co. (the payees), or by their attorney on their behalf."

The case under consideration is, in our judgment, far stronger to show a collusive purchase upon the part of Rogers than the one cited. The facts which are set forth in this opinion, coupled with the conduct of the plaintiff when upon the stand as a witness, inexplicable upon any reasonable hypothesis, except that he feared to disclose the truth and preferred to take the chance of success by permitting the court and jury to grope for facts in the dark, when a word from him giving a rational account of his conduct would have dispelled all doubt, warranted the jury in believing that the National Park Bank, being possessed of funds belonging to Hills Bros. Co., which company was ultimately liable to it for the note, concluded not to risk a lawsuit but to look to its immediate indorser, Hills Bros. Co., and so informed that company, which then hatched the scheme of a purchase of the note by Rogers, and thus hoped to consummate its fraud.

We think, upon the whole case, it was for the jury to say whether Rogers was a purchaser in good faith or was conniving with Hills Bros. Co. to purchase the note as their agent, in order to defeat the equities of the Aragon Coffee Company.

It follows that the judgment upon the demurrer should have been in favor of the defendant, and this court will enter such judgment as the circuit court ought to have rendered.

CARDWELL and HARRISON, JJ., absent.

(105 Va. 96)

HATTON v. MOUNTFORD et ux.

(Supreme Court of Appeals of Virginia.
March 1, 1906.)

1. MASTER AND SERVANT—CONTRACTS OF EMPLOYMENT—DUTIES OF SERVANT.

Where there is no express contract between an employer and an employé, imposing upon the latter a higher degree of skill and diligence in the discharge of his duties, only the ordinary and reasonable skill and diligence which is implied by law can be required of him, but, if he contracts for a higher degree of skill and diligence than the law implies, he must perform his duties with the skill for which he contracts, and cannot excuse himself for failing to do so by showing that he performed the duties of his position with the ordinary degree of skill and diligence required by law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 67.]

2. SAME.

A contract employing a music teacher which required the teacher to be loyal in the management of the school, to put forth his best efforts for the advancement of the music department, to unite in building up the institution, and to assist in maintaining discipline, required the teacher to give a higher degree and grade of service than is implied by law in the ordinary contract between master and servant.

3. SAME—DISCHARGE OF SERVANT—ACTIONS—INSTRUCTIONS.

A contract by which defendant employed plaintiff as a music teacher required the latter to aid in building up the school, to assist in maintaining discipline, and to put forth his best efforts for the advancement of the music department, thus imposing on him the duty to exercise a higher degree of skill and diligence than is ordinarily implied by law in a contract between master and servant. Defendant was discharged by plaintiff, and in an action for the discharge there was evidence that defendant was inattentive to his duties, rude to pupils and other teachers, and had, in short, about destroyed the music department. The court attempted to cover the whole case by a charge to find for defendant if plaintiff by his negligence and discourtesy so conducted himself as to injure plaintiff's business by causing pupils to leave the school or to refuse to take music. *Held*, that the charge was erroneous in failing to bring to the jury's attention the point that plaintiff had contracted for a higher degree of skill and diligence than is ordinarily implied by law in the relationship of master and servant.

4. TRIAL — INSTRUCTIONS — SUFFICIENCY — PRESENTATION OF WHOLE CASE.

An instruction given as covering the entire case should embrace material points in the case, although requested instructions presenting the individual points of the case are in themselves objectionable.

Error to Corporation Court of Danville.

Action by G. Fryatt Mountford and wife against R. E. Hatton. There was a judg-

ment for plaintiffs, and defendant brings error. Reversed.

The first three instructions, requested by defendant and refused, and which are referred to in the opinion, are as follows:

"(1) The court instructs the jury that if they believe from the evidence that, although the plaintiff, F. G. Mountford may possess the capacity to make a good teacher, if he failed to put forth the best efforts of that capacity while in the employ of defendant, then the defendant had a right to dismiss him without liability, and they must find for the defendant.

"(2) The court instructs the jury that if they believe from the evidence that the plaintiffs, G. F. and E. E. Mountford, failed to put forth their best efforts for the advancement of the music department of Roanoke College of Danville, or failed to be perfectly loyal to the management of the school, or failed to try to work in harmony with the assistant music teachers, then the defendant had a right to discharge them, without further liability under the contract of employment and the jury must find for the defendant.

"(3) The court instructs the jury that every employé impliedly undertakes to obey the just and reasonable commands of the employer, and to be careful, diligent and industrious in the performance of what is intrusted to him to execute; and if they believe from the evidence that the plaintiffs failed under their contract of employment, in any of the above named particulars, then the defendant had a right to dissolve the contract and dismiss them without liability, and the jury must find for the defendant."

Green, Withers & Green, for plaintiff in error. Julian Meade, for defendants in error.

CARDWELL, J. The judgment to which this writ of error was awarded was obtained by the defendants in error against the plaintiff in error for damages alleged to have been sustained by the act of the latter in discharging the former from his employ.

Plaintiff in error was on the date of the discharge of defendants in error, and for some time prior, the president of Roanoke College, at Danville, Va. The college is an institution of learning for young ladies, situated in said city and conducted under the auspices of the Baptist Church. Among its other departments is one of music, in which both vocal and instrumental music are taught, and prior to the opening of the session of the college in September, 1904, a correspondence was begun between plaintiff in error and G. F. Mountford, one of the defendants in error, looking to the employment of Mountford and his wife to have charge of and conduct the music department of the college during its then ensuing session. Plaintiff in error prepared, signed, and mailed to G. F. Mountford, to be signed by him and his wife, the following contract:

Danville, Va., July 29, 1904.

"This contract entered into by and between R. E. Hatton, party of the first part, and G. Fryatt Mountford and wife, parties of second part; whereby parties of the second part agree to come to Roanoke College, of Danville, and unite in the building up of the college, and do what they can to that end and to be perfectly loyal to management of school and to do or say nothing to the detriment of the college or of the teachers. Prof. Mountford agrees to teach in the college, in the music department piano especially and such other studies as necessary in the music department, to teach for a period of thirty hours per week; to put forth his best efforts for the advancement of the department; to try to work in harmony with the assistant music teacher; and to assist in maintaining discipline in the college and home. Mrs. Mountford agrees to supervise or assist in supervising and superintending the piano practice if necessary. For such the parties of the second part are to receive the sum of \$550, for the session work, from R. E. Hatton. This is to be paid by said R. E. Hatton, in eight equal payments if desired by said parties of the second part. It is further agreed that three months' notice is to be given before this contract is nullified, or teachers employed for next year, by either party.

"[Signed] R. E. Hatton,

"Party of the First Part.

"[Signed]

"[Signed]"

Mountford, instead of signing this contract as he received it, made a certain change therein, viz., by inserting the words "payable monthly" after "in eight equal payments," and striking out the words, "if desired by said parties of the second party"; and having made this change Mountford copied the contract, and he and his wife signed it and returned it at once to plaintiff in error.

There is no evidence tending to prove any other contract than that signed by defendants in error and returned to plaintiff in error, except that no mention is made therein or in the contract as prepared by plaintiff in error of room and board to be furnished to defendants in error in addition to the salary they were to receive; but no question arises in this suit as to room and board, as that matter was agreed upon by correspondence, and they were, in fact, furnished room and board by plaintiff in error up to the time of their discharge on December 8, 1904, and about two weeks thereafter.

Their contract having been completed, defendants in error came to Roanoke College on or about September 18, 1904, and began the performance of their respective duties—Mountford as director of the department of music, and Mrs. Mountford supervising the piano practice. For about two weeks they performed their duties fairly satisfactorily, as is admitted, but from that time on until

their discharge plaintiff in error a number of times, as he claims, considered it necessary to remonstrate with Mountford and ask for a better performance of his duties; complaints having been made that he had not only been negligent in the performance of his duties in several respects, and on a number of occasions, but on one occasion was guilty of the use of vulgar and repulsive language in the presence of one of his pupils and the brother of another. These remonstrances were of no avail, and in the latter part of November, 1904, nine of the young ladies in the department of instrumental music went to plaintiff in error's office at the college and vigorously complained of Mountford, and after stating their grievances notified plaintiff in error that they would stop instrumental music or leave the college altogether if Mountford was retained as director of music. By reason of this act of these young ladies, plaintiff in error again remonstrated with Mountford, and warned him that, unless he gave proper attention to his duties, he would be dismissed, and plaintiff in error about this time began a correspondence with a musical agency looking to providing a substitute should the discharge of Mountford become necessary.

On the 8th of December, 1904, a paper signed by 19 of the 23 or 24 pupils of the college then in Mountford's department was presented to plaintiff in error, and after inquiry of some of the signers as to the causes for their presenting the paper he called Mountford into his office, explained the purport of the paper, which was that Mountford had been so negligent and inefficient in the discharge of his duties the signers refused to study under him after the beginning of the second term of the school (the second half of the session), and told Mountford that under the circumstances he could no longer retain him and his wife, and must dismiss them, which he did then and there. At Mountford's request, a number of the young ladies who had signed the paper referred to were brought into his presence and questioned as to their reasons for sending in the paper, and their answers given in Mountford's presence. Whereupon he was informed that his dismissal could not be withdrawn.

The foregoing are the facts, many of which are not controverted, relied on by plaintiff in error to justify him in discharging defendants in error, except as applied to Mrs. Mountford; she having been, as is claimed, negligent in two respects which we do not deem it necessary to consider.

The verdict and judgment on plaintiff in error's special plea, plea of not guilty, and a plea of tender of the true amount due to defendants in error for services to date of their discharge, were in favor of the latter, as damages, for \$628, subject to a credit of \$98.44, paid into court by plaintiff in error.

There were no instructions asked or given for defendants in error, and the first assignment of error is the refusal of the court to give three of the five instructions asked by plaintiff in error.

No. 5 deals solely with the amount of damages recoverable by defendants in error, and need not again be referred to.

No. 4 is as follows: "The court instructs the jury that if they believe from the evidence in this case that the plaintiffs, Prof. and Mrs. Mountford, or either of them, so conducted themselves that by their carelessness, negligence, or inattention to their duties, or by their neglect and failure to perform the same, or that the plaintiff G. F. Mountford, by his rudeness and discourtesy to the students and pupils in his department, so conducted himself as to prejudice, injure, or damage the defendant, Hatton, in his business as principal of Roanoke College, or that such carelessness, inattention, and negligence in performing, or in neglecting and failing to perform such duties, or that such rudeness and discourtesy to his said pupils and students in his said department, were calculated to or might prejudice, injure, or damage said defendant, Hatton, in his said business, by causing said pupils and students, or any of them, to leave said institution or to refuse longer to take music under said plaintiffs, or either of them, in said college, that then the defendant, Hatton, had the right to dismiss and discharge said plaintiffs without notice, and without furnishing board and room, and without paying further salary beyond the time of dismissal, notwithstanding said defendant, Hatton, had agreed to furnish said plaintiffs room and board and to pay them \$550 for services for a full session, and to give three months' notice before terminating their contract, and they should find for the defendant."

The questions in the case were, first, what was the contract between the parties? and, second, had defendants in error, or either of them, been guilty of such misconduct or neglect in the discharge of their duties, as, under their contract, justified plaintiff in error in discharging them from his employ?

Where there is no express contract between an employer and an employé imposing upon the latter a higher degree of skill, care, diligence, and attention in the discharge of the duties of the position he contracts to fill, only the ordinary and reasonable skill, care, diligence, and attention implied by law can be required of him. But if an employé contracts for a higher degree of skill, etc., than the law implies, he cannot excuse himself from a failure to live up to his contract by merely showing that he performed the duties of his position with the ordinary and reasonable degree of skill, etc., required of him by law. He must perform his duties with the degree and grade of service for which he contracts. *Crescent Horse Shoe Co. v.*

Eynon, 95 Va. 151, 27 S. E. 935; Wood on Master & Servant, § 15.

As we have already observed, there was, so far as this record discloses, no evidence tending to prove a contract between these parties other than that set forth in the paper set out above as copied by Mountford, signed by himself and wife, and returned to plaintiff in error, except as to board and room to be furnished by the latter to the former, omitted from the contract as originally drawn by plaintiff in error and as changed and copied by Mountford, about which there is no controversy. By that contract the duties to be performed by defendants in error were set out, and they contracted "to be perfectly loyal to management of school and to do or say nothing to the detriment of the college or of the teachers," and Mountford, as teacher "in the college in the music department, piano especially, and such other studies as necessary in the music department," agreed "to teach for a period of thirty hours per week, to put forth his best efforts for the advancement of the department, to try to work in harmony with the assistant music teachers, and to assist in maintaining discipline in the college and home." If in fact this was the contract between the parties, it called for, not the ordinary and reasonable efforts implied by law, but a higher degree and grade of service.

As to whether or not Mountford performed his duties with reasonable and ordinary skill, diligence, and attention, there is a sharp conflict in the testimony, and there is also conflict as to whether he put forth his best efforts for the advancement of the music department. But upon the point made as a justification of the discharge of Mountford, that by his acts, omissions, misconduct, discourtesy to other teachers, and the use of vulgar and repulsive language in the presence of his pupils and friends of the school, he had about broken up the department of instrumental music at the college, there is little or no conflict. It is proved by every witness examined on behalf of plaintiff in error, except two who were not asked as to it, and it was also proved by the petition above referred to, signed by 19 of the 23 or 24 young ladies in Mountford's department, offered in evidence, and, in fact, no attempt is made by Mountford or his witnesses to refute it. Mountford does not deny that he used vulgar and repulsive language in speaking of a mistake made by one of his pupils to a brother of another one of his pupils, in the presence of still another, but merely says that he did not recall using the language; but, if he did, he would not have used it if he had known of the presence of the young lady in the room. It is also an uncontroverted fact in the case that the music department in a young ladies' college, under present conditions, is indispensable, and the most profitable department of such a college. So that, with that fact, and the further fact

testified to and practically not denied, that Mountford had by his misconduct, negligence, and other acts about destroyed that department of Roanoke College, so far as the first half session of 1904-05 was concerned, plaintiff in error was entitled to an instruction that the defendants in error were not entitled to recover in this action unless the jury believed from the evidence that they had given that degree of skill, care, diligence, and attention in the performance of the duties they represented themselves as ready and able to render, and contracted to render. While instruction No. 4, given, is a complete and comprehensive statement of the law applicable to a case where an employé has contracted for no higher degree of skill, care, diligence, and attention in the discharge of the duties he undertakes than that implied by law, viz., ordinary and reasonable, it does not cover this entire case, and left the jury free to find for defendants in error if they believed from the evidence that defendants in error discharged their duties to plaintiff in error with ordinary and reasonable skill, etc., although they had contracted for a higher degree of efficiency, skill, etc.

The purpose of instructions Nos. 1 and 2, refused, was to direct the attention of the jury to the higher degree and grade of capacity, skill, etc., that the evidence tended to show their contract required of them than is implied by law in ordinary contracts between master and servant, and to instruct the jury that if they believed that Mountford had not put forth his best efforts, etc., or that defendants in error had, by their lack of capacity and skill, inattention to their duties, or misconduct, violated their contract, plaintiff in error had a right to discharge them from his employment, without liability in damages for doing so.

Instruction No. 4, given, purported to cover the entire case, yet omitted to bring to the attention of the jury the point contended for by plaintiff in error, viz., that defendants in error had contracted for a higher degree and grade of skill, etc., in the discharge of the duties of the positions they undertook to fill than the law implies, and as indicated in instruction No. 4.

It may be conceded that instructions Nos. 1 and 2, refused, were equivocal in submitting that phase of the case to the jury, or were otherwise objectionable, yet as it was a material point in the case, to which much of the evidence was directed, it should have been covered by instruction No. 4 which was given as covering the entire case. *Berthe Zinc Co. v. Martin's Admr.*, 93 Va. 791, 22 S. E. 869; *Crescent Horse Shoe Co. v. Eynon*, supra.

Instruction No. 4 was one of a series of instructions intended to cover the whole case, and when left standing alone was clearly misleading, for the reason that under it the jury might have found their verdict in favor of the defendants in error without

taking into consideration the question whether or not they had performed their duties with that higher degree and grade of service for which they had contracted, than that implied by law where there is no such contract. In our view of the case it cannot be said that the jury were not so misled, and therefore the judgment on their verdict complained of must be reversed and annulled, and the cause remanded for a new trial, to be had in accordance with the views expressed in this opinion.

(105 Va. 139)

NORFOLK, P. & N. N. CO. v. CITY OF NORFOLK.

(Supreme Court of Appeals of Virginia.
March 1, 1906.)

1. TAXATION—EXEMPTIONS—PRESUMPTIONS.

The power and the right of the state to impose a tax is always presumed, and any exemption must be clearly granted; mere silence being the same as a denial of exemption.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 307, 322.]

2. LICENSES—EXEMPTIONS—STATUTORY PROVISIONS.

A lessee of property owned by the state and consequently exempt from taxation under the express provisions of Code 1887, § 488 [Va. Code 1904, p. 250], may, notwithstanding such exemption, be subjected to the payment of a license tax for conducting a business on or with such property.

3. SAME—MUNICIPAL TAXES—RIGHT TO IMPOSE.

The fact that the state does not impose a license tax on a business does not prevent a municipality from imposing such a tax.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 5, 6.]

4. SAME—CONSTITUTIONAL REQUIREMENTS—UNIFORMITY OF TAX.

An ordinance imposing a license tax generally upon any person operating a steam ferry between certain points does not, when considered with other ordinances authorizing the imposition of a license tax on steam ferries operated between other points, violate the constitutional requirement of uniformity, although there is but one company engaged in operating steam ferries between the points first mentioned.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 8, 9.]

5. MUNICIPAL CORPORATIONS—ORDINANCES—PRESUMPTIONS.

The burden is upon one alleging the invalidity of an ordinance to establish such invalidity.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 284.]

Error to Circuit Court of City of Norfolk.

Action by the city of Norfolk against the Norfolk, Portsmouth & Newport News Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

T. J. Wool and Frank L. Crocker, for plaintiff in error. Richard B. McIlwaine, Jr., for defendant in error.

BUCHANAN, J. The principal question involved in this case is whether or not the city of Norfolk has the power to impose a

license tax upon the Norfolk, Portsmouth & Newport News Company, doing business in that city, when the instrumentalities of that business are owned by and leased from the county of Norfolk and the city of Portsmouth.

It appears that the city of Portsmouth and the county of Norfolk are the joint owners of certain steam ferries which ply by authority of law between the city of Norfolk and the city of Portsmouth, and between the city of Norfolk and the town of Berkley, known as the "Norfolk County Ferries." By authority of law the said owners of the ferries leased the ferries to one J. L. Watson and others for a period of 10 years at an annual rental, one-half of which was to be paid to the city of Portsmouth and the other half to the county of Norfolk. This lease was assigned to the appellant, the Norfolk, Portsmouth & Newport News Company, which was operating the lease at the time the license in question was imposed by the city of Norfolk, in which is located the principal offices of the appellant company.

It is conceded that under section 457 of the Code of 1887, as amended by an act approved January 28, 1896 (Acts 1895-96, p. 218, c. 178 [Va. Code 1904, p. 239]), section 488 of the Code of 1887 [Va. Code 1904, p. 250], and the case of *Black v. Sherwood*, 84 Va. 906, 6 S. E. 484, the real and personal property leased in this case are exempt from taxation.

Since the city of Norfolk has no authority to impose a tax upon the leased property, it is argued that it has no power to impose a license tax upon the business of the lessee in operating the ferries, and whose principal office is in that city.

The appellant in conducting its business is entitled to, and receives, the police protection and supervision of the city of Norfolk, and no good reason is perceived why it should not bear some part of the expense of the city government, unless it has been granted immunity from taxation. The power and the right of the state to tax are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption. *Lake Drummond Canal Co. v. Com.*, 103 Va. 337, 348, 349, 49 S. E. 506, 68 L. R. A. 92; *Phoenix, etc., Ins. Co. v. State of Tenn.*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660.

There is nothing in any of the acts of assembly relied on which expressly or by necessary implication exempts the lessee of property, which is itself exempt from taxation, from the payment of a license tax for conducting a business on or with such property. If there be no such exemption, the fact that the state does not impose a license tax thereon for state purposes does not prevent a municipality, clothed with all the power of taxation possessed by the

state within its corporate limits, from imposing such tax.

In the case of the City of Norfolk v. Griffith-Powell Co., 102 Va. 115, 45 S. E. 889, it was held that the city of Norfolk possessed such power under its charter, and the mere fact that the state did not impose a license tax upon a particular business did not prevent the city from imposing such tax. See Harkreader v. Turnpike Co., 101 Tenn. 680, 683, 49 S. W. 751; City of New Orleans v. Crappel, 18 La. Ann. 725.

It is also insisted by the appellant that the ordinance violates the constitutional requirement of uniformity, as there were other steam ferries plying between Norfolk and Pinners Point and West Norfolk, in the county of Norfolk, and between Norfolk and Gilmerton, which are not taxed by the terms of the ordinance.

It appears from the agreed statement of facts that the appellant operated the only steam ferries that were in operation between Norfolk and Portsmouth and Norfolk and Berkley at that time, but the ordinance (No. 134) in terms imposed a license generally upon any person, firm, or corporation operating a steam ferry between those points, respectively, so that any other person, firm, or corporation who might engage in the same business would be subject to the same tax. While that ordinance does not impose a license tax upon any person, firm, or corporation engaged in operating ferries in the city of Norfolk other than those operated between Norfolk and Portsmouth and Norfolk and Berkley, there is another ordinance (No. 143) under which a license tax be imposed upon them, and there is nothing in the agreed statement of facts to show that such license is not imposed. Neither does it appear that all persons in the same class or doing precisely the same business are not taxed alike. Morgan's Case, 98 Va. 812, 35 S. E. 448. When an ordinance is attacked upon the ground that it is invalid, the burden is upon the party alleging its invalidity to show it.

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

CARDWELL, J., absent.

(105 Va. 129)

NORFOLK & W. RY. CO. v. TIDEWATER RY. CO.

(Supreme Court of Appeals of Virginia. March 1, 1906.)

1. RAILROADS — CONSTRUCTION — CROSSING OTHER RAILROADS — PROCEEDINGS BEFORE COMMISSIONS.

The State Corporation Commission, in inquiring into the necessity of the propriety of the location of a crossing by one railroad over the tracks of another, under Code 1904, § 1294b, cl. 3, acts in its capacity as a court of record, and, under section 1813a, cl. 23, of the Code, providing that the commission when so acting shall

observe and administer the common-law and statutory rules of evidence, should not, except in rare cases, call witnesses not introduced by either party, and, if it does call such witnesses, should swear them as witnesses called by the parties are sworn.

2. SAME—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error of the State Corporation Commission in admitting evidence is not ground for reversing their order in reference to the location of a railroad crossing, unless the other evidence in the case is not sufficient to support its finding.

3. SAME—NOTICE OF PROPOSED CROSSING.

Under Code 1904, § 1294b, cl. 3, providing that, before a railroad which crosses another road commences to work upon such crossing, the general managing officer of the former road shall submit plans and specifications to the general officer of the latter, and the general officer of the latter may apply to the State Corporation Commission to inquire into the necessity of the crossing within 15 days after the service of notice of such plans, a railroad which had failed to come to any agreement with another railroad which sought to cross its tracks and which was served by the latter road with a notice, in substantial compliance with the statute, of the proposed crossing, and which, within 15 days after receiving such notice, commenced proceedings before the corporation commission to have the propriety of the crossing determined, could not contend before the commission that the notice was not a sufficient compliance with the statute.

4. SAME—QUESTIONS INVOLVED.

Under Code 1904, c. 1294b, cl. 3, providing for proceedings before the State Corporation Commission for the determination of the necessity for a proposed railroad crossing and the place where and manner in which such crossing should be made, and further providing that, in case the method of crossing is determined upon, the compensation to be paid by the party desiring to make the crossing shall be ascertained according to the laws regulating the exercise of the right of eminent domain, the question of whether the crossing of the tracks of one railroad by another is a taking of property within the constitutional prohibitions against taking property without compensation and without due process of law is not involved in the proceedings before the commission.

5. SAME — PROPRIETY OF CROSSING — DETERMINATION.

Const. § 168 [Code 1904, p. cclxi], provides that railroads shall have the right to parallel, intersect, connect with, or cross any other railroad. Code 1904, § 1294d, cl. 62, authorizes railroads to cross other railroads in the manner prescribed by section 1294b. The latter section requires crossings to be so constructed as not to impair or obstruct the works and operations of the railroad sought to be crossed, and requires them to be supported by proper structures, etc. Held that, while a railroad ordinarily ought not to be permitted to cross the throat of the yards of another railroad at grade, there may be exceptional conditions which will render such a crossing proper, and the question whether the locality of a proposed crossing is such that the crossing should not be permitted is to be determined by the facts and circumstances of the particular case.

6. SAME.

Code 1904, § 1294d, cl. 38, declaring it to be the policy of the state that the crossings of

one railroad by another shall, wherever reasonably practicable, pass above or below the existing structure, does not prohibit crossings at grade, where the establishment of an overhead or underground crossing is not reasonably practicable and would involve an unreasonable expense.

Appeal from State Corporation Commission.

Proceedings before the State Corporation Commission by the Norfolk & Western Railway Company against the Tidewater Railway Company. From an order of the commission rendered in favor of defendant, petitioner appeals. Affirmed.

Jos. I. Doran, Ro. M. Hughes, Lucian H. Cocke, and Munford, Hunton, Williams & Anderson, for appellant. E. W. Knight, Walter H. Taylor, and Thos. D. Ranson, for appellee.

BUCHANAN, J. This is a proceeding instituted by the Norfolk & Western Railway Company against the Tidewater Railway Company, before the State Corporation Commission, to inquire into the necessity for, and the propriety of, the location of a crossing which the latter company desired to make across the works of the former, under the provisions of clause 3, c. 2, of an act entitled, "An act concerning public service corporations," approved January 18, 1904 (Acts 1902-03-04, pp. 968, 970, 971), and found in the Code of 1904 as clause 3 of section 1294b.

The action of the State Corporation Commission in permitting W. R. Mayo and Caldwell Hardy, two citizens of Norfolk, a city near the eastern terminus of the appellee road, to appear before it and make statements in reference to matters in issue before the commission, is assigned as error. Neither of these persons was offered as a witness by either litigant, and one of them was not sworn.

In hearing and deciding the question in controversy between the litigating railway companies, the commission was acting in its capacity as a court of record, and by the express terms of clause 23 of section 1313a of the Code of 1904 (Acts 1902-03-04, pp. 137, 143, c. 147) it is provided that when so acting the commission shall observe and administer the common and statute law rules of evidence, as observed and administered by the courts of this commonwealth. As the question in controversy in this case was one which not only affected the parties to the litigation, but involved questions of the safety and convenience of a railroad crossing, in which the public were interested, the commission might, under the rules of the common law, have had the right, if the evidence introduced by the parties left it in doubt as to what its judgment should be, to call persons as witnesses not introduced by either party, whom it thought could aid it in reaching a correct conclusion. 2 Elliott on Ev. § 821; Coulson v. Disborough, 2 Queen's Bench L. R. (1894) 316.

Except, however, under very exceptional circumstances there is no necessity for such a course, and when followed the persons called should be sworn as are witnesses called by the parties.

While the commission erred in permitting these citizens to make their statements under the circumstances and in the manner in which they were made, that error furnishes no sufficient ground for reversing the order appealed from, unless the other evidence in the case was not sufficient to support the finding of the commission.

Another error assigned is that the "commission erred in overruling the objection made by the appellant, to the effect that the notice given to it by the appellee was not a sufficient compliance with the statute, as the evident impression left in the minds of the officers of the appellant road, on whom the alleged notice was served, was that the alleged notice was not final, but merely a starting point for further negotiations."

The record shows that the officials of the two roads had been, prior to the service of the notice in question, endeavoring to agree upon the place where, and the manner in which, the appellee road should cross the works of the appellant, and that they had reached a stage in their negotiations where there was no hope of an amicable settlement of their differences, and that further efforts in that direction would be useless. The notice in question was therefore given, and is a substantial compliance with clause 3 of section 1294b of the Code of 1904, which provides, among other things, that, before a railroad or other public service corporation which crosses another commences work upon such crossing, the president or general managing officer of the company which proposes to cross the works of another company shall submit plans and specifications, appliances, and methods of operation to the president or other general officer of the latter company.

While there is some conflict in the testimony as to whether or not the notice was understood to be the commencement of the proceeding required in such cases by clause 3, § 1294b, of the Code of 1904, it is clear, we think, from the record that it was so intended by the appellee, and, if the appellant did not so understand it when the notice was first served, it did later, and was permitted to assert all the rights it could have asserted if it had complied strictly with clause 3, § 1294b, of the Code of 1904, and applied to the State Corporation Commission within 15 days from the date of the notice, to inquire into the necessity of such crossing and the propriety of the proposed location. There is no merit in this contention, as no injury resulted to the appellant from the action complained of.

The appellee, under rule 10 (45 S. E. xi), assigns as cross-error the action of the corporation commission in overruling its motion to quash and dismiss the petition of the ap-

pellant, because it was not filed within the 15 days, as provided by the section under which it was filed.

As the result in this case, upon the merits, is favorable to the appellee, as will hereafter be seen, we do not deem it necessary to consider the questions involved in that assignment of error, and do not wish to be understood as in any way expressing any opinion upon them.

The main questions involved in this appeal, as stated by the appellant in the brief of its counsel, are:

"(1) Whether, if the Constitution and statutes of Virginia authorize one railroad company to cross the throat of the yard of another railroad company, that Constitution and those statutes authorize such a crossing without proper condemnation proceedings to acquire the right to cross.

"(2) Whether the crossing of the tracks and yard of one railroad company by another is a taking of property, within the meaning of the constitutional prohibitions against taking property without compensation and without due process of law.

"(3) Whether the proper construction of the Constitution and statutes of Virginia authorizes one railroad company to cross the throat of the yard of another railroad company at grade.

"(4) Whether, under the circumstances of this particular case, the State Corporation Commission was justified in directing a grade crossing."

The first and second of these questions may be considered together. Neither of them is, in our opinion, involved in this appeal. The object of this proceeding, as appears from clause 3, § 1294b, of the Code of 1904, hereinbefore referred to, was to have the corporation commission determine the necessity for the proposed crossing, and the place where, and the manner in which, it should be made. Until those questions were finally settled, no question of taking property, with or without due process of law, or of condemning the lands of the road whose works were to be crossed, or of compensation therefor, could arise. When the plans, appliances, and methods for the crossing are adopted by the corporation commission, or if an appeal be taken from its action, upon the adoption of plans, appliances, and methods for the crossing, by this court, then it becomes the duty of the company desiring to cross to make payment of proper compensation therefor before commencing work thereon; and that compensation, by the express terms of the statute under which this proceeding was had, is to be ascertained according to the laws regulating the exercise of the right of eminent domain.

Whether crossing the works of one railroad company by another is "a taking of property," within the meaning of that term under our laws of eminent domain, or what is the measure of compensation in such a case, could not be determined in this pro-

ceeding, because the corporation commission has no jurisdiction of those questions. Neither could those questions be settled by the court having jurisdiction thereof until the questions involved in this proceeding were ended, for until that time neither the location nor the character of the crossing would be known.

The next questions raised by the appellant are:

"(3) Whether the proper construction of the Constitution and statutes of Virginia authorizes one railroad company to cross the throat of the yard of another railroad company at grade.

"(4) Whether, under the circumstances of this particular case, the State Corporation Commission was justified in directing a crossing at grade."

By section 166 of the Constitution [Code 1904, p. cclxi], it is provided that: "Every railroad company shall have the right, subject to such reasonable regulations as may be prescribed by law, to parallel, intersect, connect with, or cross with its roadway, any other railroad or railroads."

Clause 62 of chapter 4 of the "Act concerning public service corporations" (Acts 1902-03-04, pp. 968, 994), approved January 18, 1904, found in the Code of 1904 as clause 62 of section 1294d, provides that: "Any railroad corporation created under the laws of this state which shall have fully located its railway, shall have power in the construction of its said railway on such route * * * to cross any railway or railroad intervening in the manner and upon the terms prescribed by section three of chapter two of this act."

Section 3 of chapter 2, p. 970, of the act (clause 3 of section 1294b of the Code of 1904) provides, among other things, that: "If any railroad, canal, turnpike, or other public service corporation deems it necessary in the construction of its works to cross any other railroad, canal, turnpike, or works of any other public service corporation, or any county road, it may do so; provided such crossing shall be so located, constructed and operated as not to impair, impede or obstruct in any material degree the works and operations of the railroad, canal, turnpike, or other works to be crossed; and provided such crossing shall be supported by such permanent and proper structures and fixtures, and shall be controlled by such customary and approved appliances, methods and regulations as will best secure the safe passage and transportation of persons and property along such crossing, and will not be injurious to the works of the company to be crossed."

This court will not, in this case, undertake to define the extent of the right of one railroad company to cross the works of another, under the foregoing provisions of law, any further than is necessary for a decision of this case. There may be, and no doubt

are, many localities on every railroad where another railroad company would not have the right to cross, if for no other reason, because a crossing could not be so located, constructed, and operated as not to impair, impede, or obstruct in a material degree the works and operations of the other railroad. But what will constitute such a locality must be determined by the facts and circumstances of the particular case in which the question arises. Ordinarily one railroad ought not to be permitted to cross the throat of an existing or a proposed yard on another railroad at grade; but there may be exceptional conditions and circumstances shown in a particular case which will render such a crossing proper.

The corporation commission, upon which the primary duty of determining such questions is imposed by the Constitution and statutes of the state, has reached the conclusion that from the topography of the ground it is manifest that the location selected by the appellee company is practically the only place at or about which a crossing could take place. The commission further finds, upon all the facts of the case having reference to the general character of the country around Norfolk, to the railroads centering there, the various crossings now in existence, the expense and difficulties involved in erecting an overhead crossing at that place, and the relative dangers and inconveniences to the public likely to follow from the adoption of a grade or overhead crossing, that a grade crossing should be allowed.

It would be impossible, in an opinion of reasonable length, to discuss the mass of testimony taken in this case, and if it could be done it would serve no good purpose, as the facts and circumstances disclosed by this record are not likely to exist in another case involving the same questions. It is sufficient to say that, upon a careful consideration of the whole record, after excluding the statements of Messrs. Mayo and Hardy which were not admissible in evidence, as hereinbefore shown, we are of opinion that the findings of the corporation commission are sustained by the weight of evidence.

It was earnestly insisted by counsel for the appellant, both in their briefs and in their oral arguments, that the corporation commission, in allowing a grade crossing to be made, had not given due consideration to the declared policy of the state in favor of overhead or underground crossings. Clause 38, § 1294d, Code 1904. The change of the policy of the state from grade to overhead or underground crossings, both as to highways and railroads, is an eminently wise one, and should be given full effect "wherever," in the language of the statute, "it is reasonably practicable and does not involve an unreasonable expense, all the circumstances of the case considered." But to require the establishment of an overhead or underground crossing where it is not reason-

ably practicable and would involve an unreasonable expense, all the circumstances of the case considered, would be as much against the policy of the state as to permit a grade crossing where those difficulties are not shown to exist. In reaching our conclusion in this case we have not been unmindful of the provisions of that statute.

We are of opinion that the order appealed from should be affirmed.

(104 Va. 817)

STOKES' ADM'X v. SOUTHERN RY. CO.
(Supreme Court of Appeals of Virginia.
Jan. 18, 1906.)

1. RAILROADS — ACCIDENTS AT CROSSINGS — EVIDENCE—ADMISSIBILITY.

In an action against a railway company for the death of a traveler at a railroad crossing, evidence relating to the crossing of a wagon in front of a freight train more than 30 years before, as to the time it required a wagon and team different from that used by decedent to go over the track at the crossing, and as to the speed of another train, was inadmissible.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1127.]

2. SAME.

In an action against a railway company for injuries at a crossing, the question whether or not the company's right of way at or near the crossing had on it undergrowth which prevented the traveler from seeing the approaching train was material.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1130.]

3. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where, in an action against a railway company for injuries at a crossing, a witness testified that he did not know the condition of the right of way at the time of the accident, and that when he went there five hours after the accident, which occurred at 5 p. m., it was dark, the refusal to permit the witness to state the condition of the right of way at the crossing five hours after the accident was not prejudicial; it being clear that the witness had stated that he did not know what the condition of the right of way was at the time.

4. RAILROADS — ACCIDENTS AT CROSSINGS — CONTRIBUTORY NEGLIGENCE.

Where the proximate cause of a collision with a train at a crossing was the contributory negligence of the traveler, the question of the negligent management of the train was immaterial.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1020-1023.]

5. SAME—DUTY TO LOOK AND LISTEN.

It is the duty of a traveler on a highway to look and listen for the approach of trains before going on a railroad crossing, when his looking and listening would be necessarily effective.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1043-1051.]

6. SAME—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railway company for the death of a traveler in a collision with a train at a crossing, examined, and held to show that decedent was guilty of contributory negligence precluding a recovery.

Error to Circuit Court, Lunenburg County.
Action by W. H. Stokes' administratrix against the Southern Railway Company.

There was judgment for defendant, and plaintiff brings error. Affirmed.

Rehearing denied March 9, 1906.

G. S. Wing, for plaintiff in error. Munford, Hunton, Williams & Anderson, for defendant in error.

BUCHANAN, J. This is an action to recover damages for the alleged negligent killing of the plaintiff's intestate by the Southern Railway Company.

Upon the trial of the cause the defendant company demurred to the evidence. Its demurrer was sustained, and a judgment rendered in its favor. To that judgment this writ of error was awarded.

It appears that about 5 o'clock on the 22d day of August, 1903, a south-bound passenger train of the defendant company ran upon the plaintiff's intestate, W. H. Stokes, who was crossing its tracks at a highway grade crossing near Meherrin, in the county of Lunenburg; in a twohorse wagon loaded with wheat, killing him and his two mules, and destroying his wagon.

The contention of the plaintiff is that the proximate cause of the accident was the failure of the defendant to cause the whistle on its engine to be blown for the crossing, as required by statute, and the running of its train, which was behind time, at an unusually rapid rate of speed.

The defendant claims that the crossing signal was blown, and that the train was not running in excess of 40 miles an hour, its schedule rate; and insists that, even if it was guilty of negligence in the management of its train, the proximate cause of the accident was the failure of the decedent to exercise due care before going upon its track.

The plaintiff took five bills of exceptions to the action of the court in refusing to permit her to introduce certain evidence, all of which, except the first, are relied on here as grounds for reversing the judgment complained of.

The assignments of error based upon bills of exceptions 2, 4, and 5 are without merit. The evidence objected to was clearly inadmissible. One relating to the crossing of a wagon in front of a freight train more than 30 years before; another to the time it required a different wagon and team to go over the track of the defendant at the crossing; and the third to the speed of another train going in the opposite direction.

It appears from bill of exceptions No. 3 that the plaintiff wished to ask Eddie Owen, one of her witnesses, if he knew the condition of the defendant's right of way at the crossing five hours after the accident occurred, stating that she expected to prove by the witness that the view from the crossing was obstructed by undergrowth on the right of way. The court refused to allow the question to be asked.

Whether or not the defendant's right of way at or near the crossing had upon it un-

dergrowth which would have prevented the plaintiff's intestate from seeing the approach of the train, which caused his death, was a material question. The trial court so thought, as it permitted both the plaintiff and defendant to introduce witnesses to prove the condition of the right of way at that point prior and subsequent to the accident. The bill of exceptions discloses no reason why the court declined to permit the question we are now considering to be asked; but another bill of exceptions, to which it refers, shows that the witness had already stated that he did not know the condition of the right of way at the time of the accident, and that when he went there five hours afterwards (the accident occurred about 5 o'clock p. m.) it was dark.

While it would have been better to have permitted the question to be asked, no prejudice resulted to the plaintiff from the court's action, since it is clear from what the witness had already testified that he did not know what the condition of the right of way was at the time designated in the question.

This brings us to consideration of the case upon the demurrer to the evidence.

In the view we take of the case, it is unnecessary to determine whether or not the defendant was guilty of negligence in the management of its train, as charged in the declaration. For, if it was, the proximate cause of the accident, as shown by the evidence, was the contributory negligence of the plaintiff's intestate.

The crossing is a dangerous one, and Mr. Stokes, who lived in the neighborhood and was on his way to mill, knew this. The county road crosses the railway track a little obliquely, in a cut which extends some distance both north and south of the crossing. The bank or side of the cut, which is about 25 feet from the center of the railway track, at the point where the highway crosses the railway, was originally about seven feet deep. Five or six years prior to the accident it had been cut down or lowered about two feet by the defendant, for a distance of about 65 feet along the highway and about 75 feet along the railway in the direction from which the train came. There were only three eyewitnesses to the accident. A boy about 12 years of age, a witness for the plaintiff, who was riding in the wagon with Mr. Stokes, testified that, when they reached a point in the highway about 200 feet from the crossing, "I told him I thought that I heard a roaring, and he stopped, and just as he started off he said the train was going the other way, and we drove off down to the crossing, and just as the mules' front feet got over the rail the train was right there. Then he commenced to whip the mules to get across, and I jumped off." The witness further testified that he was sitting on the seat in the wagon with Mr. Stokes and on his right side.

The engineer in charge of the locomotive, who was introduced by the defendant, testi-

fied that, as his train approached the crossing "a short distance south of Meherrin, when I got within about 100 yards or 150 yards, * * * I saw a mule team, two-horse wagon with two mules to it, being driven by a white gentleman—I did not know who he was—sitting in the wagon driving them. He looked at me. I saw him, and I commenced blowing the steam whistle, * * * and he commenced whipping his team up to cross over ahead of me. Consequently he got his mules just about across the track, and the fore wheels of the wagon were just pulling up on the rail, when the engine struck him." The engineer further testified that he put on the emergency brakes and did everything he could to stop the train; that when he first saw the mules they were about 25 or 30 feet from the track.

The other eyewitness, also put on the stand by the defendant, was a girl who was sitting at a window in a house about 80 yards from, and in full view of, the crossing as Mr. Stokes approached it. She testified that when she first saw the wagon it was about 35 steps from the crossing, a little back of where the "cut-off" was; that he was whipping his team when she first saw him, that at that time she had heard the rattle of the train and seen the smoke from it.

An approaching train could not be seen from the point 200 feet from the railway track where Mr. Stokes stopped his wagon, nor could it be seen until he reached the "cut-off," 65 feet from the crossing, at which point he could see along the railway 75 feet.

The defendant's evidence shows, by actual measurements made, and views taken, some time after the accident, that an approaching train could be seen 287 feet, when within 50 feet of the crossing; 665 feet, when within 32 feet of it; and 1,528 feet, when within 25 feet. But the plaintiff's evidence tends to show that, on account of weeds and small undergrowth growing on the "cut-off" at the time of the accident, an approaching train could not be seen more than 75 feet from the crossing until a point 30 feet from it was reached, when an approaching train could be seen a short distance—how far is not shown.

The uncontradicted evidence of the engineer is that, when within 100 or 150 yards of the crossing, he saw Mr. Stokes and his team when the mules were about 25 or 30 feet from the track, and that Mr. Stokes looked at or toward him. If Mr. Stokes saw the approaching train as the engineer testifies, then it was clearly his duty to have kept off the railway track. If he did not see the approaching train, he could have seen it if he had been in the exercise of due care. The track itself was a proclamation of danger, and it was his duty, before going upon it, to use his eyes and ears—to look and listen—and to do so when and where his looking and listening would be reasonably effective. *Johnson's Adm'r v. C.*

& C. Ry. Co., 91 Va. 171, 21 S. E. 238; *Washington, etc., Ry. Co. v. Lacey*, 94 Va. 460, 475, 476, 26 S. E. 834; 2 *Sheer. & Red. on Neg.*, §§ 476, 478. He had no right to conclude, as he seems to have done, that the "roaring" heard 200 feet away from the track was made by a train going away from, instead of coming toward, the crossing. He had crossed the railway track more than a mile from and north of the crossing, and had traveled along the highway, the general direction of which was parallel with the railway and not far from it. It is not pretended that any train passed either way during that time. Having been warned by the "roaring" of a train, which he had no right to believe had passed, he ought to have been the more careful before going upon the track.

The little boy sitting in the wagon by Mr. Stokes testified that as the wagon approached the track from the point where they halted he looked and listened; in what direction he looked he does not state. He was sitting on the seat on the side farthest from the train. His size, his position, and the direction the wagon was moving prevented him from seeing the train until it was right upon them, unless he leaned forward or backward so as to look around Mr. Stokes. It is not shown that he did this.

We are of opinion that the circuit court did not err in sustaining the defendant's demurrer to the evidence, and the judgment must be affirmed.

(58 W. Va. 669)

FLAHERTY v. FLEMING et al.

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1906.)

1. EASEMENT—RIGHT OF WAY—OBSTRUCTION.

Kight, by deed dated the 15th of July, 1889, and duly recorded on the 22d of July, 1889, conveyed to Flaherty a lot of land on the north side of Seventh street in the city of Parkersburg, "also a free right of way for an alleyway 12 feet wide extending from the rear end of said lot across another lot owned by said Kight to the alley running to Latrobe street." After this deed was recorded, Kight conveyed the lot over which the right of way had been granted to Weber, and Weber conveyed it to Fleming. *Held*, that under the circumstances of this case the placing of a fence upon, or a gate upon and over, such right of way by Fleming, after becoming the owner of his lot, is a wrongful obstruction of such way, and in violation of the right of Flaherty under his deed.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 124, 125.]

2. SAME—INJUNCTION.

Injunction is a proper remedy to prevent the maintenance of a wrongful obstruction of a private way.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 134, 135, 137.]

3. INJUNCTION—CRIMINAL PROCEEDINGS.

It is a rule, subject to few exceptions, that a court of equity will not interfere by injunction with criminal proceedings.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 178, 179.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Bill by Michael W. Flaherty against Charles Fleming and E. F. Wilson. Decree for defendants, and plaintiff appeals. Reversed.

J. W. Vandervort, for appellant. J. Robert Anderson and F. L. Muhleman, for appellees.

COX, J. This is an appeal from a decree sustaining a demurrer to and dismissing a bill in chancery, brought in the circuit court of Wood county by Michael W. Flaherty against Charles Fleming and E. F. Wilson, justice. The bill alleges, in substance: That J. W. Kight, by deed dated the 15th of July, 1889, and recorded on the 22d of July, 1889, conveyed to Flaherty a lot of land on the north side of Seventh street in the city of Parkersburg, and "also a free right of way for an alleyway 12 feet wide extending from the rear end of said lot across another lot owned by said Kight to the alley running to Latrobe street"; that after the recordation of this deed Kight conveyed the lot over which the right of way was granted to George Weber, and afterwards Weber conveyed it to Fleming by deed dated the 14th of April, 1897; that after Fleming became the owner of his lot he occasionally fenced up said right of way, so that Flaherty was not able to freely use the same; that about a week before the filing of the bill Fleming began the erection of a gate on and over said right of way, and obstructed the free use of such right of way by Flaherty; that shortly after Fleming purchased his lot Flaherty called Fleming's attention to the fact of the existence of such right of way; that Flaherty also gave notice in writing of his rights under his deed to Fleming, and that if he did not remove the gate Flaherty would remove it; that, the gate not being removed pursuant to the notice, Flaherty tore it down; that Fleming procured a warrant from Wilson, justice, and caused Flaherty to be arrested upon a charge of injuring and defacing real property not his own; that such right of way 12 feet wide has been used by Flaherty since he purchased his lot until so obstructed by Fleming; and that Fleming threatens to replace said gate and to reconstruct said obstructions. Previous to the decree sustaining the demurrer and dismissing the bill, a preliminary injunction had been awarded, as prayed for in the bill.

The principal controversy in this case is whether or not the defendant Fleming may place upon and over such right of way a fence or gate. This involves a construction of the deed to Flaherty, and the ascertainment of the intention of the parties to it when it was made. It does not clearly appear by the bill what the condition of the right of way was when the deed was made. Therefore what we shall say in relation to the intention of the parties and the construction of the deed will relate to the right

of the owner of the servient lot to obstruct the right of way after the time the deed was made, and not to any obstruction or obstructions to such way which existed at the time of the making of the deed. If there be no ambiguity, we must arrive at the intention of the parties from the language used. The words are to be taken in their ordinary and popular sense, unless it appear by the context that they were used in a different sense, or unless, when applied to the subject-matter, they have a technical meaning. *Railroad v. Schutte*, 103 U. S. 118, 26 L. Ed. 327; *Snodgrass v. Wolf*, 11 W. Va. 158; *Schuykill Co. v. Moore*, 2 Whart. 477. For the purpose of construction, all parts of the deed must be considered together. *Barber v. Insurance Co.*, 16 W. Va. 658, 37 Am. Rep. 800; *Heatherly v. Bank*, 31 W. Va. 70, 5 S. E. 754. It rarely happens that the language used in one grant of an easement is exactly like the language used in another. Therefore each case must be determined according to the words used. The words here are: "A free right of way for an alleyway 12 feet wide." Generally, the mere grant of a right of way over land, and nothing more, does not pass any other right or incident. The owner of the soil may make any use of his land which does not interfere with a reasonable use of the way. Subject to the easement, his control extends indefinitely upward from the surface and downward ad infernos. *Jones on Easements*, § 391; 14 Cyc. 1201. However, where the easement is created by express grant, defining the rights of the parties, the terms of the grant must govern. "Whether a grantee of a right of way is entitled to a way unobstructed by gates or bars depends upon the terms of the grant, the purposes for which it was made, the nature and situation of the property, and the manner in which it has been used." *Jones on Easements*, § 319; *Field v. Leiter*, 118 Ill. 17, 6 N. E. 877; *Cowling v. Higginson*, 4 M. & W. 245; *Smith v. Worn*, 93 Cal. 206, 28 Pac. 944; *Houpes v. Anderson*, 22 Iowa, 161.

It is contended that the word "free" means free from compensation; without further payment. This contention cannot be maintained. The word "free" is found in a deed of grant. The consideration for the grant is named in it. If the word "free" means free in the sense that it is without further consideration, then it would be useless in this deed, and would give no more than the law would give without the use of the word. It is unnecessary to say "free" in the sense of without further consideration, in a deed of grant, in relation to the thing granted. There would be no more reason for using the word "free" in that sense, in relation to the right of way, than there would be for using it in relation to the lot granted by the deed. Without the use of the word in either case, the thing granted is free from the payment of consideration other than that

agreed to be paid. It appears that the word "free," as used in this clause, qualifies and relates to "right of way" in a different sense. It is descriptive of the right of way—the thing granted—and is not descriptive of the use to be made of the right of way. Webster's Dictionary defines the word "free," when used in relation to a thing to be enjoyed or possessed, as follows: "Thrown open, or made accessible to all; to be enjoyed without limitations; unrestricted; not obstructed, engrossed, or appropriated; open." Applying that definition here, the word "free" indicates the condition and character of the "right of way"—the thing granted, the thing to be enjoyed and possessed. In that sense, it means an unobstructed right of way, so far as any future act of the owner of the servient lot is concerned. The additional language, "for an alleyway 12 feet wide," we think means for the purpose of an alleyway 12 feet wide, or to be used as an alleyway 12 feet wide. The way is definite, and fixed in width, and is "for an alleyway." The word "alleyway" has the same meaning as the word "alley." An alley may be public or private. When used in a plat or statute concerning towns or cities, it will be taken to mean a public way, unless the word "private" is prefixed or the context requires a different meaning. Elliott on Roads and Streets, § 24. When used in a deed between private parties, it may mean a private alley, if that clearly appears to be the intention. *City of Chicago v. Borden*, 180 Ill. 430, 60 N. E. 915. An alley is a narrow passage or way in a city, as distinguished from a public street. 2 Am. & Eng. Enc. Law, 149. If the grant were of a public alleyway or alley, it would certainly imply an open and unobstructed alleyway or alley. From the use of the same word or words by parties in relation to land in a city, although by the context it appears to be a private alleyway, it seems to be a fair inference to say that they mean the same as to the character and condition of the alleyway, so far as future obstructions are concerned, as they would mean were it a public alley, or alleyway. In other words, the difference between a public and private alleyway is not so much in the character or condition of the alleyway as in the use and control of it.

Taking the words of the deed together, it appears to us, that the intention was to give a way open and unobstructed so far as any future act of the owner of the servient estate is concerned. If there be doubt as to this construction, then we must resort to the circumstances surrounding the transaction, the situation of the parties, the subject-matter of the deed or contract, and the subsequent acts of the parties under it. *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692; *Heatherly v. Bank*, supra. The bill of complaint is rather barren of circumstances or facts which aid us in construction. It does appear, how-

ever, that these lots are in a city, and not in the country, and that Flaherty had the use of this right of way until Fleming purchased his lot, and down to the time of the erection of the gate, with the slight interference and obstructions by the occasional fencing up of the way by Fleming. It was nearly eight years from the time that Flaherty bought his lot until Fleming bought his lot, during which time Flaherty used such way. It seems to us that this is material upon the question of construction, and as to the intention. Upon the question of construction, see *Dickinson v. Whiting*, 141 Mass. 414, 6 N. E. 92; *Burnham v. Nevins*, 144 Mass. 88, 10 N. E. 494, 59 Am. Rep. 61; *Kana v. Bolton*, 98 N. J. Eq. 21; *Williams v. Clark*, 140 Mass. 238, 5 N. E. 802; *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113; *Hacke's App.*, 101 Pa. 245. In *Williams v. Clark*, the controversy was concerning a crossing of a railway. The court said: "While, in terms, it is not provided that this crossing should not be unobstructed by gates or bars, yet the facts that it was to be 'convenient,' and that the railroad company itself constructed, and for many years permitted the existence of such a one, sufficiently show that what it intended to grant was a free right of passage. No usage or circumstances such as are shown where one grants a way or right of way over a field devoted to agricultural or other purposes, indicating that the right granted is to be subordinate to the rights of the grantor, or the use made by him of the premises, here exist."

The construction above adopted, in our judgment, determines the question of the right of Fleming to obstruct the way in controversy. If the way is to be open and unobstructed, so far as future acts of the servient owner are concerned, it certainly is not to be obstructed by him. The placing of any thing upon the way by the servient owner which would make it less useful or less convenient to the one entitled to the easement than an open, unobstructed way is an obstruction, and a violation of the terms of the grant. It can hardly be contended that the placing of a fence or gate upon and over this way does not make it less useful and less convenient than an open, unobstructed way. "The necessity of opening and closing the gate, as well as the more limited space through which the defendant must conduct his teams and cattle, would materially interfere with his convenient use of the lane." *Dickinson v. Whiting*, supra. See, also, *Burnham v. Nevins*, supra; *Kana v. Bolton*, supra. Injunction is a proper remedy to prevent the maintenance of a wrongful obstruction of a private way. *Rogerson v. Shepherd*, 83 W. Va. 307, 10 S. E. 632; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020.

There is another feature to the plaintiff's bill. He seeks to enjoin the prosecution of the criminal proceeding upon the warrant mentioned, which appears to have been issued

against Flaherty, charging him with injuring and defacing real estate not his own, namely, the gate or gates in controversy. It is a rule subject to few exceptions that equity will not interfere by injunction with criminal proceedings, having no jurisdiction or power to afford relief in such cases. Jurisdiction over criminal cases is conferred upon courts specially created to hear them, and with few exceptions it is beyond the power of equity to control, or in any manner interfere with, such proceedings by injunction. High on Injunctions, § 68, and cases cited in note 5. It appears, however, that if a statute, concerning which an arrest or criminal prosecution is threatened, affects civil property and its enjoyment, in protecting the property right equity may properly enjoin the criminal prosecution; but in such case its interference is founded solely upon the ground of injury to property and the necessity of preserving property rights. Also, where a suit is already pending in equity, and a criminal prosecution is instituted for the purpose of testing the same right as that in issue in the equitable action, in such case a court of equity may impose conditions on a suitor seeking its aid, and hence, in order to protect its prior jurisdiction, may compel him to abandon the criminal prosecution until a final determination of the whole matter in equity. *Dobbins v. City of Los Angeles* (U. S.) 25 Sup. Ct. 18, 49 L. Ed. 169; *High on Injunctions*, 88, and cases cited in note 10. It does not appear that the plaintiff brings himself within any of the exceptions. The criminal proceeding was commenced first, and the statute under which it was commenced is not questioned. That statute determines no property right in this case.

We are of the opinion that the injunction against the criminal prosecution is improper, and that the bill, to the extent that it relates to the criminal prosecution, is without equity. The demurrer in this cause is general, and must be overruled, because the allegations of the bill, if true, are sufficient for the purpose of an injunction preventing the obstruction, or the maintenance of an obstruction, of the right of way mentioned. *Allen v. S. P. Coal Co.*, 58 W. Va. —, 52 S. E. 454.

It follows that the decree of the lower court must be reversed, and this cause remanded, to be further proceeded with according to the principles herein announced and the rules governing courts of equity.

(58 W. Va. 665)

SHEARS et al. v. TRADERS' BLDG. ASS'N et al.

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1906.)

1. MORTGAGES — FORECLOSURE — SEPARATE SALES.

Where one executes to the same trustees two deeds of trust, at different times, conveying separate lots of land, to secure to the same

person two distinct debts, and where default is made in the payment of the debts, and the trustees are required to make sale of the property, they should sell the same separately, and not jointly, and to sell it collectively will be an irregularity for which the sale, and deed made pursuant thereto, will be set aside, upon proper bill filed for that purpose.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1072.]

2. SAME—IRREGULARITIES—NOTICE TO PURCHASERS.

A purchaser at such sale is charged with notice of the irregularity. He is bound to know the powers of the trustees, and to see that the sale is made in conformity with the instrument creating the trust and as required by law.

3. SAME—WAIVER OF OBJECTIONS.

The grantors will not be estopped to set such sale aside, because one of them was present at the sale and did not call attention to the irregularity and object to the sale.

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Bill by B. F. Shears and Hattie Shears against the Traders' Building Association and others. Decree for defendants, and plaintiffs appeal. Reversed.

J. W. Vandervort, for appellants. W. N. Miller and Caldwell & Watson, for appellees.

SANDERS, J. The appellants, B. F. and Hattie Shears, on the 26th day of April, 1901, executed to the defendants H. H. Moss and A. K. Leonard, trustees, a trust deed on two lots in Tygart district, Wood county, to secure to the defendant the Traders' Building Association the sum of \$1,100. On the 7th day of June, 1901, the same parties conveyed to the same trustees two lots in Jeannette Tavenner's addition to Tavennersville, in said county, to secure to said association the payment of the sum of \$600. Default having been made in the payment of the sums secured, the trustees, on June 18, 1904, sold the properties conveyed, and defendant S. P. Moore became the purchaser thereof, at the price of \$1,700, and afterwards obtained a deed. On July 11, 1904, the plaintiffs filed their bill to set said sale and deed aside. Pending the suit, an injunction was awarded by the judge of the circuit court, in vacation, restraining Moore from prosecuting an action of unlawful entry and detainer to recover possession of the property from Shears. At the final hearing the court refused to grant the relief prayed for, dissolved the injunction, and dismissed the bill.

The appellants present several reasons for reversal, but it is only necessary to notice the one which we regard as fatal to the decree, and which plainly calls for setting the sale aside and canceling the deed. The trustees, Moss and Leonard, in proceeding to make sale, advertised the properties jointly, or collectively—that is, they advertised the entire property jointly, by one notice—and on the day of sale the property was lumped, or sold collectively, and purchased by said Moore. These deeds of trust are specific liens upon the property

separately conveyed by them to secure the amount of indebtedness therein named, respectively, and upon a sale of the property conveyed by one deed of trust, if it should bring more than sufficient to pay off the lien, it would not be proper to credit the surplus upon the loan secured by the other deed of trust, if, upon a sale of the property conveyed by that deed, it should not sell for enough to satisfy the indebtedness. The property should be so sold as to be able to determine, with certainty, the amount realized from the property conveyed by each trust deed. Who can say but what the property conveyed by one of the deeds sold for more than sufficient to pay the debt secured by it? To sell the property collectively, it would be impossible to know the proportionate amount each piece of property brought, and therefore it could not be determined how much should be credited upon each loan. The cestui que trust has no right, under the trust deed, if the property conveyed by one deed should sell for more than sufficient to pay off the debt which it was given to secure, to have the surplus applied to the satisfaction of the debt secured by the other deed of trust, in the event that the property conveyed thereby should prove inadequate for the purpose.

It is urged that the property was offered separately, and that the trustees failed to receive a bid sufficient to pay the association's debt, and therefore it was sold collectively. This cannot be offered as an excuse for selling the property collectively, because by the terms of the deeds no such right existed. The trustees were not authorized to sell, except in conformity with the contract creating the trust, and the property conveyed by each deed was only liable to be sold in satisfaction of the indebtedness thereby secured.

It is contended by the defendants that the answer of the building association shows that the properties were first offered separately, and that they were then offered together, and that, a larger price being thus obtained, the plaintiffs were not prejudiced, but benefited, by the joint sale of the property, and that the plaintiffs, having failed to set up in the bill this matter of joint sale, or make any issue in the pleadings in regard thereto, cannot now make a new or different case on this hearing. It is true the plaintiffs, in the conclusion of their bill, assign six grounds why the sale should be set aside, and in these assignments it is not complained that the properties were jointly sold; but, while this is so, it is shown by the bill that the two deeds of trust were given upon separate pieces of property to secure different debts and that the property was jointly sold. This being so, the court will look to the whole bill to see if the plaintiffs are entitled to relief, and the fact that the bill contains allegations attempting to specifically point out irregularities will not prevent the plaintiffs from relying upon the other allegations in the bill which show irregularities. This being the

allegation of the bill, it is not denied by the answer, but, on the other hand, is admitted.

It is argued that it is shown that the property brought more when offered jointly than it did when offered separately, and therefore the plaintiffs are not prejudiced. How much from the proceeds of sale will be credited on the \$1,100 loan, and how much on the \$600 loan? How much did the property conveyed by the trust deed dated June 7, 1901, bring, and how much did the property conveyed by the second deed of trust bring? It nowhere appears. The property upon which the small loan was made may have brought a sum much more than sufficient to discharge the lien against it, and, if this be so, as we have observed, the surplus arising from the sale of the property which sold for more than sufficient to pay off the lien against it could not be applied to discharge the lien against the property, which did not sell for enough to do so.

It is claimed by the defendants that the silence and conduct of B. F. Shears at the time of the sale should estop him. It is true that Shears was present when the sale was made, but he had no control over the proceedings. The manner of advertising and selling was fixed by the trust deeds, and the sale was being conducted entirely by the trustees. Shears had no voice in it, and the fact that he was present and did not object to the sale being made in the manner in which it was made cannot in any way estop him to say now that the trustees did not proceed in conformity with the provisions of the trust deeds. The grantor misled no one by his conduct. All that can be charged to him is that he was present and was silent; that he did not then say that the trustees had no power to make the sale as they were proceeding to do. A purchaser of property sold by a trustee under a deed of trust given to secure a debt, and authorizing the trustee, after advertising in a certain manner, to make sale of the property to satisfy the debt secured thereby, is charged with notice of the powers of the trustee; and it is the purchaser's duty to inquire and determine for himself if the sale is being made in conformity with the provisions of the instrument creating the trust. The irregularity here complained of is such as, from its very nature, immediately presents itself to view. "Silence will not estop, unless there is not only a right, but a duty, to speak." *Cautley v. Morgan*, 51 W. Va. 304, 41 S. E. 201; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; 38 L. R. A. 694, 64 Am. St. Rep. 891; *Dawson v. Crow*, 29 W. Va. 333, 1 S. E. 564; *Pocahontas Light & Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

For the reasons given, we reverse the decree of the circuit court, set aside the sale, and cancel and annul the deed made thereunder, and award to the plaintiffs their costs, both in this court and in the court below.

(58 W. Va. 676)

STATE v. STRAYER.(Supreme Court of Appeals of West Virginia.
Feb. 6, 1906.)**1. INDICTMENT—MISNOMER—AMENDMENT.**

If a misnomer in an indictment for a felony appear before or in the course of the trial thereon, the indictment may be amended by inserting therein, under an order of the court, the true name of the accused.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 514.]

2. SAME—MOTION TO QUASH.

An indictment should not be quashed because of a misnomer therein.

3. SAME—LOSS—SUBSTITUTION OF COPY.

If an indictment for a felony be stolen, lost, or destroyed after a trial thereon and the rendition of a verdict of guilty, the trial court, under its inherent common-law powers, may cause to be filed in the record of the case a copy thereof as a substitute therefor, to subserve any purpose for which the indictment may be needed in the further progress of the case.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 78.]

4. CRIMINAL LAW—APPEAL—PRESUMPTIONS.

In the absence of an objection to the substitution of such copy, on the ground that it is not a true or correct copy, its accuracy and correctness will be presumed.

5. SAME—BILL OF EXCEPTIONS.

A bill of exceptions, made up and signed more than 30 days after the expiration of the term of the court at which final judgment in the case was rendered, is no part of the record, and cannot be considered.

6. SAME—RECORD—EVIDENCE.

If it affirmatively appear, from an order in the case, that the evidence was not transcribed by the stenographer within 30 days from the end of such term, it is no part of the record, although there is a nunc pro tunc order purporting to make it so as of the term at which the judgment was rendered.

(Syllabus by the Court.)

Error to Circuit Court, Cabell County.

Ben Strayer was convicted of murder, and brings error. Affirmed.

R. L. Blackwood, Gordon O'Blerne and F. W. Riggs, for plaintiff in error. C. W. May, Atty. Gen., and Frank Lively, for the State.

POFFENBARGER, J. This is a writ of error to a judgment of the criminal court of Cabell county sentencing Ben Strayer to confinement in the penitentiary of this state for life, under a conviction on an indictment for the murder of Sam Benedict. Some of the assignments of error are predicated upon rulings of the court as to evidence. One is the overruling of a motion to set aside the verdict as being contrary to the law and the evidence. Owing to defects in the record, it will be impossible to consider any of these assignments. There is but one paper in the record, called a "bill of exceptions." It purports to set out evidence in the case; but was not made up and signed either in the term at which the judgment was rendered or within 30 days after the expiration of that term. The term ended on the 20th day of February, 1906, as shown by a certificate of the clerk of the trial court. It affirmatively appears from a vacation order, entered on the 5th day of April,

1906, that the evidence in the case had not then been transcribed by the stenographer from his notes. Therefore the bill of exceptions could not have been made up and signed at an earlier date. It was not done before the 26th of April, 1906; for that is the date of the certificate of the stenographer. On the 27th day of April, 1906, the court entered an order purporting to make this bill of exceptions a part of the records as of the last preceding term. If the bill of exceptions was inadvertently omitted at said preceding term, as recited in this order, it did not, at that time, contain the evidence. This appears affirmatively from the vacation order. Under principles settled in Tracy's Adm'x v. Carver Coal Co. (W. Va.) 50 S. E. 825, it is clear that the evidence is no part of this record. See, also, Jordan v. Jordan, 48 W. Va. 600, 37 S. E. 556.

It is objected that the record does not show the impaneling of any grand jury, nor the finding of any indictment against the accused. The printed record does not, but certified copies of the record do, show these essential steps. Hence these assignments avail nothing. The indictment, as returned, appeared to be against Ben Thrayer, and was so recorded in the order showing its return. On his arraignment the defendant moved to quash, because his true name was Ben Strayer. This motion the court overruled, and then, on motion of the state by its attorney, permitted the indictment to be amended so as to state the true name of the defendant. Error is predicated upon this action of the court, and Buzzard's Case, 5 Grat. (Va.) 694, and Drake and Cochren's Case, 6 Grat. (Va.) 665, are cited. These cases are not in point. In the former the wrong name was inserted in the indictment, and the correct name was indorsed on the back of the indictment and entered in the record. There was a variance between the record and the indictment. The record showed one man had been indicted, while the indictment showed that a different person had been charged with the offense. It was not a simple case of misnomer, and therefore not within the statute allowing amendment. In the other case the indictment was against Drake and Cochren, but the clerk, in making a minute of it, accidentally omitted the name of Drake. The application was not to amend the indictment on the ground of a misnomer, but to amend the record of the court; a proceeding not authorized by the statute. Section 10 of chapter 158 of the Code of 1899 provides that no indictment shall be abated for any misnomer of the accused, and authorizes the court, in case of a misnomer appearing, before or in the course of a trial, forthwith to cause the indictment or accusation to be amended according to the fact. That is exactly what was done in this case. Hence neither argument nor authority, other than the statute itself, is necessary to justify the action of the court in so doing.

After the verdict had been rendered, and a

motion for a new trial made, the indictment with the verdict written on it disappeared. This was brought to the attention of the court by the clerk after having been sworn by the court. The prisoner was present in the court and a record of the fact of the loss was made. Thereupon the court directed the attorney of the state to prepare, as nearly as possible, a true and exact copy of the indictment, with the indorsement thereon. This having been done, the court inspected the copy and ascertained, to its satisfaction, that it was a true and exact copy of the original indictment, together with a copy of the indorsement of the verdict thereon. Said copy was then filed in the record of the case to take the place of the original. To this action and ruling of the court the prisoner objected; and, his objection being overruled, he excepted. It does not appear that any particular objection was made to the copy. It is not pretended that it is not a true and correct copy of the original paper. The exception is based upon want of power and authority in the court to substitute a copy for the original. *Bradshaw v. Commonwealth*, 16 Grat. (Va.) 507, 86 Am. Dec. 722, holds that if after arraignment of, and plea by, the prisoner, the indictment be lost, he cannot be tried. At that time there was no statute authorizing new indictments to be made when an indictment has been stolen, lost, or destroyed before trial, in the manner now provided by section 10 of chapter 52 of the Code of 1899. The decision in the *Bradshaw Case* follows that of a divided court in *Ganaway v. State*, 22 Ala. 772. That case was decided in 1853. After that time *Bradford v. State* was decided in 1875, and is reported in 54 Ala. 230, holding as follows: "The circuit court has inherent power, without the consent of the prisoner or his counsel, to order the substitution of an indictment, when, after the plea to the merits, it has been lost or destroyed during the trial." At that time there was in Alabama a statute corresponding in all substantial particulars to the statute now in force in this state. Hence the reasoning of that court in *Bradford v. State* is directly applicable to this case. Both able and exhaustive, it shows conclusive reasons why the danger of putting a man to trial on a copy of the original indictment cannot result from substituting a copy after trial. Therefore a portion of the opinion is here quoted and adopted as a part of this opinion:

"It may be the defendant should not be arraigned or put on trial except on the original finding of the grand jury, because of that he should have inspection, and because of the danger, however remote, that he might be called to answer an accusation the grand jury had never presented, if, when it has been lost, its substitution on secondary proof of its contents was permitted. Such must be accepted now as the law, and the statute, authorizing the preferring a new indictment, is in affirmance of the reasoning on which *Gannaway's Case* rests. It does not author-

ize substitution. It authorizes only preferring a new indictment, excluding from the bar of the statute of limitations, the time elapsing after the finding of the first, and the presentment of the new. The loss contemplated must have occurred before, and not during, trial. The purpose is to put the defendant on trial, only on the original finding of the grand jury—that which carries with it, by its indorsements, the statutory evidence of verity. On that finding the accused was arraigned. The genuineness of the indictment was admitted by his demurrer, and recognized by the court in the judgment on the demurrer, and in interposing for the defendant the plea of not guilty. Of the existence and verity of the indictment there was no controversy. Its loss occurred during the progress of the trial, and as is the most reasonable presumption from the record after the jury had been impaneled and sworn. It was not discovered until the evidence had been introduced, and the solicitor was opening the argument to the jury. There is no doubt that the indictment substituted is an exact copy of the original. The grounds of demurrer to the original were specially assigned, and are in every respect applicable to the copy substituted. These grounds are resolvable into one—that the acts constituting the assault are not stated. They are not stated in the substituted indictment, and the statute dispenses with their statement, requiring only the statement of the fact of assault, the name of the female, and the criminal intent. Of the existence of the original indictment, and of its verity, there could be and was no controversy. The substitution was the introduction into the records of matter previously recognized by the court and admitted by the defendant—of matter the verity of which had previously passed beyond controversy. It was the duty of the court to make the record speak the truth, to conform it to the facts as they existed when the defendant was arraigned, pleaded, and was put on his trial, thereby no right of the accused is imperiled. He is not subjected to any other jeopardy than that in which he was placed when put on his trial. That the grand jury had made a presentment against him, that it was returned into court, and that he had admitted its verity, was already judicially ascertained, and apparent of record. His clear, constitutional right was to a verdict from the jury impaneled and sworn, which he had accepted as his trial. The loss or destruction of the indictment could not impair or take away this right. The state had a corresponding right that the trial should progress, and a judgment of conviction or acquittal rendered, finally determining the prosecution. Such rights cannot be impaired or destroyed by the accidental loss or the willful abstraction or destruction of papers pending the trial. *Mount v. State*, 14 Ohio, 295, 45 Am. Dec. 542. The substitution of

such papers on satisfactory proof, by the court, is the only mode of supplying the loss, and lies within the inherent power of the court. Otherwise, the progress of a cause could be arrested—the escape of the criminal could be secured by the felonious abstraction, or the accidental loss of an indictment.”

See, also, *Smith v. State*, 4 G. Greene (Iowa) 189; *State v. Rivers*, 58 Iowa, 102, 12 N. W. 117, 43 Am. Rep. 112; *State v. Stevisiger*, 61 Iowa, 623, 16 N. W. 746.

Upon these authorities we have no hesitancy in saying the court did not err in substituting a copy of the original after conviction and entry of the verdict upon the record. The verdict, recorded in the order book of the court, was full and complete, showing a conviction of the crime of murder. Nothing remained to be done but to render judgment on it.

As no error in the judgment is perceived, it will be affirmed.

(58 W. Va. 681)

STATE v. CLIFFORD.

(Supreme Court of Appeals of West Virginia. Feb. 8, 1906.)

1. LIBEL AND SLANDER—WORDS ACTIONABLE PER SE.

Words imputing want of chastity to a woman are actionable per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 71-78.]

2. CRIMINAL LAW—ARGUMENT OF COUNSEL—WAIVER OF ERROR.

In order to warrant the appellate court to revise errors predicated upon the abuse of counsel of the privilege of argument, it should be made to appear that the party asked and was refused an instruction to the jury to disregard the improper statements of counsel.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2645.]

3. SAME—CONVERSATION WITH JUROR.

When it clearly appears from the record that the plaintiff in error could not have been prejudiced by a remark made to a juror during the course of the trial, the verdict should not be set aside because of such remark.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2263, 2264.]

4. SAME—NEW TRIAL.

State v. Williams, 14 W. Va. 851, Syl. pt. 2, reaffirmed.

(Syllabus by the Court.)

Error from Circuit Court, Berkeley County. J. R. Clifford was convicted of libel, and brings error. Affirmed.

Faulkner, Walker & Woods, for plaintiff in error. C. W. May, Atty. Gen., and Frank Lively, for the State.

McWORTER, P. At the April term of the circuit court of Berkeley county the grand jury of said county returned into court the following indictment:

“The grand jurors of the state of West Virginia, in and for the body of the county of Berkeley, and now attending the said court, upon their oaths present, that on the

3rd day of June, A. D. 1899, one J. R. Clifford, of the county of Berkeley aforesaid, was one of the proprietors, editors, and publishers a newspaper, published and printed at Martinsburg, in said county of Berkeley, state of West Virginia aforesaid, called and known as the ‘Pioneer Press’; that said J. R. Clifford, in an article and writing published by him in said newspaper, unlawfully and maliciously contriving to injure and vilify one Hattie R. Newman and to bring her into public scandal, contempt, ridicule, and disgrace, then and there, to wit, on the said 3rd day of June, A. D. 1899, at Martinsburg, in the said county of Berkeley, and state of West Virginia, aforesaid, did publish in said newspaper aforesaid, called and known as the ‘Pioneer Press,’ and circulate in said county, a false, scandalous, malicious, and defamatory libel of and concerning the said Hattie R. Newman, containing divers false, scandalous, malicious, and defamatory matters and things, of and concerning the said Hattie R. Newman (all of which matters and things were published in the said Pioneer Press, in a single article and editorial, on the said 3rd day of June, A. D. 1899), of the tenor following, to wit:

“I Shall Introduce Him.

“Rev. (7) J. O. Newman, of Hagerstown, Md., and who is set up as one of the stars of the first magnitude of the Free Baptist Church of the Shenandoah Valley, has made it a special object to pray for us at Storer College on several anniversary occasions. Last Thursday he stood on the rostrum, battling his eyes like a toad in the ashes, shaking and ducking his shallow head, and begging the Lord to have mercy on us.

“Now, we want it distinctly understood that we want none of his prayers, for they can only add damnation to our soul, if they add anything, because he himself is damnable, and, if his religion, the life he has led, and his prayers, can land him in heaven, we prefer to go to the other place.

“Since he has been blabbing in the pulpit, we have seen him skulking in the bushes with a noted prostitute, and without following him down a transaction took place only a few weeks ago that ought to make the devil blush; but John don’t seem to care about it. It is said, and no one has denied it, that he [meaning the said John O. Newman] went into his own house and found a man by the name of Baum and his wife [meaning the wife of the said John O. Newman, viz., the said Hattie R. Newman] playing the dog. [Meaning that the said Baum and the said Hattie R. Newman were then and there engaged in the criminal act of sexual intercourse, they not then and there being lawfully married to one another, and that said sexual intercourse was then and there being done and performed by them as sexual intercourse occurs and is performed by and between a male and female dog.]

"Both he and Newman's wife being teachers at the time, a public investigation took place, and Baum declared that Mrs. Newman [meaning the said Hattie R. Newman] had frequently been "stark naked" before him [meaning that she, the said Hattie R. Newman, had neither clothes nor covering of any kind on or about her person at the times he, the said Baum, had seen her, and had frequently thus exposed and shown her person to the said Baum], and to prove it told how many scars she had on her person. Hagerstown never had a more disgraceful affair, for so much of which can't be told in print. But to show what kind of fellow John C. Newman is: he came to Martinsburg a few Sundays after it occurred in company with his wife (?) [meaning that there was some question and doubt as to the said Hattie R. Newman being the lawful wife of said John C. Newman, and that they were living together presumably as man and wife, instead of being lawfully married to one another] and he preached (?) and she played and sung in the church, and so they live to demoralize the young under the guise of religion. Who blames an editor for objecting to such a moral leper and malodorous scamp as John C. Newman praying for him in public? There is no place in hell hot enough for such dirty scoundrels; but there will be nothing done about it in the Free Will Baptist denomination of this Valley, because he is too good a lackey. May God Almighty soon deliver the race of devils in the pulpit, and let our children have better examples.

"While his wife (?) [meaning that there was some question and doubt as to the said Hattie R. Newman being the lawful wife of the said John C. Newman, and that they were living together presumably as man and wife, instead of being lawfully married to one another] is black in character, John C. Newman is blacker, because he feigns to be a preacher, and is too low himself to put his foot on such rotten conduct, for well does he know that it would be kettle calling pot black."

"To the great scandal, injury, and disgrace of the said Hattie R. Newman, and against the peace and dignity of the state."

The defendant demurred to the indictment, which demurrer was overruled. At the September term, 1901, the case was tried upon the plea of not guilty, and a verdict of guilty returned by the jury. The defendant moved in arrest of judgment and to set aside the verdict and grant him a new trial, which motions were also overruled and judgment entered for a fine of \$100 and cost of prosecution, and further provided for imprisonment of defendant in the Berkeley county jail until the fine and costs should be paid, for a period not exceeding 60 days. The defendant gave bond under section 10, c. 36, Code 1899. Upon the trial the defendant took four bills of exceptions, numbered 1, 2, 3, and 4, respectively, and procured from one of the

judges of this court a writ of error and supersedeas.

The first assignment of error is the overruling of the demurrer to the indictment, claiming that "the indictment is not sufficiently explicit, inasmuch as it did not inform the defendant as to what specific portions of said articles were complained of." The indictment seems not to include anything as applying to the husband of Hattie R. Newman, the J. C. Newman mentioned in the indictment, but the prosecution is for defaming the name of Hattie R. Newman only. The entire article is set out in the indictment, and the parts relied upon are brought to notice by innuendoes which sufficiently set out the statements relied upon, and gives the defendant notice of what he is expected to answer. In *State v. Aler*, 39 W. Va. 549, 20 S. E. 585, syl., point 2, it is held: "It is an elementary rule of pleading that whatever is alleged must be alleged with certainty, and one of the means of insuring certainty in a complaint or indictment for slander or libel is innuendo." Point 3 of the same case holds "An innuendo may serve for an explanation to point a meaning where there is precedent matter expressed or necessarily understood or known; but never to establish a new charge." *Kraus v. Sentinel Company* (Wis.) 19 N. W. 384; *Freeman v. Sanderson* (Ind. Sup.) 24 N. E. 239; 13 Enc. Pl. & Pr. 102. Words imputing want of chastity to a woman are slanderous and actionable per se. *Ronnie v. Ryder* (City Ct. Brook.) 8 N. Y. Supp. 5; *Newman v. Stein*, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447; *Prescott v. Tousey*, 50 N. Y. Super Ct. 12; 82 Cent. Dig. par. 71, Col. 1933. It is also contended by defendant that the innuendoes do not give the natural meaning of the statements which they purport to explain. But, where the article itself is libelous, the innuendo may be regarded as surplusage. 13 Enc. Pl. & Pr. 103: "If the words charged are not libelous per se, an innuendo is necessary. Of course, if the words complained of are unambiguous and obviously defamatory, no innuendo is necessary. If the indictment is good without an innuendo, the innuendo may be rejected as surplusage." *Oting Commonwealth v. Snelling*, 15 Pick. (Mass.) 321.

The second assignment of error relates to the refusal of the court to allow witness John C. Newman to be asked the following question: "Did you not tell of the said conversation at the investigation of the school board about March 21, 1899?"—as set out in bill of exceptions No. 1. The question was asked in an attempt to affect the credibility of the said Newman as a witness, who had testified that Baum's knowledge of the scars on the person of Hattie Newman came from a conversation which he had had with said Baum in which he told Baum about the scars. Baum had testified that he knew of the scars on Hattie Newman by inspection. Baum and Hattie Newman were teachers in the colored

school at Hagerstown, and their conduct had been investigated by the board of education, and it appears in the record that she had been exonerated. There is nothing brought out in the evidence concerning the school investigation which would have made it material for Newman to have said anything about the scars at that time, and whether he made any reference to it at that time is not material to the issue in this case, and whatever his answer might have been it would not be material.

The third assignment of error was the refusal of the court to permit Newman being asked the following question: "Are you the same John C. Newman who offered up prayers for J. R. Clifford at Harpers Ferry in 1899?"—as set out in bill of exceptions No. 2. This question was also immaterial and could not affect the case at bar, and it was not error to exclude it. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415, syl., point 4, says: "Whether matter is material to the issue depends on the question whether its truth or falseness would affect the issue; and, if the truth or falseness would not affect the issue, the matter is not material." What difference could it possibly make in this case whether the witness was the same man who had offered up prayers for defendant or not.

The fourth assignment of error, as in bill of exceptions No. 3, was that the court erred in not setting aside the verdict of the jury and granting the defendant a new trial because of the language used by the prosecuting attorney in his closing argument before the jury. The language referred to is as follows: "If he had been born a beast, would have been a polecat; if he had been born a bird, would have been a buzzard; if he had been born a reptile, would have been a lizard; if he had been born a fish, would have been a mudcat; and, if a man, a libeler." To the use of which language the defendant, by his attorney, objected and called the attention of the court to the same, and the court very promptly instructed the jury that the language was improper and ought not to have been used, and that it should not be considered by the jury in any way against the defendant. The fact that the court instructed the jury that this language was improper and should not be considered would counteract any effect the language may have had to prejudice the jury against the defendant, if it did not really prove a benefit to the defendant. In *State v. Allen*, 45 W. Va. 65, 30 S. E. 209, syl., point 7, it is said: "Counsel necessarily have great latitude in the argument of a case, and it is, of course, within the discretion of the court to restrain them; but with this discretion the appellate court will not interfere, unless it clearly appears from the record that the rights of the prisoner were prejudiced by such line of argument." And in *Landers v. Railway Co.*, 46 W. Va. 492,

33 S. E. 296, syl., it is held: "In order to authorize this court to revise errors predicated upon the abuse of counsel of the privilege of argument, it should be made to appear that the party asked and was refused an instruction to the jury to disregard the unauthorized statements of the counsel." *State v. Shawn*, 40 W. Va. 1, 20 S. E. 873; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, syl., point 13, 13 Am. St. Rep. 875.

The fifth assignment of error was that the court erred in not setting aside the verdict of the jury because the evidence was not sufficient to warrant the jury returning a verdict of guilty. The question of the weight of evidence is with the jury and a verdict should not be set aside unless it is clearly shown there is no substantial evidence at all to support their finding. In this case the defendant in his testimony states that he was the editor of the paper publishing the article set out in the indictment; and further says: "I am the author of that article." The defendant not only does not deny the writing and publishing of the article, but seems to be proud of it, and attempts to justify its publication on high moral grounds that he did it from pure motives, says he "wrote to arouse public sentiment." Such articles published habitually for a time in a decent community would evidently succeed in "arousing public sentiment," and, if it failed to do so, the moral standard of the community permitting such obscene publications could not be considered very high. It was for the jury to say whether the publication was true and published "with good motives and for justifiable ends."

The sixth assignment of error was that the court erred in not setting aside the verdict and granting a new trial because of the conversation had between the juror J. Henry Kastle and W. L. Gaff after the case had submitted to the jury and before rendering the verdict. According to the affidavits of Gaff, Kastle, and A. S. Garrett, who was also present, the conversation amounted to this: Kastle came into the store and Gaff asked him if he was still courting, and Kastle replied that he was. Then Gaff said that from the evidence he had heard it would be hard for him to decide the case, as the woman swore one way and the man the other: Kastle making no reply to this statement. There was no expression of opinion on the part of Kastle or others which showed any prejudice on the part of Kastle against the defendant, nor could the remark of Gaff have any influence on the juror tending to change his judgment in the case. When it clearly appears from the record that the defendant could not have been prejudiced by a remark made to a juror during the course of the trial, the court would not set aside the verdict when the evidence is plainly sufficient to justify the verdict found. In *State v. Miller*, 24 W. Va. 802, the remark that "the defendant was in a tight

place" was made in the presence of two of the jurors, and was held not sufficient to set aside the verdict.

The seventh assignment of error was that the court erred in refusing to set aside the verdict and grant a new trial on the affidavit of defendant showing newly discovered evidence. The affidavit of J. R. Clifford, filed in support of his motion for a new trial, gives the names of some three or four witnesses, and shows by his affidavit what he expects to prove by them, respectively, and that he discovered this since the trial. The affidavit seems to be sufficient in form, but fails to produce the affidavit of any of said witnesses showing that they were ready to and would testify to the facts set forth in case a new trial were granted. It is well settled that, in order to entitle the mover to a new trial for newly discovered evidence, he must accompany his motion with the affidavit of the witnesses by whom he expects to prove the facts stated, showing that said witnesses are ready to so testify to such facts, or, if the affidavit of the purported witnesses is not produced, the applicant must show satisfactory excuse for the absence of such affidavit. Defendant wholly fails to show any excuse why the affidavits of the witnesses are not produced. As held in *State v. Williams*, 14 W. Va. 851, syl., point 2: "Upon a motion for a new trial on the ground of newly discovered testimony, the testimony of the newly discovered witness should be substantially set out in the affidavit of the witness, as it can be testified to in the court before the jury, or a satisfactory excuse be shown for the absence of the affidavit." Citing in support of the decision *Armstrong Mfg. Co. v. Thompson* (Sup.) 88 N. Y. Supp. 151. 4 Cur. Law, 861, refers to said *Armstrong Mfg. Co. v. Thompson* Case in note 76.

For the reasons herein stated, the judgment of the circuit court is affirmed.

(73 S. C. 131)

BROOKSHIRE v. FARMERS' ALLIANCE EXCHANGE OF SOUTH CAROLINA, Limited, et al.

(Supreme Court of South Carolina. Dec. 18, 1905.)

CORPORATIONS—DISSOLUTION—RECEIVERS.

A corporation directed its directors to wind up the affairs and return the stock to the contributors. At the time the corporation was solvent. A stockholder sued for the appointment of a receiver to wind up the affairs and distribute the stock. There was evidence that the directors under the direction of the stockholders had invested the stock in bank stock. The charter of the corporation provided that its funds should be used to conduct a mercantile agency. The stockholders had acquiesced in such investment for ten years, and thereafter they loaned the money on good security. Some of the funds were lost in conducting the business for which the corporation was formed, but no fraud or mismanagement was charged, and no neglect on the part of the officers was shown. *Held*, that the suit would be denied.

Appeal from Common Pleas Circuit Court of Richland County; Carey, Special Judge.

Action by H. E. Brookshire, on behalf of himself and others, against the Farmers' Alliance Exchange of South Carolina, Limited, and others. Decree for defendants, and plaintiff appeals. Affirmed.

See 51 S. E. 442.

The following is the opinion of the court below:

"At a meeting of the trustee stockholders of the Farmers' Alliance Exchange, held on the 29th day of October, 1902, a resolution was duly passed: 'That the State Exchange is hereby dissolved, and the directors are instructed to pay out the funds to the contributors through the county and subtrustee stockholders, as provided by the charter, as soon as practicable.' Article 14 of the plan of the Alliance Exchange provides: 'Whenever this corporation may be dissolved, either by limitation of its charter or from any other cause, the stock shall be returned through the county and subtrustee stockholders to the original contributors.' Under this authority, the board of directors were winding up the affairs of the corporation and preparing to return the stock, or a pro rata thereof, to those entitled thereto. In March, 1903, this action was brought, whereby it was sought to have the court take charge of and wind up the affairs of the Alliance Exchange and appoint a receiver as an aid thereto. It is not alleged or claimed by the plaintiff that the Alliance Exchange is insolvent. On the contrary, the evidence shows that it owes but little, if anything. It is not only solvent, but has about \$17,000 to be returned to its stockholders. The question for me to determine is whether the court should take the liquidation of the Alliance Exchange out of the hands of the board of directors, where the stockholders and plan of organization have placed it, and itself, through the aid of a receiver, wind up its affairs. To justify the court in taking this course the necessity therefore should be very clear. 'A court of equity is disinclined to take the control and management of the affairs of a corporation out of the hands of its officers and directors and substitute its receiver therefor. Nor are mere irregularities in the management of a corporation, without fraud committed or intended, sufficient for the appointment of a receiver, courts of equity being very reluctant to appoint receivers for corporations, because such appointment is a practical displacement of the boards of directors and the lawfully constituted corporate authorities.' 23 Enc. Law, 1021-23. The burden is upon the plaintiff to make this necessity appear. The danger of loss of the funds of the Alliance Exchange or serious impairment thereof is alleged in the complaint as one of the grounds for the court to take charge of the same. The plaintiff charges that the different boards of directors of the exchange for many

years failed to use the funds intrusted to them in the manner prescribed by the charter and plan of organization, which resulted in loss to the stockholders. The corporation was organized in the year 1889, and of the capital stock there was paid in the sum of \$23,395.35. The funds now in hand amount to \$16,465.65, with some interest thereon. It is evident, therefore, that there has been a diminution of the original fund.

"But how did it occur? The charter is very broad, but the main business engaged in by the Alliance Exchange was that of conducting an agency for the purchase and sale of supplies for the benefit of the Farmers' Alliance. This business was certainly authorized by the charter and plan of the exchange. M. L. Donaldson was the first manager of the agency, which position he held until the 1st day of January, 1892. The testimony shows that the business was not successful under his management, and resulted in a loss to the Alliance Exchange of over \$4,000. D. P. Duncan was his successor, and held the position of manager from 1892 until 1900, and his management resulted in a loss to the exchange of \$2,600. These losses resulted from the conduct of business authorized by the charter and plan of organization through the regular agents of the corporation. These agents were acting within the scope of their authority and the corporation is bound by their acts. There is no charge in the complaint that they were guilty of any fraud or mismanagement for which they should be held liable to the exchange. Duncan is not made a party to the suit and Donaldson is made a party as a creditor; the complaint alleging that the Alliance Exchange is indebted to him. The testimony satisfies me that the diminution of the capital stock was the result of unsuccessfully conducting a business authorized by the charter and plan. The corporation and its stockholders must therefore bear the loss. It is also charged by the plaintiff that the funds of the exchange have been used by the directors for the purpose of reorganizing suspended alliances and paying salaries and expenses of an organizer of suballiances, and for the purpose of paying the salaries of managers and officers of the exchange and for other unwarranted uses and purposes. There is no proof of these charges; but, on the contrary, the proof is the other way. It is also charged by the plaintiff that the board of directors has failed and refused to pay many just claims against the exchange, thus subjecting the funds of the corporation to danger and impairment in paying the costs of litigating said claims. There is no proof of this. The testimony satisfies me that the exchange owes practically nothing. The only debts hinted at in the testimony are the claims of M. L. Donaldson and J. C. Coit, which are disputed by the board of directors, and neither of these gentlemen have testified in

this case as to any debts. But even if they have valid claims against the exchange, they can sue the corporation. This action is brought for the benefit of stockholders and not creditors. That there is no danger here is conclusively shown by the fact that notwithstanding an order has been passed in this case allowing creditors to prove their claims, none have been established. It is also charged by the plaintiff that repeated efforts have been made by the stockholders of the exchange to have the directors carry out the purposes of the exchange or to wind up the corporation. The proof is that the directors have always obeyed the instructions of the stockholders and were promptly proceeding to wind up the affairs of the exchange under the resolution of the stockholders, till their efforts were arrested by the filing of this suit. It is further charged by the plaintiff that many of the suballiances owning stock in the exchange, have become inoperative and their members become scattered, and it is impossible to have a majority of the stock represented at any meeting of the stockholders. The testimony shows that about 90 per cent. of the stock was represented at the meeting of stockholders on October 29, 1902, which passed the resolution to go into liquidation. The vote was \$14,827 of the stock for the resolution and \$4,337 against it. It is further charged by the plaintiff that the board of directors own, manage, or control the majority of the stock of the exchange represented by the active stockholders, and are thereby enabled to control the action of the corporation. Of this charge there is no evidence whatever. I do not think the board of directors are trying to control the stockholders to the injury of the minority stockholders.

"It is further charged by the plaintiff that the board of directors had in the year 1900 on deposit in the Palmetto Bank & Trust Company about \$20,000, and that they invested the same in a personal loan, and that no part of the same is being used for the charter purposes of the corporation. The history of this fund is that in the year 1893, the agency business of the exchange not being successful, the funds of the same were invested in stock in the Farmers' & Mechanics' Bank and used in a banking business. This was expressly authorized by the stockholders and has been acquiesced in by them for over 10 years, and I do not think at this late day can be complained of by dissatisfied stockholders. It was authorized and ratified and acquiesced in them. 'An application for a receiver is not entitled to favorable consideration when the plaintiff has lain for a long period of years and quietly acquiesced in a condition of affairs which he seeks to change by obtaining a receiver.' High on Receivers, 14. This was done by a previous board of directors, and even if unauthorized would furnish no ground for taking the affairs of the corporation out of the

hands of the present board and appointing a receiver. 'A remote or past danger will not suffice as a ground of relief, but there must be a well-grounded apprehension of immediate injury. And where the wrong complained of occurred, if at all, several years before the application for the relief, and so long since as to afford no ground for apprehension of impending danger, and no act is alleged as being now threatened, a receiver will not be allowed.' High, 13, 14. That a corporation has lost the greater part of its property and permanently abandoned its business is not alone ground for the appointment of a receiver for its remaining assets on the application of minority stockholders. It must be shown in addition that its officers have been guilty of such mismanagement of its affairs as renders a receivership necessary to preserve the existing corporate property. *Clark v. Linseed Oil Company*, 105 Fed. 787, 45 C. C. A. 53; 23 Enc. Law, 1022. Nearly all of the matters complained of by the plaintiff in this case happened long ago and under the management of previous boards. The board of directors in 1900 found the funds of the exchange invested in stock of the Farmers' & Mechanics' Bank. The dividends received on this stock were not satisfactory, and a sale of the stock was made to J. P. Matthews at par, less \$1,850, the amount of an overdraft made by the agent of the corporation, D. P. Duncan. The overdraft was for \$2,600, but \$750 of the amount was paid from the fund realized from sale of evidences of indebtedness. The note of the said J. P. Matthews was taken for said stock for \$16,465.65 and secured by a deposit of \$20,000 of the capital stock of said bank. In 1902, the Palmetto Bank & Trust Company bought the business and property of the Farmers' & Mechanics' Bank, and other notes secured by stock of the Palmetto Bank & Trust Company were given by J. P. Matthews and indorsed by Matthews and Bauknight. The fund is now in this shape and amply secured.

"Do these transactions justify the appointment of a receiver? I do not think so. Much has said about the directors acting outside of the charter and plan of organization. The charter, after enumerating many things which the exchange could do, uses these words: 'And to conduct all other enterprises that may be necessary and desirable to their profit and benefit.' This is broad enough to cover all transactions complained of. The plan of the organization provides that the 'capital stock shall be a sacred trust fund to be used only in the purchase of goods.' Ever since the exchange ceased to purchase goods the different boards of directors have endeavored to preserve the fund and have done so. The board, in putting the fund in its present shape, used good judgment, and did an act resulting in a benefit to the stockholders. Complaint has been made against them for paying the overdraft of the agent of the corporation. There is no proof before me

that this overdraft was for obligations for which the corporation was not liable. The interest on the fund since the change of investment amounts to much more than the overdraft. There is no proof that this interest has been wasted or illegally used. In addition to this, the stockholders have acquiesced in this change of investment ever since it was made, and with full knowledge thereof have in meeting assembled practically endorsed the action of the directors by directing them to return the fund to the original contributors. The fund is practically in money, for it can be converted into money on short notice. The case of *Matthews v. Bank*, 60 S. C. 183, 38 S. E. 437, has no application here. There the stockholders at a regular meeting authorized the directors to pay out its assets to the stockholders. They paid out a part of the assets to the stockholders and then commenced a banking business, lending money to themselves and others, and losing assets by bad management. The proof in this case shows no such state of facts, but shows that as soon as the directors were directed by the resolution of the stockholders to do so, they proceeded to wind up the affairs of the corporation and to obey the resolution. In the recent case of *Klugh v. Coronaca Milling Co.*, 68 S. C. 100, 44 S. E. 566, it was held that minority stockholders, seeking to wind up the affairs of a corporation for negligence or mismanagement on the part of its officers or board of directors, must show on the part of the managers (1) fraudulent acts; (2) ultra vires acts; (3) negligence of corporate directors. The testimony fails to convince me that the present or any other board of directors of the exchange have been guilty of fraudulent acts, but does satisfy me that they have acted in good faith towards the stockholders, and nearly always under their instructions and with their approval. I see no such ultra vires acts as justify putting the exchange in the hands of a receiver. I have already discussed this question. Especially is this true at this late day. In the case of *Johnstone v. Railroad Company*, 39 S. C. 55, 17 S. E. 512, the court uses this language: 'As the complaint shows that this lease was entered into as far back as 1886, about five years before this action was commenced, and as it does not show that any dissatisfaction even has heretofore been expressed therewith either by the directors or stockholders, it is very clear that even if the lease was made without authority originally, yet it can afford no grounds for this action brought by two of the stockholders.' See, also, *Johnson v. Rock Hill*, 57 S. C. 381, 35 S. E. 568.

"Is there negligence on the part of the corporate directors justifying the appointment of a receiver? I think not. The investment made by the board of directors shows good management and not negligence. The fund was put out at interest and abundantly secured and can be converted into

cash at any time. There is no danger to the fund. As to any accounting, the directors have accounted in this case and have for distribution the funds which came into their hands. The case as I see it, is about this: The directors have on hand about \$17,000 belonging to the original contributors, and the question is, shall the court take charge of it and administer it, or permit the directors to return it under the resolution of the stockholders and plan of the organization? It is said the plan is impracticable. It is the corporation's own plan adopted by all sub-alliances. I do not regard it any more difficult than for the court to undertake to distribute the fund, and it is certainly much cheaper. The plaintiff has failed to make such a showing as justifies taking the affairs out of the hands of the directors, who are charged with the liquidation thereof, and entailing upon the fund the expenses of a receivership and the heavy costs of administering the affairs of the corporation by the court. The action having failed in its purpose, it follows that the complaint should be dismissed.

"It is therefore ordered and adjudged, that the application to the court to take charge of the affairs of the Alliance Exchange and appoint a receiver therefor be denied, and the complaint dismissed, and that the plaintiff pay the costs of this action."

James S. Verner and Bellinger, Townsend, Townsend & Haskell, for appellant. Lyles & McMahan and Hunt, Hunt & Hunter, for respondents.

POPE, C. J. This court is fully satisfied with the reasoning and conclusions of the circuit judge.

The judgment of the circuit court is affirmed.

WOODS, J., did not sit in this case because disqualified.

(73 S. C. 123)

THOMASON v. THOMASON.

(Supreme Court of South Carolina. Dec. 15, 1905.)

DIVORCE—INJUNCTION—DISPOSAL OF PROPERTY.

Pending a suit for alimony, the circuit court issued an injunction restraining the husband from disposing of certain funds. Held, that an order modifying the injunction so as to pay half of the fund to the husband, and to invest the balance in certain lands in the name of the husband, and to enjoin him from transferring the same, sufficiently protected the wife's rights.

Appeal from Common Pleas Circuit Court of Spartanburg County; D. A. Townsend, Judge.

Action by Lillie Thomason against Claude Thomason. From an order modifying an injunction restraining defendant from receiving certain funds, plaintiff appeals. Affirmed.

Evans & Finley and Sanders & De Pass, for appellant. Stanyarne Wilson, for respondent.

POPE, C. J. An order was made on the ex parte application of the plaintiff whereby his honor, Judge D. A. Townsend, enjoined the defendant, Claude Thomason, from receiving the sum of \$4,200 until the further order of the court. This sum was the proceeds of defendant's judgment against the Southern Railway Company on account of injury received by him from said railway. The ground of the plaintiff's application for the injunction prayed for was the claim of plaintiff for alimony after charging her husband with desertion, etc. Subsequently, after due notice, the defendant moved for a dissolution of the injunction already granted. Upon due consideration, his honor, Judge Townsend, ordered a modification of his injunction by allowing the defendant to receive the sum of about \$2,181, but restraining the defendant, who had suggested his willingness that so much of his money so received from the Southern Railway Company as was necessary to pay for the tract of land, containing 138½ acres, near Crawley station, in said county of Spartanburg, in this state, should be held by the clerk of court and so invested, from transferring said tract of land until the further order of this court. From this modification of said original order of injunction of Judge Townsend, the plaintiff has appealed to this court.

After careful consideration, the court is of the opinion that the order of Judge Townsend should be affirmed, as it seems to fully protect whatever right the plaintiff may establish under the allegations of her complaint. Inasmuch as the cause is yet to be heard upon its merits, we do not deem it necessary or proper to discuss the testimony submitted on the hearing before Judge Townsend. The order of Judge Townsend restrains the defendant from transferring the said tract of land until the further order of the court. We construe this as intending also that the defendant shall not mortgage or incumber the same until the further order of the court.

It is the judgment of this court that the order appealed from be, and the same is, affirmed.

(73 S. C. 111)

JARO v. HOLSTEIN.

(Supreme Court of South Carolina. Dec. 2, 1905.)

1. PARTIES—INTOXICATING LIQUORS—WRONGFUL SEIZURE—ACTION AGAINST CONSTABLE—STATE AS PARTY.

In an action against a state constable in claim and delivery for mules and wagon seized by him because hauling contraband liquor, the state is not a necessary party.

2. EVIDENCE—RES GESTÆ.

In claim and delivery for mules and wagon seized by a state constable in hauling liquors,

a bill by a wholesale liquor dealer, purporting to show that the liquor was bought for personal use, is admissible as part of the *res gestæ*.

2. INTOXICATING LIQUORS—TRANSPORTATION IN STATE—SEIZURE.

Where liquor is bought in another state and transported from the place of purchase to be delivered to a party within the state by a private person, with the knowledge that it will be used for illicit traffic, it may be seized by the state constable while in the state in the possession of the party carrying it.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 868.]

Appeal from Common Pleas Circuit Court of Abbeville County; Ernest Moore, Special Judge.

Action by Martin G. Jaro against J. C. Holstein. Judgment for plaintiff. Defendant appeals. Reversed.

Wm. N. Graydon, for appellant. Wm. P. Greene, for respondent.

JONES, J. In this action of claim and delivery the plaintiff recovered judgment for the possession of two mules and a wagon, and \$35 damages. The appeal relates mainly to the following defense set up in the defendant's answer: "That he is a state constable, whose duty it is to look after the enforcement of the dispensary law of this state. That having information that the defendant was violating the dispensary law of the state, by hauling and handling contraband liquor both in the day and night time, this defendant was on the lookout for plaintiff, and on the night of 18th of August, 1904, near Clark's Hill, in Edgefield county, in the said state of South Carolina, this defendant found the said Martin G. Jaro with three gallons of contraband liquor in a wagon, pulled by two mules, and under and by virtue of the laws of this state this defendant seized said whisky and the wagon and team so unlawfully engaged, and reported the same to the state authorities, had the same appraised and advertised, and was preparing to carry out the law, when they were taken from this defendant's possession by the proceedings herein." The circuit judge struck out of the answer as irrelevant the words: "That having information that the plaintiff was violating the dispensary law of this state by hauling and handling contraband liquor, both in the day and night time." The appellant very properly made no effort in argument to sustain the exception as to this order. The allegation was clearly irrelevant. The issue was whether plaintiff was actually hauling contraband liquor, so as to forfeit the mules and wagon—not whether defendant had information that he was doing so.

The defendant's next proposition that the state was a necessary party has been settled against his view by a number of cases. *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; *Pennoyer v. McConaughy*, 140 U. S. 20, 11 Sup. Ct. 699, 35

L. Ed. 363. The bill made out by the wholesale dealers from whom the liquor was purchased, purporting to show that it was bought for the personal use of the individuals therein mentioned, was admissible in evidence for what it was worth. "A memorandum made at the time of negotiating a verbal contract and relating to its terms may be admitted as *pars rei gestæ*." 24 Am. & E. Ency. Law, 688; 1 Elliott on Evidence, §§ 556 and 537.

All the other nine exceptions relating to the admissibility of evidence and the charge to the jury may be disposed of by considering the fourth and ninth exceptions, which are as follows: "(4) Because his honor erred in refusing to allow defendant's attorney to ask the plaintiff, Jaro, when he was on the stand, if he did not know that the man Stone, at Parksville, was recognized in the community as a liquor seller, and in ruling and holding that it made no difference whether the liquor was intended for illegal sale or not, and in further holding that the fact of it being purchased for the purpose of illegal resale could not make any difference, whereas it is respectfully submitted that if a party brings liquor into the state, knowing that it is intended for an illegal purpose, then he cannot protect himself on the ground that he is engaged in interstate commerce, and his honor erred in holding to the contrary.

* * * (9) Because his honor erred in charging the jury, at the request of the plaintiff, the following proposition: '(2) That a party has a right to buy liquors outside of the state of South Carolina and transport them to any point within the state of South Carolina, and if he buys them and while they are being transported to their destination in the state of South Carolina, even though such liquors are intended for an unlawful use, they cannot be seized until they reach their destination, neither has an officer of the state the right to seize any conveyance, horses, mules, or harness accompanying the same before they reach their destination.' It is submitted that said charge is erroneous, for the reason that if a party intends an illegal use of whisky, he is *particeps criminis*, and is not entitled to the protection of the law, which only applies to liquors brought into the state for a legal use."

It is contended that the ruling and charge of the court is sustained by the cases of *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1068; *State v. Holleyman*, 53 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567; *Smith v. Lafar*, 67 S. C. 493, 46 S. E. 332; *State v. Moody*, 70 S. C. 56, 49 S. E. 8. In the case of *Rhodes v. Iowa*, supra, there was a shipment of intoxicating liquors into Iowa from another State, and the agent of the railroad carrier in Iowa, when the merchandise reached its destination, moved the package from the car in which it had been transported to the freight depot, preparatory to delivery to the consignee. It was claimed that this removal by the carrier's agent was

in violation of the Iowa statute, on the ground that, under the Wilson act (Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313), the police power of the state operated upon the property the moment it passed the boundary line of the state. The court held that the subject of any interstate shipment is protected by the interstate commerce power until such shipment is consummated by the arrival of the goods at their destination and their delivery to the consignee. But it should be noted that there was no suggestion in that case that the consignee ordered the liquors for any unlawful purpose and that the carrier was aiding and abetting in the attempt to violate the state law. The case of *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, upholds the right of a citizen of South Carolina to order from another state for his personal use intoxicating liquors to be delivered in South Carolina. All the decisions of the United States Supreme Court construing the Wilson act subject intoxicating liquors to the police control of a state after complete delivery to the purchaser or consignee; but it has not been held, so far as we can ascertain, that the police power of a state is powerless to reach the case of a carrier, who is also the purchaser of intoxicating liquors for himself and others, and is transporting the same with knowledge that such liquors are intended for illicit sale. The case of *State v. Holleyman* holds that intoxicating liquors purchased in another state for the use of the purchaser himself, and transported by him in his own private conveyance across the state line towards his home, have not arrived within the state, within the meaning of the Wilson act of Congress, so as to be contraband, while in the course of transportation between the state boundary and the home of the purchaser. The majority of the Supreme Court, in banc, held that such a transportation was within the protection of interstate commerce; but the decision does not go to the extent of holding that a party in actual possession of intoxicating liquors bought for himself and others, and procured for illicit traffic, is beyond the police power of a state, merely because such liquors are in course of transportation by the purchaser in his own private vehicle from a point without, to a point within the state. The case of *Smith v. Lafar* merely decides that liquors shipped from one state into another by express are in transit while in possession of the express company, and an action lies against a dispensary constable, individually, for willful and malicious seizure of liquor in transit, shipped for personal use. In that case, the court used the following language: "Liquor purchased in another state and shipped to the purchaser in this state is not contraband, being protected as an article of interstate commerce until it is delivered to the purchaser. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1068; *State v. Holleyman*, 55

S. C. 244, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567. The fact that the purchaser to whom it is consigned is engaged in the illicit sale of liquor and purchases it for the purpose of resale cannot make any difference. The liquor is none the less an article of interstate commerce, and cannot be lawfully seized until delivered to the consignee. This language, however, must be construed in the lights of the facts of that case, as should be done in every case; otherwise the general language of the court may lead to inferences and conclusions not intended by the court or warranted by the particular case. That case involved an interstate shipment founded on an interstate contract whereby the duty of the carrier required a delivery to the consignee at the termination of the shipment. Manifestly interstate commerce protected the liquor until delivery to the consignee. The mere fact that the consignee intended it for illicit sale, of course, could not affect the carrier's duty to deliver in pursuance of the interstate contract. What would be the law if the carrier was aiding and abetting the illicit traffic by making purchases and transporting liquor for such purposes, is a question not involved and not considered in *Smith v. Lafar*.

In the present case, it appears that the plaintiff, whose property was seized, was both purchaser and carrier, and the case sought to be submitted to the jury in justification of the seizure was that the carrier, with knowledge of the purpose to sell the liquor unlawfully, was by the act of transportation and purchase aiding and abetting in the attempt to violate the state law. The case of *State v. Moody* does not sustain the ruling of the circuit court, but, on the contrary, is in conflict therewith. In that case intoxicating liquors had been purchased by the defendants for themselves and others at Dockery's distillery, in North Carolina, and were being transported through Marlboro county for delivery to parties living in Darlington county. They were arrested in Marlboro county while engaged in transporting said liquors, and were indicted for such offense. The judge charged the jury, in substance, that, while one may lawfully transport liquor into this state for his own and another's personal use, yet that, if it was being transported for an unlawful purpose, it was liable to seizure and the party liable to arrest. The above charge was approved by this court. In determining the question whether a particular state statute is invalid as an attempted exercise of police power because it conflicts with interstate commerce, it must be remembered that the United States Supreme Court has announced the rule that state regulations, enacted in the exercise of the police power, are not void unless they directly interfere with or burden interstate commerce. Numerous cases may be cited to show that regulations may be valid notwithstanding they remotely or indirectly, or for

a limited time or to a limited extent, affect interstate commerce. Examples may be found in the case of *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166, which upheld a state statute making it a misdemeanor to run a freight train on the Sabbath, as applied to a freight train engaged in interstate commerce; in the case of *Lake Shore, etc., R. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, which upheld the statute of Ohio requiring regular passenger trains within that state to make daily certain stops each way at towns of over 3,000 inhabitants, as applied to interstate passenger trains; in the recent case of *Pabst Brewing Company v. Crenshaw*, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. Ed. 925, which upheld a statute of Missouri subjecting intoxicating liquors, arriving in the state, to inspection regulations, as no interference with interstate commerce because it operated to deter shipments into the state.

The prime object of the federal commerce power is to protect the freedom of legitimate trade among the states. This great power is acknowledged to be paramount as to all matters not reserved to and inherent in the police power of the states, but it ought never to be so extended as to become an aid and shield for unlawful traffic. The police law of the state, which is designed to uproot illicit traffic in intoxicating liquors by seizure within this state of liquors intended for such traffic, does not materially or injuriously affect legitimate interstate commerce. It leaves wholly unhampered the citizen's right to import for personal use, and not for sale, and subjects no innocent agent of interstate commerce to the penalty of law for discharging any proper duty of such agency. We think that the principle announced in *Plumley v. Mass.*, 155 U. S. 416, 15 Sup. Ct. 154, 39 L. Ed. 223, is applicable here. In that case a statute of Massachusetts designed to prevent fraud and deception in the sale of imitation butter, as applied to oleomargarine brought into Massachusetts from other states, was upheld as not in violation of interstate commerce. Undoubtedly oleomargarine was a legitimate article of interstate commerce, and under the case of *Lelsy v. Hardin*, 185 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, it would not be in violation of any valid state law to sell oleomargarine, as such, in the original package in which it was imported, as interstate commerce would protect it until sale in such package. The court, however, proceeds to show that the doctrine of *Lelsy v. Hardin* did not apply to the case then before the court, which involved the right of a state to protect the public from deception and fraud in the sale of this food product. The court said: "The Constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society, and the states are as competent to protect their people against such

offenses or wrongs as they are to protect them against crimes or wrongs of a more serious character." Upon similar grounds we think that interstate commerce will not protect intoxicating liquors imported into this state for an unlawful purpose, if the importation is in such a way as to make the carrier an aider and abettor in the scheme to violate state laws. Under these views, the ruling and charge of the court were erroneous.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(73 S. C. 109)

Ex parte WALLACE.

(Supreme Court of South Carolina. Nov. 29, 1905.)

1. APPEAL—REVIEW—FINDINGS OF FACT.

Findings of fact in a proceeding in a probate court for admeasurement of dower by the circuit court on appeal from the probate court are binding on the Supreme Court, and will be affirmed when supported by the evidence.

2. ACTIONS—ADMEASUREMENT OF DOWER—ACTION AT LAW.

A proceeding in the probate court for admeasurement of dower is an action at law.

Appeal from Common Pleas Circuit Court of Richland County; Jos. A. McCullough, Special Judge.

Action by Fannie C. Wallace against E. Barton Wallace and others. From a decree affirming a judgment of the probate court, Fannie C. Wallace appeals. Affirmed.

Lyles & McMahan and J. E. McDonald, for appellant. Allen J. Green, for respondents.

JONES, J. The plaintiff brought this action to recover dower in a certain dwelling and lot containing nine acres of land in and adjoining the city of Columbia. It was not disputed that William Wallace was once seized of the premises in question, that he was married to plaintiff in 1876, and died in 1902. It appears that on February 21, 1863, pursuant to a power of attorney to him, E. J. Arthur, as attorney in fact for William Wallace, executed a deed conveying the premises to Sarah Wallace and John Wallace in trust for the use of said William and his family during his natural life, and after his death for his children. On March 3, 1864, William Wallace, as executor of his father's will, filed his return in the probate court, showing the distribution of his father's estate under the will, by which it appears that the premises in question had at that time been substituted as a part of the trust estate settled on him under his father's will, in lieu of his note, at the appraised value of \$6,024 and \$3,981 in cash paid him, and upon his return he is credited as of the 21st of February, 1863, accordingly. There was testimony, however, that the deed was in the possession of William Wallace in 1881. This deed was not recorded until July 14, 1894.

The demand for dower is based upon the contention that this deed was delivered July 14, 1894, during coverture. The circuit court concurs with the probate court in finding as a fact that the said deed was delivered at the time it purports to have been executed. This being an action at law, the conclusion of the circuit court on a question of fact is binding on this court. It cannot be said that there was absolutely no testimony to support such finding. It must follow that the plaintiff is not entitled to dower in said premises.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(73 S. C. 82)

LUTHER et al. v. WHEELER et al.

(Supreme Court of South Carolina. Nov. 27, 1905.)

1. MUNICIPAL CORPORATIONS—POWERS—BORROWING MONEY.

Municipal corporations have no authority to borrow money, unless such authority is expressly given, or unless some duties are imposed or powers conferred on the corporations which could not be exercised at all without borrowing money.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1844.]

2. SAME—PUBLIC BUILDINGS—DEBT FOR CONSTRUCTION.

Municipal corporations may contract debts for erecting municipal buildings, to be restricted to such sums as the corporation could reasonably expect to pay out of the ordinary revenues for the fiscal year; but where a building is erected in good faith, and the expense exceeds the estimate of revenues, the indebtedness thereby incurred is valid.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1842.]

3. SAME—NOTE FOR DEBT.

Where the officers of a town of less than 1,000 inhabitants under a municipal resolution give a note for the money used in erecting a necessary public building, and the note is afterwards renewed under resolution, it is invalid; but the holder may recover of the town the amount received and used by the town as money had and received.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1844.]

4. SAME — NOTE — ESTOPPEL TO DENY VALIDITY.

Citizens and voters of a town adopted a resolution at a town meeting for the building of a town hall, and knew of the application of the town revenues in part to the building and that the money was borrowed to pay for the balance. Held, that they were not estopped from claiming that a note given for the money by the town officers was void for want of authority in the officers.

Suit for injunction by R. L. Luther and others against J. S. Wheeler and others. Decree rendered.

Bellinger & Townsend, for petitioners. Hunt, Hunt & Hunter, for respondents.

WOODS, J. The plaintiffs, as resident taxpayers of the town of Prosperity, brought this action to enjoin the defendants, as intendant and wardens constituting the town council of that town, from paying a note for

\$1,000 given to the Bank of Prosperity for money borrowed for the purpose of building a town hall, market, and guardhouse. On the application of plaintiffs' attorneys, his honor, Chief Justice Pope, granted at chambers, on August 4, 1904, a temporary injunction, and required the defendants to show cause why it should not be made permanent. The defendants appeared on August 18, 1904, in answer to the rule to show cause, and it then appearing that issues of fact were involved, H. C. Holloway, Esq., was appointed referee, "to take the testimony and report the same, together with his conclusions thereon, to the Supreme Court at its regular November term, 1904." The facts as found by the referee are substantially as follows: On March 9, 1902, after due notice given by the town council, about 65 or 70 out of the 90 or 95 registered voters of the town of Prosperity, at least one of the plaintiffs being present, met at the High School building for the purpose of nominating an intendant and wardens to serve for the ensuing year. The testimony shows after the nominations a resolution to the effect that it be "the sense of this meeting that the new council procure a lot, and erect thereon a town hall, market, and guard house," was unanimously adopted. The design and cost of the building were not considered at this meeting, and at no time was the question of borrowing money for its erection ever submitted to the citizens of the town, the newly elected council assuming entire charge of all these matters. The new council made an estimate of the income of the town for that fiscal year, and reached the conclusion that by managing economically they could pay \$150 for the lot, expend \$1,500 on the building, and still meet the ordinary current expenses of the town. On June 30, 1902, a lot for the site of the building was actually purchased at the price of \$150, council giving the note of the town for the purchase money, with interest, due in one year. Relying on their estimate, council passed an ordinance on July 5, 1902, to borrow \$1,000 from the Palmetto Bank & Trust Company, Columbia, S. C., "for the purpose of building city hall." A resolution dated July 9, 1902, and properly signed and attested by the town officials, authorized the borrowing of \$1,000 from the Palmetto Bank & Trust Company with which "to carry on the affairs of the town," the obligation to be secured by pledge of "the taxes of the town arising from the levy for the present year, or the profits derived by the town from the dispensary, or both if necessary." This resolution is not referred to in the minute book of council, but the referee found that it was the same as the ordinance mentioned as passed on July 5, 1902; and this seems correct, council explaining the apparent difference in purpose for which the money was borrowed by saying that when it was found necessary to borrow they decided to put the sum borrowed into the common treasury and pay it out as needed, whether for work on the building, or

for ordinary current expenses. On July 11, 1902, the town council negotiated the note of the town for \$1,000, payable January 10, 1903, the resolution of July 9th being attached, at the Palmetto Bank & Trust Company, and received thereon \$960. At this time the only debt outstanding against the town so far as the testimony shows was the \$150 note given for the purchase money of the lot. It is true the ordinary current expenses for the remainder of the year had to be met, but the resolution authorizing the creation of the debt specified that the money was to be used "to carry on the affairs of the town," and there is nothing to show that the bank had express notice of the original ordinance specifying that the money was to be used for the purpose of building a town hall.

The cashbook of the town shows that the total municipal income from all sources for the fiscal year beginning April 22, 1902, was \$1,832.19. The receipts up to July 11, 1902, were \$455.56, and the expenditures \$440.82, of which \$297.60 was paid out on the building and the balance on current expenses. This left available to council \$1,391.37 with which to pay the ordinary current expenses from July 11th to the end of that fiscal year, amounting to \$1,001.13, and with which to pay the balance of \$1,352.40 on the lot and building debts of \$1,650, thus showing council had fallen far short in their estimate. If the \$1,650 had not been spent on the town hall, council would have had a balance of \$687.84 on hand at the end of the fiscal year; but, instead of limiting the cost of the building and lot to \$1,650 as originally contemplated, they decided to enlarge and improve the building, and to meet the additional expense borrowed on September 8, 1902, \$600 from the Bank of Prosperity, giving therefor the note of the town, payable in one year, thus making the total indebtedness of the town for the fiscal year 1902 \$3,394.35, as against a total income of \$1,832.19. At maturity, on January 10, 1903, the \$1,000 note to the Palmetto Bank & Trust Company was taken up by the Bank of Prosperity, and a renewal note, under the seal of the town, was given by the council; the ordinance authorizing such action, which was similar to the resolution under which the original debt was incurred, being attached thereto. A like second renewal note was given at the maturity of the first, in 1904, under the authority of a similar ordinance. From this it clearly appears that this last renewal note for \$1,000 to the Bank of Prosperity, maturing January 7, 1905, payment of which is herein sought to be enjoined, evidences the same debt that was created on July 11, 1902, with the Palmetto Bank & Trust Company. Thus it will be seen that council had created a debt against the town of \$1,750, evidenced by three notes for \$150, \$1,000, and \$600, respectively, which would necessarily have to be paid by a future council, after the expiration of their term of office, and out of taxes and licenses to be levied and collected in an-

other fiscal year, and so the revenues of a future fiscal year would have to be applied to the payment of a debt contracted in a prior year. From the cashbook of the town it appears that the total income of the town, including cash on hand, from April 22, 1903, to April 26, 1904, was \$1,806.95, and the expenditures \$1,743.96, which included payment of the \$150 note for the purchase money of the lot and of the \$600 note to the Bank of Prosperity. The total income of the town from January 1, 1903, to January 1, 1904, was \$1,504.17, and from January 1, 1904, to November 1, 1904, \$1,292, showing that at no time have funds been on hand with which to pay the note for \$1,000 held by the Bank of Prosperity. At the time it was determined to erect this building, the council had no place to meet, the market was in bad condition, and the guardhouse totally inadequate; and therefore it was necessary to erect a building of some kind for municipal purposes. When completed, the town hall cost \$2,291.01, but the work appears to have been done cheaply, and the building to be quite satisfactory in every way. During the progress of the work on the building, itemized statements of the receipts and expenditures of the town, showing the amount of its indebtedness and to whom due, were published in the newspaper or posted in public places, and any other information of this kind could have been had from the clerk and treasurer. Plaintiffs acquiesced in the incurring of these debts and the building of the town hall to the extent of making no complaint until the bringing of this action. We consider first the general principles of law applicable to the case, and then the effect of the Constitution and the statute law of the state.

Municipal corporations have only such powers as are granted to them by the Constitution or by statute, either expressly or by necessary implication. The following statement of the law, taken from 1 Dillon on Municipal Corporations, § 89, is supported by practically unbroken authority: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." *State ex rel. Heise v. Town Council*, 6 Rich. Law, 404; *State ex rel. Atkins v. Maysville*, 12 S. C. 76; *Blake v. Walker*, 23 S. C. 517; *White v. Rock Hill*, 34 S. C. 242, 13 S. E. 416; *Columbia Club v. McMaster*, 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826; *Mauldin v. City Council*, 42 S. C. 293, 20 S. E. 842, 27 L. R. A. 284, 46 Am. St. Rep. 729. The power to

borrow money is not a necessary incident of municipal life, and hence does not exist unless expressly given, or unless some duties are imposed or powers conferred on the corporation which manifestly could not be exercised at all without borrowing money. The two leading cases on the subject are *Mayor of Nashville v. Ray*, 19 Wall. 468, 22 L. Ed. 164, and *Swackhamer v. Hacketts-town*, 37 N. J. Law, 191. Authorities to the same effect will be found collected in 8 *Rose's Notes*, 253; note to *Jones v. Camden* (S. C.) 51 Am. St. Rep. 828; *Wells v. Town of Salina* (N. Y.) 23 N. E. 870, 7 L. R. A. 759; *Allen v. Intendant of La Fayette* (Ala.) 8 South. 30, 9 L. R. A. 497; 1 *Dillon on Municipal Corporations*, §§ 125 (1), 507a; 20 *A. & E. Ency. Law*, 1143. The contrary view was taken in a number of the earlier cases cited in 1 *Dillon on Municipal Corporations*, § 118, and by some of the Justices of the Supreme Court of the United States, in *Nashville v. Ray*, *supra*. There is now, however, little, if any, judicial dissent from the view that municipal officers are not the general fiscal agents of the corporation, with the implied power to borrow money for corporate purposes. This conviction of the courts has been greatly strengthened by the disasters which have befallen so many communities, growing out of the negligent and fraudulent misappropriation of money borrowed by counties, cities, and towns. In *State ex rel. Atkins v. Maysville*, 12 S. C. 76, the court says: "The only point discussed at bar is the power of the town of Maysville to levy taxes. It appears that no express authority is granted for that purpose in its charter. Such power can only be implied on the ground of necessary implication. To raise such an implication, it would be necessary to hold that municipal powers cannot be effectively granted without the taxing power—a proposition that we cannot affirm. No such power of taxation can therefore be implied." The power to levy taxes is far more usual and necessary to corporate existence than the power to borrow money on the faith of taxes, and, if the former is not implied from the fact of incorporation, for a stronger reason the latter is not.

There is, however, an obvious difference between borrowing money, even for the purpose of applying it to the ordinary current expenses of the town, and contracting debts to those who are employed to do those things requisite to the conduct of the town's affairs, such as street laborers, policemen, etc., or even for the erection of buildings to be used for municipal purposes. "In the one case the application of the credit is secured to the advancement of the authorized object, while money borrowed is liable to be lost, to be squandered, or to be diverted to illegitimate purposes." 2 *Daniel on Neg. Inst.* § 1530. Under the general rule of law,

the council of the town of Prosperity could have made a debt for a town hall and guard-house to one who contracted to build it. *Neely v. Yorkville*, 10 S. C. 141; 1 *Dillon on Municipal Corporations*, § 125 (6); *Police Jury v. Britton*, 15 Wall. 586, 21 L. Ed. 254; *Mayor of Nashville v. Ray*, 19 Wall. 468, 22 L. Ed. 164; 21 *A. & E. Ency. Law*, 31; *Clalborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069; *Allen v. Intendant of La Fayette* (Ala.) 8 South. 30, 9 L. R. A. 497; *Newgass v. City of New Orleans* (La.) 7 South. 565, 21 Am. St. Rep. 368; *Clark v. City of Des Moines*, 87 Am. Dec. 423, and note. But even the power to contract debts for municipal purposes should be restricted to such debts as the council could reasonably expect, and in good faith did expect, to pay from the ordinary revenue of the town for the current municipal fiscal year. Without such a restriction, it is manifest there would be no safeguard against involving the town in overwhelming debt for municipal buildings and enterprises out of all proportion to its present or reasonably to be expected population and wealth. While this might not imply the same moral turpitude, it is as disastrous to the taxpayer as intentional misappropriation of borrowed money. Especially when any unusual enterprise is contemplated, all who deal with the municipal authorities are chargeable with knowledge that the council would have no right to involve the town in debt for its prosecution, unless, after a careful estimate, they with good reason believed there would be a surplus revenue for the current year, over all necessary current expenses, sufficient to pay the debt to be contracted for such building or other enterprise. If, however, such an estimate is made, leading to the reasonable conclusion that the anticipated revenue will be sufficient to meet the debt contemplated for the municipal building or other special enterprise as well as current charges, and accordingly the building or other enterprise is commenced, and any considerable expense incurred, and then it should turn out that the estimates of the expenses were too low, or the estimates of the revenue too high, indebtedness thereafter incurred in the prosecution of the enterprise would nevertheless be valid, because the law is not so unreasonable as to require in such circumstances the waste of the public funds which would be consequent upon the abandonment of the work in an incomplete condition. Judicial expression as to this limitation upon the power of municipal officers to contract debts in the name of the corporation, which we think should be insisted on, is not as explicit as might be desired; but this view is clearly intimated in the very strong opinion of the court, delivered by Mr. Justice Bradley, in *Nashville v. Ray*, *supra*. And the view of

Judge Dillon is that the usual grants of municipal powers contemplate that the expense of the execution of such powers shall be met year by year from revenue derived from current taxation and other ordinary sources. 1 Dillon on Municipal Corporations, § 125. The case of *Neely v. Yorkville*, supra, is not an authority to the contrary, for there one of the bonds in issue was dated February 11, 1861, and the other June 4, 1861, and both were payable January 1, 1862. Presumably, they were given in anticipation of the collection of the revenues of 1861. Certainly there is no evidence in the record that they were not so given, and the question here under discussion, as far as the reported case shows, was not made in argument and was not referred to in the opinion. But even if the general rule of law should be thought not so rigid as we have stated it, as to the circumstances under which a municipality may contract debts without special authority, as we shall hereafter see, it was made so by the Constitution of 1865.

The indorsement of a note given by a municipal corporation which has no power to borrow money, or which has not exercised such power in compliance with the conditions required by law, cannot avail to give it validity. The Bank of Prosperity, therefore, cannot stand on any higher ground than the Palmetto Bank & Trust Company. There was never any power, either real or apparent, to give the note, and being therefore void from the beginning, no force could be given it by indorsement. Even when the power to borrow money is expressly given, though the holder of the paper is not bound to see that the money is properly applied, yet he takes it subject to the risk that it has been properly and lawfully issued. The authorities to this effect are so numerous that we refer only to *Jones v. Camden*, 44 S. C. 323, 23 S. E. 141, 51 Am. St. Rep. 819; *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390. Under the principles of law to which we have adverted the conclusion cannot be avoided that the note held by the Bank of Prosperity, having been given for borrowed money, is not a valid obligation of the town. Of course, if the instrument here under consideration, in form a note, is to be regarded a bond, that would be an additional reason for holding it void; for it is not pretended there was any compliance with the constitutional conditions essential to the validity of a municipal bond issue. The question is not a practical one in this case, because the instrument is invalid, even if it be regarded as a note, since it was given for borrowed money. The court does not, however, wish to be understood as assenting to the proposition, urged by counsel for the plaintiffs, that a paper, in form a promissory note, becomes a municipal bond, merely because it has affixed the seal of the

corporation. *Bank v. Railroad Company*, 5 S. C. 156, 22 Am. Rep. 12.

Regarding the note entirely void, and therefore eliminated from the transaction, it is still to be considered whether the bank could recover the amount loaned for which the note was given, as money had and received by the town; not because it had been loaned to the town, or because its officers had borrowed it and promised to pay it, but because it was money of another used by the town for legitimate corporate purposes authorized by law. Cogent argument may be made and strong authority adduced on both sides of this question. The argument against such a recovery is stated with great force by Beasley, C. J., in *Swackhamer v. Hackettstown*, supra, and by Judge Earle, in *Wells v. Salina* (N. Y.) 23 N. E. 870, 7 L. R. A. 759. The view expressed in these and other cases is that to allow a recovery for money had and received, while denying the power to corporate officers to make a valid contract to repay borrowed money, would be (1) to repudiate such a contract in the abstract while ratifying and giving it full effect in the concrete, and (2) to raise an implied contract to repay where there is no power to make an express contract. A statement of the basis of the action for money had and received, we venture to think, will show that these arguments are not sound. Express contracts and contracts implied in fact depend upon the will of the parties to be bound, indicated in the one case expressly in some form recognized by law, and in the other by circumstances from which assent may be inferred as a conclusion of fact. Quasi contracts, or contracts implied in law, are obligations imposed by law as duties, quite independent of the assent of the party held to be bound, and often in spite of his earnest dissent. In an action on an express contract, or a contract implied in fact, the measure of the recovery is ordinarily fixed by the promise. In an action depending on the obligation or duty called quasi contract, the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff. If a recovery were allowed against a municipal corporation on a note for money borrowed, the judgment must be for the amount of the note, however large, and though the money may have been squandered. But in an action against a town for money had and received, the question is not what the claimant has parted with to officers who were not authorized to take his money for the town, or what they have promised him, but how much has the town been benefited. If the money was squandered, there can be no recovery; if it was used extravagantly, for buildings or enterprises not reasonably necessary for municipal purposes, there can be no recovery beyond the actual benefit. This view, it will be seen, leaves no room to

say that a promise to pay back money is implied where no valid contract can be made, or that allowing any recovery for money had and received subjects the town to the same peril as to admit the unrestricted right of a municipal council to borrow money. The right to such a recovery is supported by the weight of authority, as will appear by reference to the following citations, though it has been denied, as we have seen, by courts whose opinions should receive great consideration. 1 Dillon on Munic. Corps. § 126, note, and sections 460-461; 20 A. & E. Ency. Law, 1158; Keener on Quasi-Contracts, 272; Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040; Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; Chelsea Savings Bank v. City of Ironwood, 130 Fed. 410, 66 C. C. A. 230; Allen v. Intendant of La Fayette (Ala.) 8 South. 30, 9 L. R. A. 497. The view of the court expressed in Bank v. State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865, is not in the least inconsistent with this view. The distinction between that case and this is made obvious by these sentences of the opinion of the court, delivered by Mr. Justice Jones: "Nor do we think this action can be sustained, as contended by the respondent, as an action for money had and received. The state has only received that to which it was entitled, viz., money for the hire of convicts, received from the hands of the superintendent of the penitentiary. Plaintiff has paid no money to the state by mistake; for in the eye of the law plaintiff dealt with Neal, not with the state, and received from Neal all that it contracted for, the liability of the makers of the notes, supported by Neal's indorsement." There the state was not unjustly enriched, but received only its due, and there was no legal or equitable principle upon which it could be required to refund to a mere volunteer.

In this case these important facts are established: (1) The money was expended for a municipal purpose impliedly authorized by the charter, because reasonably necessary for the proper conduct of municipal affairs; for we suppose it will not be disputed that both under the general principles of law and the special provisions of the statute, the expenditure of public funds for the erection of a guardhouse, council chamber, and town hall would be sustained; (2) the town received full benefit for the entire amount expended; (3) the council had reason to believe, and did believe, when the building of the town hall was commenced and until they had expended on it about \$300, that the entire debt of \$1,000 contemplated and afterwards contracted to the Palmetto Bank & Trust Company could and would be repaid from the regular income of the town for the current fiscal year, and if the bank had exhausted all means of inquiry into the town's affairs, as it was its duty to do, noth-

ing would have been discovered beyond these facts. If the general principles of law above stated are applied to these facts, the conclusion is obvious that the Bank of Prosperity as the equitable assignee of the Palmetto Bank & Trust Company could recover against the town the sum advanced as money had and received by the town for its benefit. But it remains to consider to what extent, if at all, these general rules have been modified by the Constitution and the statutes of this state—whether these general rules have been so altered that the town of Prosperity is under no legal obligation to refund the amount received from the Palmetto Bank & Trust Company. For it is to be observed that while a recovery for money had and received does not require either an express contract or a contract implied in fact to support it, yet it does require for its support a debt imposed by law, and where the Constitution or statute law of the state forbids, not only the borrowing of money, but the incurring of any debt, or that a debt, to be valid, must be created under certain restrictions, as, for instance, that it must have the sanction of taxpayers or voters expressed at an election, then there can be no recovery for money had and received. In its last analysis, the action for money had and received stands on the judicial conception that the use by one person of the money of another creates a debt; but this judicial conception manifestly could have no application to municipal corporations in the face of positive constitutional or statute law that no debt shall be contracted by a municipality or that a debt shall be contracted only in a certain manner.

Warned by the disasters resulting from the abuse of public credit, the constitutional convention of 1895 endeavored to protect it by making the sanction of a referendum in almost all cases necessary to the validity of public debt. Even the General Assembly was forbidden to increase the debt of the state, except by the affirmative vote of two-thirds of the qualified electors voting at a popular election, Const. 1895, art. 10, § 11. As to municipal corporations, the Constitution provides: "The General Assembly shall provide by general laws for the organization and classification of municipal corporations. The powers of each class shall be defined so that no such corporation shall have any powers or be subject to any restrictions other than all corporations of the same class." Const. art. 8, § 1. The General Assembly, in pursuance of this requirement, divided towns and cities into classes according to population. The town of Prosperity falls in the class of those containing less than 1,000 inhabitants. The Constitution further provides, in section 3, art. 8: "The General Assembly shall restrict the powers of cities and towns to levy taxes and assessments, to borrow money and to contract debts, and no tax or assessment shall be levied or debt

contracted except in pursuance of law, for public purposes specified by law." For the creation of a debt of any description, therefore, it is necessary for municipal authorities to find either legislative authority or warrant in some other provision of the Constitution itself. In the statutory provision relating to towns of less than 1,000 inhabitants, to be found in article 1, c. 49, of the Civil Code of 1902, which may be said to constitute the charter of such towns, no authority is given to contract a debt of any description whatever, not even to anticipate in any way the collection of taxes for the current fiscal year. The fact that by section 1989 of the Civil Code of 1902, relating to towns of over 1,000 inhabitants, it is provided: "In cities of over 5,000 inhabitants, that, in anticipation of the collection of taxes in any fiscal year, said city council may from time to time, as occasion may require, borrow money for corporate purposes and pledge the taxes levied, or to be levied, in said year for said purposes for the payment of the money so borrowed and interest thereon"—clearly implies that the General Assembly did not intend to confer upon towns of less than 1,000 inhabitants the power to borrow money for corporate purposes, and pledge the taxes of the current year for its payment. But, as we have seen, the power to borrow money is a much larger and more dangerous power than the power to contract a debt, either for labor or supplies, or for money had and received for the benefit of the town. In the one case, the lender has only to show that the proper corporate officer received the money, and his right to recover does not in the least depend upon the benefit accruing by the actual application of the money; in the other, he who furnishes money can only recover for a debt arising from the actual benefit or enrichment of the town at his expense. The exclusion by omission, therefore, of towns of less than 1,000 inhabitants from the provision allowing towns to borrow money in anticipation of the collection of taxes does not necessarily imply an intention to deny such towns the power to create a debt of any kind in anticipation of the collection of current taxes.

While, as already said, there is no warrant in any act of the General Assembly for the creation of any debt by towns of less than 1,000 inhabitants, the following constitutional provision, attached as a proviso to the section prohibiting the creation of bonded indebtedness, except upon certain conditions, applies to all municipal corporations, and we think does warrant the creation and payment of a debt, like that now under consideration, by any municipality organized under the laws of this state, including those of less than 1,000 inhabitants: " * * * This section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the

year when such certificates are issued and payable out of such taxes." This section of the Constitution was framed and adopted in the light of the law of municipal corporations to which we have referred as generally recognized in this country. The well-established rule of law denying the right of municipal corporations to borrow money without special authority conferred expressly, or by necessary implication, was well known when the Constitution was adopted, as one of the greatest safeguards against waste and corruption. If it had been intended to change this rule, there would have been an express conferring, or, at least, an express recognition of the power to borrow money. Hence we think it would be going much too far to hold that this section gives by implication the power to borrow money on certificates of indebtedness, which would of course be binding on the corporation as soon as the money passed into the public treasury, without respect to whether it should thereafter be used for corporate purposes or not. But this provision of the Constitution must be held to have been made in view also of the other established rule to which we have adverted, that the proper municipal officers may contract debts for services actually rendered and money had and received to the actual benefit of the town in the prosecution of authorized municipal work, in anticipation of the taxes or other revenue, and with the reasonable expectation at the time the work was commenced and expenses incurred, that payment could and would be made from such expected revenue of the current year. When, therefore, the convention recognized the authority of municipalities to contract debts and issue certificates in anticipation of the expected collection of taxes, it plainly meant those debts which the existing law recognized as being within their province and authority to contract, and, as we have seen, a debt for money had and received for the benefit of the town, used in an enterprise authorized by law reasonably necessary for corporate purposes, the town receiving full value and the council believing and having reason to believe it would be paid from the revenue of the current year, was within the province and authority of the officers of the corporation. It is true, section 3, art. 8, of the Constitution, provides that no debt shall be "contracted except in pursuance of law, for public purposes specified by law." But this section is necessarily modified by section 7, which follows, and allows indebtedness to be incurred in anticipation of the collection of taxes. There is in this last section no specification of any particular purposes for which such debts may be contracted, and the meaning, therefore, manifestly is, they may be contracted for any legitimate corporate purpose. This was the character of the debt to the Bank of Prosperity, and its payment is authorized by the general rules of law, and is not only not forbidden by constitutional or

statute law, but on the contrary, the authority to create such a debt is strongly implied in the Constitution itself. The debt being valid at its creation, its validity is not affected by the fact that it turned out that the reasonable expectations of the council as to the ability to pay from anticipated revenues were not realized, or even that the revenues received for the current year were exhausted by the application of them to other purposes.

It is true, the referee finds that on July 11, 1902, when the money was actually received from the Palmetto Bank & Trust Company, in expecting to repay it from the revenue of the current fiscal year, the council did not take into the account the ordinary current expenses for the remainder of the year; but at the beginning of the fiscal year they did take all items into the account, and reached the conclusion that the money to be expended on the town hall could be refunded in addition to providing for the ordinary current revenues, and when the money was received from the bank had actually expended on the building about \$300. To prosecute the work thus in good faith begun, rather than incur the waste of abandoning it, stood on nearly as high ground of necessity as the ordinary expenses of the town.

The character of the debt was not changed by the several renewals of the note; for it was not created by the original note, which was given entirely without authority, and it therefore could not be changed in character by any change of the note. The note was of no force as against the town, but as between the Palmetto Bank & Trust Company and the Bank of Prosperity it should be recognized as the symbol of the debt, and hence its indorsement to the Bank of Prosperity will be recognized as a transfer of the debt. The note being without validity, and not representing the debt as between the town and the bank, the rate of interest expressed in it is of no consequence. The real debt is \$900, the amount actually received and used, with interest from July 11, 1902, at the rate of 7 per cent. per annum, less any sums paid by the town thereon in the form of discount, interest, or otherwise.

Under the views herein expressed, it is not necessary to discuss the question of acquiescence; but it may be well to say that there was no evidence of participation or active assent by the plaintiffs to the borrowing of money or the incurring of the debt, and hence there could be no estoppel. *Milster v. Spartanburg*, 68 S. C. 34, 46 S. E. 539.

The judgment of this court is that the town council of Prosperity be enjoined from paying more than the real debt as above stated. As the practical result is mainly in favor of the defendants, the plaintiffs must be charged with the costs of the cause.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(124 Ga. 656)

JOHNSON et al. v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)
RIOT—EVIDENCE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

There was no error in the rulings on the admission of evidence. The alleged newly discovered evidence was impeaching in its character. The evidence authorized the verdict, and the discretion of the trial judge in overruling the motion for a new trial will not be interfered with. (Syllabus by the Court.)

Error from City Court of Wrightsville; Wm. Faircloth, Judge.

J. D. Johnson and others were convicted of riot, and bring error. Affirmed.

E. L. Stephens, for plaintiff in error. B. B. Blount, for the State.

COBB, P. J. Johnson and two others were arraigned upon an accusation charging them with the offense of riot. The act of riot alleged in the accusation was surrounding the house of the prosecutor, throwing walnuts against the house, firing off pistols, and shouting to the occupants that, if they did not like it, to come out and show themselves. The jury returned a verdict of guilty, and the defendant assigns error upon the refusal of the judge to grant a new trial.

The court admitted evidence to the effect that at the time of the alleged riotous conduct, the wife of the prosecutor was so badly frightened that she fainted, and further admitted in evidence a sack containing rocks and walnuts shown by a witness to have been picked up about the house the morning after the alleged riot. The objection to all this evidence was that it was irrelevant. There was no merit whatever in this assignment of error. It is apparent that the evidence threw light on the conduct of the accused at the time of the alleged riot. Persons in the house claimed to have recognized the rioters through a crack in one of the windows. One ground of the motion for a new trial is alleged newly discovered evidence as to the size of this crack; it being contended that under this evidence it was impossible for the witnesses to have seen what they claimed to have seen. This evidence was impeaching in its character. The discretion of a trial judge, exercised in passing upon a motion for a new trial based upon a ground of this character, in the absence of anything indicating an abuse of such discretion, will not be interfered with. The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

Judgment affirmed. All the Justices concurring.

(124 Ga. 651)

CROSSON v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. COURTS—CITY COURT—CERTIORARI—NEW TRIAL.

The city court of Sylvester was not, by the act of August 11, 1904 (Laws 1904, p. 207),

regularly established as a constitutional city court. *White v. State*, 49 S. E. 715, 121 Ga. 592. See, however, repealing act, and that creating a new court to be known by the same name, approved August 21, 1905 (Acts 1905, pp. 868, 869). A judgment of a city court, not created under the provisions of paragraph 5, § 2, art. 6, of the Constitution, can be reviewed only by a writ of certiorari. *W. U. Tel. Co. v. Jackson*, 25 S. E. 264, 98 Ga. 212. The power to grant new trials is confined by the Constitution to the superior courts and such city courts as are therein specified. *Stewart v. State*, 25 S. E. 424, 98 Ga. 202; *Cooper v. State*, 30 S. E. 249, 103 Ga. 406; *Welborne v. State*, 40 S. E. 857, 114 Ga. 793.

2. CERTIORARI — WHEN ALLOWED — TIME OF APPLICATION.

"The fact that, in a given case tried in the city court mentioned, a motion for a new trial was made, will not cut off the movant's right to take the case up by certiorari, if he voluntarily dismisses such motion and applies for the writ of certiorari within the time prescribed by the statute." *Archie v. State*, 25 S. E. 612, 99 Ga. 23. But he cannot pursue this remedy after the expiration of 30 days from the date of the judgment rendered against him. *White v. State*, 51 S. E. 505, 123 Ga. 503. As the city court judge was without power to entertain the motion for a new trial, it was a mere nullity, and the filing thereof could not operate to extend the jurisdiction of the court over the case beyond the date of its final judgment. *White v. State*, 51 S. E. 505, 123 Ga. 503, distinguishes the case of *Roach v. Sulter*, 54 Ga. 458.

3. SAME — DISMISSAL.

The application for the writ of certiorari having been made too late, the judgment of the superior court dismissing it for that reason should not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Pete Crosson, on conviction before a city court brought certiorari. From an order of the superior court dismissing the writ, he brings error. Affirmed.

J. W. Walters, Jr., and Walters & Walters, for plaintiff in error. W. E. Wooten, Sol. Gen., and J. H. Tipton, for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 254)

CITY COUNCIL OF AUGUSTA et al. v. CLARK & CO.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. LICENSES — MUNICIPALITIES — CLASSIFICATION — REVIEW BY COURT.

When a city charter authorizes a municipality to require by ordinance a license tax of persons engaged in any occupation, trade, or business carried on within the corporate limits of the city, the municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxes in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, unless it manifestly appears that the classification is unreasonable and arbitrary.

2. SAME — ARBITRARY CLASSIFICATION.

The classification of persons lending money upon personal property or personal security in a different class from chartered banks, negotiators of loans on realty, real estate agents,

and dealers in bonds and stocks, and the imposition of a tax differing in amount upon such money lenders from that imposed upon such other classes, is not so wanting in reason that the ordinance providing for such classification will be declared void as being entirely arbitrary.

3. USURY — PENALTY — POWER OF MUNICIPALITY TO IMPOSE.

In the absence of express charter power, the authorities of a municipality have no authority to impose a penalty upon one charging usury.

4. LICENSES — ORDINANCE — MONEY LENDERS.

A tax ordinance imposing a license tax on money lenders, and providing that the license shall be void whenever the usury laws of the state shall be violated, is invalid so far as the forfeiture is concerned, but valid as to the tax upon the business.

5. SAME — BOND — VALIDITY OF REQUIREMENT.

A tax ordinance fixing the amount of tax to be levied upon an occupation, and requiring the person engaged in this occupation to give a bond in conformity with an act of the General Assembly, is not void as to the tax, even though that part of the ordinance requiring the bond may be invalid.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Clark & Co. against the city council of Augusta and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Clark & Co. filed a petition for injunction against the city council of Augusta and the sheriff of the city, containing substantially the following allegations: On December 22, 1904, the city council of Augusta adopted an ordinance levying taxes for the support of the government of the city for the year 1905, and in the ordinance a license or business tax of \$350 was imposed upon a certain class of persons, to which plaintiffs belonged; such class being described in the ordinance as follows: "Money Lender. A money lender as contemplated by this ordinance is one who carries on the business of lending his own or other peoples money, and not as a stock and bond broker, pawnbroker, chartered bank, negotiator of loans on realty, real estate agent or firm of such agents, or dealers in bonds and stocks as herein provided, but who carries on the business of lending money on personal security or personal property, other than stocks and bonds, shall also be deemed a money lender, \$350.00. Provided, this license is issued by the city and accepted by the licensee with distinct understanding and agreement that whenever the licensee in the conduct of his business shall violate the usury laws of Georgia, this license shall be thereby forfeited, and from the date of such violation it shall not be lawful for such licensee to do further business under this license, and must file a bond in conformity with state law. Money lender, agent or agency for collection of claims, or carrying on business in the city, whether office located in city or not, subject to foregoing provisions, \$350.00." It is alleged that that portion of the ordinance just quoted is void, first, because it discrimi-

nates against money lenders of the class to which plaintiffs belong in favor of negotiators of loans on realty, who are really money lenders under another name, the license upon the latter being only \$50, and that this discrimination is in violation of that provision of the Constitution of the state which declares that all taxes shall be uniform upon the same class of citizens; second, the ordinance provides that the license shall be forfeited when one holding the same shall violate the usury laws of the state, the provision for forfeiture being void for the reason that the state statutes on the subject of usury are exhaustive in reference to penalties and forfeitures; third, the ordinance requires the applicant for the license to file a bond in conformity with the state law, and the state law referred to, being the act of August 15, 1904 (Acts 1904, p. 79), is violative of the Constitution of the state of Georgia, the provisions which it violates being those which declare that protection to person and property is the paramount duty of the government, and that no person shall be deprived of life, liberty, or property without due process of law; and that citizens of the United States residents of this state shall be declared citizens of this state, and it shall be the duty of the General Assembly to pass such laws as will protect them in the full enjoyment of their rights, privileges, and immunities of citizenship; and that laws of a general nature shall have uniform operation throughout the state, and no special law shall be passed in any case for which provision has been made by general law; and that the right of the people to be secure in their houses and persons against unreasonable searches and seizures shall not be violated, and that the act also violates that provision of the fourteenth amendment of the Constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. It is alleged that the city council of Augusta and the city sheriff, attempting to enforce the provisions of the state law and the ordinance against plaintiffs, have caused execution to be issued which has been levied upon the property of the plaintiffs, and that the sheriff will proceed to sell the same, unless steps are taken to stop the sale. It is alleged that the plaintiffs were engaged in the business of lending money in the city of Augusta when the ordinance was passed. The prayers of the petition are for injunction to restrain defendants from proceeding further with the execution, for general relief, and for process. To this petition the defendants filed a demurrer and an answer. The answer admitted the allegations so far as they related to the existence of the ordinance, but denied that the ordinance was in any way in violation of either the Constitution of

Georgia or the Constitution of the United States. It was alleged in the answer that the plaintiffs had not paid the license in accordance with the ordinance, and that they had never in any way complied with the statute referred to, and that they had never filed the bond required by the ordinance, nor in any way complied with the statute referred to in the petition. It was alleged that plaintiffs were engaged in a gross violation of the usury laws of the state; the percentage which they charged being 400 and 500 per cent. per year. The case was heard by the judge on the petition, demurrer, and answer; and an injunction was granted as prayed for in the petition. To this ruling the defendants excepted. The ordinance also levied a tax on the persons engaged in the following businesses: Banks (excepting such as are exempt by law) capital stock not exceeding \$100,000, \$50; exceeding \$100,000 paid capital, \$100; stock and bond broker, \$75; negotiator of loans on realty only, \$50; pawnbroker, \$350; real estate agent, \$25; private banks, \$350.

C. Henry Cohen, W. H. Barrett, and Wm. H. Fleming, for plaintiffs in error. Louis Brooks, Austin Branch, and Jos. Hall, for defendants in error.

COBB, P. J. 1. The charter of the city of Augusta authorizes the city council to pass an ordinance requiring any person, firm, or corporation to pay a license tax upon any occupation, trade, or business carried on within the corporate limits of the city, provided that the occupation, trade, or business is not one already taxed exclusively by the state. Acts 1896, p. 119. Under this power the city council is authorized to determine what occupations shall be made the subject of taxation. The charter does not require that the same tax shall be imposed upon every occupation. But the Constitution requires that taxation shall be uniform upon the same class of subjects. All property within the territory of a taxing power shall be taxed, and none shall be exempted, except that which the Constitution in terms authorizes the Legislature to exempt. The Constitution, however, does not require all occupations to be made the subject of taxation. Some may be taxed, and some may be left free from taxation, according to the discretion of the taxing authority. But, when a given class are subjected to an occupation tax, all of that class must pay the same tax. Civ. Code, § 5883. It will thus be seen that the Constitution recognizes the propriety of classifying subjects for taxation other than property, and leaves the matter of classification to the determination of the taxing power, whether it be the General Assembly or one of the subordinate public corporations created by it. The classification of occupations for taxation must not be purely arbitrary, but must be founded upon some valid or sufficient reason. Whether there is a reason for the class-

ification is a question primarily intrusted to the judgment of the taxing power, but is subject to be reviewed by the courts; and, whenever the classification is shown to be unreasonable and arbitrary, the courts will interfere, and prevent injustice from resulting from such a classification. It will be seen from the ordinance that a tax of \$350 is levied upon money lenders of the class to which plaintiffs belong, as well as upon pawnbrokers and private banks. So far as the amount of the tax is concerned, these three occupations are placed in the same class. Chartered banks and other classes of money lenders are taxed in lesser and different amounts, varying from \$25 to \$100.

2. There is no contention that the tax is excessive in amount, and therefore the decision in *Morton v. Macon*, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485, is not pertinent to any of the questions raised in the present case. The question is whether money lenders of the class to which the plaintiffs belong are essentially of the same class as chartered banks, negotiators of loans, real estate agents, and lenders upon stocks and bonds. Taxes are imposed upon all these classes, but in different amounts. They are each separate and distinct occupations, varying from each other in their nature as to the details of the business carried on, and simply because they all might be classified in the one general class of lenders of money is no reason why these different occupations might not be arranged in different classes for the purpose of taxation, and a different amount of tax placed upon each. If the classification is not subject to the criticism of being arbitrary and without foundation in any sound reason, the fact that a different amount of tax is levied upon the different classes is wholly immaterial, where no question is made as to the tax upon a particular class being excessive in amount. It is within the power of a city council, under charter authority of the character possessed by the city council of Augusta, to make one general class of all persons engaged in the business of lending money; and it is also in their power to subdivide this general class into further classes, so long as the subdivision is not wholly arbitrary and unreasonable. The subdivision of the general class of money lenders as set forth in the ordinance does not seem to be wholly without reason; and, as the right to classify exists and the right to determine the amount to be placed upon each class is reposed in the city council, we do not think the ordinance is subject to the criticism made upon it in the petition.

3, 4. It is contended that that portion of the ordinance levying a tax upon money lenders is rendered void by reason of the provision therein that a violation of the usury laws shall work a forfeiture of the license. The effect of this provision in the ordinance is to impose a penalty for usury. It purports to work a revocation of the license

of one engaged in the business of lending money; and, if the city has authority to require a license to engage in this class of business, the forfeiture of this license is nothing more or less than a penalty for charging usury. The language of the ordinance indicates that this was the purpose and intent of this enactment. The laws of this state regulate the rate of interest to be charged, and provides what penalty shall be imposed for the exaction of usury. These laws are exhaustive upon this subject, unless there is something in the charter of the city expressly authorizing it to deal with the subject of a penalty for usury. It is not claimed that there is in the charter any such authority. The ordinance, so far as it purports to impose a penalty upon money lenders for usury, is absolutely void for want of authority in the city to enact that provision. But we do not think this provision in the ordinance vitiates the whole ordinance upon the subject of taxation upon money lenders. The purpose of the ordinance was primarily for the raising of revenue, and not the punishment of usury, and that part of the ordinance which attempts to punish the usurer is such an insignificant part of the ordinance as a whole, and even of the particular provision, that it may be eliminated therefrom without affecting the validity of what remains. Whether any part of a law can be upheld when one part of it is invalid depends upon whether the invalid part is so connected with the scheme of the law that it is to be presumed that the lawmaking power would not have passed the law without its inclusion therein. Of course, no one will contend that the passage of the ordinance for the purpose of levying taxes for the support of the city government was so dependent upon the provision imposing a penalty for usury upon money lenders that without it the ordinance would not have been passed. See in this connection, *Mattox v. State*, 115 Ga. 212, 41 S. E. 709.

5. It is contended that the ordinance, so far as it relates to money lenders, is invalid, for the further reason that the ordinance requires the money lender to file a bond in conformity with the state law; the state law being the act of 1904 (Acts 1904, p. 79), providing for the regulation of the business of lending money on household goods, wages, etc. It is said that this act is unconstitutional, for various reasons set forth in the petition, and, the act being unconstitutional, as the ordinance requires a compliance with the act, the ordinance is void for requiring something to be done which the city council had no right to require. It is unnecessary in this case to pass upon the constitutionality of the act. If it is constitutional, then the plaintiffs, so far as the character of the business regulated by the act is concerned, would be compelled to give the bond therein required, whether there was anything in the ordinance of the city of Augusta upon the

subject or not. The ordinance of the city of Augusta embraces a larger class of money lenders than those whose business is regulated by the act. But the ordinance embraces all of those who are embraced within the act. A money lender engaged in such a business in the city of Augusta as would make him liable to the tax would, therefore, be subject to the regulations of the state law, and the ordinance simply requires that which, if the act is constitutional, the law requires. But suppose the act is unconstitutional, then, in order to obtain a license from the city of Augusta, they would not be required to give a bond, because they could not be required to give a bond under an unconstitutional law. The city council had a right to impose a tax upon the class of persons to which the plaintiffs belonged, and the tax as imposed is not subject to any of the objections made by them. They are therefore subject to the payment of this tax. They have not paid the tax required of them. When they have paid or tendered this tax, and a license is refused them on the ground that they have not given the bond required by the ordinance, they can then raise the question whether the act referred to in the ordinance is not unconstitutional. The question as to the constitutionality of the act of 1904 is therefore prematurely made. It may be that the city will not require the bond to be given. If it does, then the plaintiffs may, with propriety, invoke a decision of the court as to the validity of that law. If that part of the ordinance requiring the bond to be given is invalid, its invalidity would not void the whole ordinance, for the reasons given a preceding portion of this opinion, and, until they have complied with that part of the ordinance which is unquestionably valid, they will not be heard to question the constitutionality of the act of the General Assembly that is made a part of the ordinance by reference to the same.

Judgment reversed. All the Justices concurring.

(124 Ga. 682)

GREER v. STATE

(Supreme Court of Georgia. Jan. 13, 1906.)

1. HOMICIDE—INSTRUCTIONS.

As the evidence introduced by the state made out a plain case of murder, and the statement of the defendant established a case of justifiable homicide, the court below did not err in omitting from its charge the law of voluntary manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 649-655.]

2. CRIMINAL LAW—EVIDENCE—NEW TRIAL.

The verdict was authorized by the evidence, and, the trial judge being satisfied therewith, this court will not interfere with his refusal to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

Lem Greer was convicted of murder, and brings error. Affirmed.

Jos. D. Boyd and W. E. H. Searcy, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 684)

SANDERS, SWAN & CO. v. ALLEN et al.
(Supreme Court of Georgia. Jan. 12, 1906.)

1. SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The verdict of the jury was plainly based on an erroneous theory as to the measure of the plaintiff's damages, and the court below did right to grant a new trial.

2. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Under the act approved December 21, 1897 (Acts 1897, p. 53), the only circumstances under which the representative of a deceased person who is jointly sued with such representative will be disqualified from testifying as to transactions with his deceased codefendant are "when his evidence would tend to relieve or modify the liability of the party offered as a witness and tend to make the estate of said * * * deceased party primarily liable for the debt or default."

3. SAME—EVIDENCE OF AGENT.

Under Civ. Code 1895, § 5269, subd. 5, in order to render incompetent the evidence of an agent or attorney at law of a sane or surviving party as to transactions with the insane or deceased adverse party at interest, the agency or confidential relationship must have existed at the time of the transaction testified about.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action by Sanders, Swan & Co. against S. H. Allen, administrator, and others. Verdict for plaintiffs. From an order granting a new trial, they bring error. Affirmed.

Dean & Hobbs, for plaintiffs in error. H. H. Perry, Howard Thompson, G. H. Prior, and Parks & Gaillard, for defendants in error.

CANDLER, J. This case comes up on exceptions to the second grant of a new trial. The suit was for damages from the breach of two contracts for the sale and future delivery of cotton; and the jury found for the plaintiffs the full amount sued for. The plaintiffs, besides excepting to the grant for a new trial assign error upon their exceptions pendente lite to the rejection of certain evidence which will hereafter be mentioned.

1. We do not hesitate to rule that the grant of a new trial was proper. The amount of damages claimed by the plaintiffs was the difference between the contract price of the cotton and the price which they were compelled to pay for other cotton in order to fill contracts that they had made on the basis of their contracts with the defendants. It was not alleged or shown that the defend-

ants had any notice that the cotton they contracted to sell the plaintiffs had been resold by them, and, in the absence of such a showing, no such basis of calculation could be used to compute their damages; the correct measure of damage being the difference between the contract price and the market price at the time the cotton should have been delivered. *Wappoo Mills v. Guano Co.*, 91 Ga. 396, 18 S. E. 308; *Huggins v. Southeastern Lime Co.*, 121 Ga. 311, 48 S. E. 933. It is true that the defendants did not attack the petition by an appropriate special demurrer on account of this defect, and that there was no evidence to show what the market price of cotton was at the time stipulated for the delivery of that covered by the contracts sued on; but, even so, the verdict for damages was plainly based on an erroneous theory of law, and had no legal foundation upon which to rest. It was therefore contrary to law, and was properly set aside by the trial judge.

2, 3. The second and third headnotes need no elaboration, further than to say that the evidence offered by the plaintiffs should have been admitted. It did not appear that the evidence of Cooper would affect in any way his liability under the contracts sued on. The act of 1897, referred to in the second headnote, was primarily designed to prevent the party offered as a witness from deriving any advantage by giving testimony which his deceased codefendant could not contradict. This case did not fall within the provisions of that act. The other witness offered had formerly been an agent of Sanders, Swan & Co.; but the agency had terminated at the time of the transactions testified about, and it appeared that he was not in any manner interested in the suit. His testimony should have been admitted.

Judgment affirmed. All the Justices concurring.

(124 Ga. 685)

FIELD v. JORDAN et al.

(Supreme Court of Georgia. Jan. 12, 1906.)

JUDGMENT—SETTING ASIDE—LACHES.

Complainants having negligently allowed three years to pass without seeking to set aside the judgment complained of at law, under the facts of this case equity can grant them no relief.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. W. Jordan and others against T. S. Field. Judgment for plaintiffs, and defendant brings error. Reversed.

R. O. Lovett and W. W. Haden, for plaintiff in error. R. J. Jordan, for defendants in error.

BECK, J. The plaintiffs below filed their equitable petition to the superior court, alleging that they were the defendants in an

action brought against them by Field, the defendant in the case at bar, and that when the case came on for trial at the April term, 1900, of the justice's court in which it was pending, a demand was made for a bill of particulars, whereupon the magistrate continued the case for the term and marked upon his docket, "Bill of particulars demanded, and cont." But during the term at which the case was continued, to wit, on May 1, 1900, the justice rendered judgment against petitioners without their knowledge. When their attention was called to this judgment by a summons of garnishment which had been issued thereon, their counsel immediately brought to the attention of counsel for Field the fact that the judgment was irregular, and Field's counsel promptly agreed that it should be treated as a nullity, and it was so treated; the justice acquiescing therein and setting the case down again for trial. When the case thus came on for trial it was continued at the request of Field, who, "on cross-examination, showed that there was better evidence than his own as to the correctness of the account sued on." Since that trial the case has been continued from time to time, but never tried. In December, 1903, Field, having employed other counsel than those who made the agreement to treat the judgment as void, again proceeded to enforce the judgment rendered May 1, 1900, and it is to restrain him from so doing that this action was brought. The judge below granted the injunction prayed for, and Field excepted. The evidence introduced upon the hearing disclosed a state of facts substantially similar to those alleged in the petition. The defendant, however, did make an affidavit to the effect that he had never agreed to consider the judgment a nullity and had not ratified the agreement of his former counsel treating it as such. In addition to his answer, the defendant filed a demurrer upon the ground, among others, "that more than three years have elapsed since said judgment was rendered, and the filing of this proceeding to set the same aside, and the same is barred." As the judgment will be reversed upon this ground of the demurrer, it is unnecessary to set forth the other grounds.

Whatever may be the moral duty of Field in regard to this judgment, he cannot be restrained, either at law or in equity, from enforcing it. In the case of *Field v. Peel*, 122 Ga. 503, 50 S. E. 346, it was decided that the judgment was not void, but erroneous, and, as the plaintiffs have allowed the time to pass within which they could have attacked it at law, under the facts of this case equity is powerless to assist them. It appears that the judgment was rendered May 1, 1900, and so entered upon the justice's docket. This was constructive notice to the plaintiffs that the judgment had been rendered, and, if they were dissatisfied therewith, they should have applied for a writ of certiorari within the time allowed by law.

Moreover, it appears that they received actual notice of the judgment some time after the 80 days had elapsed; but then, instead of taking steps to have it vacated, they relied upon the naked promise of counsel for Field that it would be treated as a nullity. Instead of relying upon this naked promise to treat the judgment as a nullity, defendants in execution, within the statutory period allowed for instituting proceedings to set aside judgments, should have begun proceedings to set aside or vacate this judgment. And this period is fixed by statute at three years. Civ. Code 1895, § 3764. Their failure to take the proper steps within the time allowed can only be termed negligent. The various sections of the Code (Civ. Code 1895, §§ 3987, 3988, 5370) which prescribe the method of setting judgments aside in equity for fraud, accident, or mistake, all contain the provision that the movant must show that there has been no fault or negligence on his part. These plaintiffs have not met this requirement. While the case from which it is taken is not exactly on all fours with the one at bar, we quote the following language from the opinion as applicable here: "Equity does not help the sleepy. Only the vigilant, the watchful, the searchers for an available and legal remedy * * * are [given] the passports to her favor. She does not relieve against the plain statute of limitations of three years as a bar to set aside a judgment at law, but rather follows the law and applies it herself. Often she not only does that, but sets up her own bar to any demand that is stale and shows laches." *Morris v. Morris*, 76 Ga. 738.

Nor is the fact that the justice agreed to treat the judgment as a nullity of any avail. When once his judgment is rendered, unless it be absolutely void, his hands are tied, and he can no more lawfully set it aside than he can vacate the judgments of this court. *White v. Burnett*, 113 Ga. 151, 38 S. E. 332 (2); *Field v. Peel*, 122 Ga. 506, 50 S. E. 346.

Judgment reversed. All the Justices concurring.

(124 Ga. 678)

HACKNEY v. J. R. ASBURY & CO.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. DISMISSAL AND NONSUIT—EFFECT—LIMITATIONS.

The mere dismissal in general terms of a suit will not, after the expiration of six months from such dismissal, operate as a bar to the bringing of a second suit by the same plaintiff against the same defendant and on the same cause of action, when the cause of action is not barred by the statute of limitation applicable thereto at the time the second suit is brought. Section 3786 of the Civil Code of 1895 is not applicable to such a state of facts, as that section provides: "If a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such second case shall stand upon the same footing, as to limitation, with the original case."

2. SAME—DISMISSAL AS TO CERTAIN DEFENDANT—WANT OF SERVICE—NEW ACTION—NECESSITY OF PAYING COSTS.

Where two persons were sued, the case dismissed as to one for want of service upon him, judgment rendered against the other, and on the execution against him as an entry of nulla bona was made, the plaintiff was not required to pay the costs of the first action before bringing suit against the person not served therein, as for want of service the former suit was never commenced against him (*McLendon v. Hernando Co.*, 28 S. E. 152, 100 Ga. 219), and therefore the suit against him could not be the recommencement of a former action against him, so as to bring it within the provisions of Civ. Code 1895, § 5043.

3. COURTS—COUNTY COURT—JURISDICTION.

Upon the trial of an appeal from a county court, the judge of the superior court did not err in refusing to charge, upon request, that if the defendant resided in a named militia district of the county, and the residence of the county judge who had tried the case was in another designated militia district, and the suit was for less than \$50, there should be a finding that the county court did not have jurisdiction of the case.

4. EVIDENCE—SUFFICIENCY.

The evidence supported the verdict, and the court did not err in refusing a new trial. (Syllabus by the Court.)

Error from Superior Court, Tallahassee County; H. M. Holden, Judge.

Action by Miles Haekney against J. R. Asbury & Co. There was judgment for plaintiff, and defendant brings error. Affirmed.

Wm. N. Maltbie and J. W. Hixon, for plaintiff in error. Saml. H. Sibley, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 669)

FERGUSON v. McCOWAN et al.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. SALE—BILL OF SALE—UNCERTAINTY.

Where the description in a deed to personalty is so general that the property sought to be thereby conveyed cannot be distinguished from the general mass of articles of a similar nature, the instrument is void for uncertainty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 54-57.]

2. APPEAL—ASSIGNMENTS OF ERROR.

The mere allegation that the court refused to permit the plaintiff "to show by [a named witness] that the property sued for was the property of" the plaintiff is not a good assignment of error.

3. TRIAL—NONSUIT—WHEN GRANTED.

The granting of the nonsuit was proper. (Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Horace A. Ferguson against R. F. McCowan and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Horace A. Ferguson sued R. F. McCowan and Furman D. Lawton for the value of certain furniture, books, and surgical instruments alleged to be the property of the plaintiff and to have been unlawfully seized and

sold by the defendants. "After showing the sale as alleged and the value of the property sued for, the plaintiff offered in evidence the following deed to show title in plaintiff": A warranty deed from E. G. Ferguson to the plaintiff, purporting to convey, besides other personalty, "office furniture and bedroom furniture, consisting of tables, chairs, bedsteads, bedding, etc., and books, surgical instruments, etc." On objection by defendants this instrument was excluded from evidence upon the ground that the property sought to be therein conveyed was not sufficiently described. Plaintiff then offered to prove by the maker of the deed that the property seized and sold by the defendant was the same as that described in this instrument. The court refused to permit the witness to so testify. The court also refused to allow the plaintiff "to show by [the maker of the instrument] that the property sued for was the property of" the plaintiff. "Plaintiff showed by said witness that there was no other writing purporting to convey said property, except the deed offered in evidence." There being no other evidence, the court granted a nonsuit, and the plaintiff excepted, assigning error upon the rulings of the court in rejecting evidence and in granting a nonsuit.

M. G. Bayne, for plaintiff in error. T. J. Cochran, T. R. Martin, J. L. Lawton, and Westmoreland Bros., for defendants in error.

FISH, C. J. (after stating the facts). 1. "A deed must itself contain descriptive words, with respect to its subject-matter, such as will enable a third person to apply the same to the locus in quo without resorting to any secret and undisclosed intention on the part of the parties thereto." *Huntress v. Portwood*, 116 Ga. 351, 355, 42 S. E. 513, 515. There were no such words, describing the property sought to be conveyed, in the instrument offered in evidence in the present case as would enable a third person, without resorting to the secret or undisclosed intention of the parties thereto, to apply the description to any particular office or bedroom furniture or to any specific books or surgical instruments. In other words, there was nothing in the writing by which the personalty sought to be conveyed could be distinguished from the general mass of similar articles. In this connection see *Stewart v. Jaques*, 77 Ga. 365, 368, 3 S. E. 283, 4 Am. St. Rep. 86; *Hampton v. State*, 124 Ga. 3, 52 S. E. 19, and cases cited. The instrument was void for want of sufficient description of the property sought to be conveyed. This being true, it follows that the court did not err in refusing to allow it to be introduced in evidence, nor in refusing to permit the maker thereof to testify that the property taken and sold by the defendants was the same as that described in such writing.

2. The mere allegation in the bill of exceptions that the court refused to allow the plaintiff "to show by [the maker of such instru-

ment] that the property sued for was the property of" the plaintiff, is not a good assignment of error, as it is not stated how or by what character of evidence such fact was attempted to be shown by the witness.

3. There being no evidence to support the allegations in the petition, the granting of a nonsuit was proper.

Judgment affirmed. All the Justices concurring.

(124 Ga. 676)

SANDERS v. CARTER.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. SHERIFFS AND CONSTABLES—PLEA TO PETITION FOR RULE—DISMISSAL.

Where it is alleged in a petition for a rule against an officer that he has levied the plaintiff's *fi. fa.* upon property of the defendant sufficient to satisfy the plaintiff's lien, and that he has had ample time in which to "make said money and has not done so," a plea by the officer denying each and every paragraph of the petition will not be dismissed on the ground that "it is not an answer to the rule, but simply a general denial of the plaintiff's petition."

2. SAME—VALIDITY OF LEVY.

Either an actual or constructive seizure of chattels by an officer will constitute a valid levy upon personalty. But where an officer goes to the residence of a defendant in execution for the purpose of making a levy, and, the defendant being absent, merely requests a member of the latter's family to inform the defendant that he has made a levy upon certain personalty, which he found and left therein, and does nothing else, not even making an entry of the levy upon the writ, there has been no seizure whatever, and hence no valid levy.

3. SAME—EVIDENCE.

Upon the hearing of a rule against a constable for a failure to sell property upon which it was alleged in the plaintiff's petition that he had made a levy, and the evidence shows that there has been no valid levy, it is not erroneous for the judge to refuse to admit in evidence testimony tending to identify the specific property upon which the attempted seizure was made.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Proceedings by J. W. Sanders against R. P. Carter. Judgment for defendant, and plaintiff brings error. Affirmed.

Z. B. Rogers, for plaintiff in error. J. N. Worley, for defendant in error.

BECK, J. Sanders brought a rule against Carter, as constable, for failure to make the money on a levy. The constable in his answer set up a general denial of the facts alleged in the petition, and upon the trial Sanders moved to dismiss the plea "because it was not an answer to the rule, but simply a general denial of the plaintiff's petition." The court overruled the objection, and the plaintiff excepted. The plaintiff traversed the answer, and the case proceeded to trial. Upon the hearing the uncontradicted evidence showed that the constable, in company with the plaintiff and another, went to

the house of the defendant in *fi. fa.* at night, for the purpose of levying upon a quantity of cotton. The defendant was not at home. The plaintiff testified: "Mr. Carter levied on the cotton and told some of [the defendant in *fi. fa.*'] family who was there that he had levied on the cotton, and for them to tell Arthur [defendant in execution] when he came. The cotton was not locked up. After the levy Mr. Carter told me that the papers were not in proper shape. He gave them back to me, and I took them to Mr. Bond [justice of the peace], and it was for them and for him and in his presence I wrote out the last two lines of the description in the *fi. fa.* He made no entry of the levy on the *fi. fa.*" The officer left the cotton where he found it. The plaintiff then attempted to prove, by parol evidence, that the cotton alleged to have been levied on was the property described in the mortgage upon which the *fi. fa.* was issued. The court would not allow the testimony, entered upon judgment discharging the officer from the rule, and the plaintiff excepted.

1. The court properly allowed the constable's answer to stand. The plaintiff alleged that there had been a levy, that the property levied upon was sufficient to satisfy his lien, and that the officer had had ample time in which to "make said money and had not done so." In denying each and every allegation of the petition, the officer necessarily denied that there had been a levy; and, if there was no levy, it follows as a logical sequence that there were no funds in his hands out of which to satisfy the plaintiff's lien. The answer could not be construed as evasive or ambiguous, and the trial judge did not abuse his discretion in not dismissing it.

2. It would seem, from the evidence, that the execution did not contain a sufficient description of the property, and that the constable recognized this deficiency in the *fi. fa.* and returned it to the plaintiff in order that it might be cured. But whether this irregularity would render the levy a nullity or not, it is not necessary to decide; for, under the plaintiff's own testimony, there had been no lawful levy. To constitute a levy, there must be a seizure by the officer, either actual or constructive. There was, of course, no actual seizure here; nor was there a constructive seizure. "Actual or constructive seizure, as distinguished from the oral declaration of an officer of an intent to seize, or that he had seized property under a writ then in his hands for execution, is essential to the completion of a levy; and hence the mere appearance of an officer in possession of an execution at a store of the defendant, accompanied by the announcement that he had come to levy upon a stock of goods therein, does not constitute such a seizure as would amount to a levy of the writ then in his hands." *Jones v. Howard*, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep.

231. And in that case the court said: "A constructive seizure is accomplished by the actual reduction by the officer of the property intended to be seized to his control. He must have brought such property so far under his subjection that he could exercise control over it. * * * He must do some act for which he could be successfully prosecuted as a trespasser, if it were not for the protection afforded him by the writ." Had the constable in the case at bar found the defendant in execution at home at the time of the alleged levy, and had the defendant agreed to hold the cotton levied upon for the officer, the rule would be different. But where the officer merely went to the house of the defendant in *fi. fa.* and informed a member of the household that he had levied upon a heap of cotton which he had seen in one of the rooms of the house, and left without seeing the defendant, and did not even make an entry of such "levy" upon the writ, there certainly has not been such a seizure as the law requires.

8. From the foregoing it follows that the court below did not err in refusing to admit the testimony offered by the plaintiff to prove that the property at the house of the defendant upon which the alleged levy was made was the property described in the mortgage upon which the *fi. fa.* was issued. If the acts of the constable did not amount to a levy, it is immaterial upon what specific property the attempted seizure was made. Judgment affirmed. All the Justices concurring.

(124 Ga. 658)

WEST v. BRAKELOW S. S. CO., Limited.
(Supreme Court of Georgia. Jan. 12, 1906.)

SHIPPING—INJURIES—EVIDENCE—NONSUIT.

As the evidence for the plaintiff was not sufficient to authorize a verdict in his favor, the court committed no error in granting a nonsuit.

(Syllabus by the Court.)

Error from City Court of Savannah;
T. M. Norwood, Judge.

Action by Henry West against the Brake-low Steamship Company, Limited. Judgment for defendant. Plaintiff brings error, and defendant assigns cross-error. Judgment on main bill affirmed; on cross-bill dismissed.

Garrard & Meldrim, for plaintiff in error.
Robt. L. Colding, for defendant in error.

FISH, O. J. Henry West sued the Brake-low Steamship Company, Limited, for damages for personal injuries. The substance of the petition was: The defendant company, a foreign corporation, was on November 25, 1902, the owner of the steamship *Ramleh*, which was, on that date, being loaded with rosin and lumber in the port of Savannah. For the purpose of stowing lumber in the ship, the defendant company erected thereon a derrick, to which was suspended a "fall,"

or rope, which was old, worn, unsafe, and dangerous. While the lumber attached to such rope and supported thereby, for the purpose of being loaded in the vessel, was being carried onto the ship, the rope, by reason of its worn condition, broke and caused a piece of lumber to fall upon the plaintiff, who was engaged at the time as a laborer in loading the vessel, causing his injuries as set out in the petition. The plaintiff did not know of the unsafe and dangerous condition of the rope, and could not have known of it by the exercise of ordinary care. He relied upon the defendant company to furnish reasonably safe instrumentalities for the loading of the ship. It was the duty of the defendant to furnish a safe and sound rope, and it knew, or could have known by inspection, of the unsafe condition of the rope which broke. The answer denied the material allegations of the petition. On the trial, at the conclusion of the evidence submitted by the plaintiff, the court, on motion of defendant's counsel, granted a nonsuit, to which ruling the plaintiff excepted.

The evidence for the plaintiff tended to establish all the allegations of his petition, except as to the erection of the derrick upon the ship by the defendant, the furnishing by it of the rope, the breaking of which caused the plaintiff's injury, and that it was the duty of the defendant to furnish the rope which was being used in loading the vessel. There was no allegation that the plaintiff was employed to do the work in which he was engaged by the defendant, nor any allegation that the vessel was being loaded by the defendant itself, and the evidence did not show that such were the facts. The plaintiff testified that at the time he was injured he was employed by Churchill, a stevedore. Bryant, one of the plaintiff's witnesses, who was one of the laborers engaged in loading the ship, testified that the rope which broke "came out of the forecabin," and that he noticed the condition of the rope and called the attention of the boatswain of the vessel thereto, who looked at it, and "said he guessed it would do all right." This witness also testified that the boatswain "is over the sailors," and that "the captain is first, and the first mate next, and the second mate next, and the boatswain next, when they have not got a third mate." Another witness for the plaintiff testified: "I know when you call for new rope it comes, to my remembrance. Generally call for it from the mate, I suppose. I hardly ever see the captain around on the deck. Q. They generally call on the mate and they get it? A. I suppose so."

In our opinion there was no error in sustaining the motion for a nonsuit. From the evidence it appears that the plaintiff was not a servant of the defendant company, but was employed by the stevedore, who was engaged in loading the ship, and who, apparently, was an independent contractor for

this purpose. If the stevedore had taken a contract to load the vessel with the lumber and furnished the labor and necessary appliances for so doing, then it is clear that the owner of the vessel would not be liable to the plaintiff for the consequences of the negligence of such independent contractor. *Young v. Smith & Kelly Co.* (decided at the present term) 52 S. E. 765 and authorities cited. Whether this stevedore or the defendant company furnished the rope used for the purpose of loading the ship with the lumber does not appear. The mere fact that the rope in question came out of the forecabin of the ship did not show that the owner of the vessel undertook to furnish it as an appliance to be used in loading the ship. Even if it belonged to the defendant, it might have been merely borrowed by the stevedore for this purpose. Nor did the mere supposition of a witness that, when a new rope was needed, the mate was called on for it, amount to evidence that this rope was furnished by the defendant company for the purpose indicated. The same may be said with reference to the testimony that the attention of the boatswain, who commands the sailors, was called, by one of the laborers engaged in loading the vessel, to the condition of this rope, and that he looked at it and said he guessed it would do. In order for the defendant company to be made liable for the plaintiff's injuries, it was necessary for it to appear that it had control and supervision of the work of loading the vessel, or that it furnished the instrumentalities for loading the same, including the rope in question, and was negligent in the respect and manner alleged in the petition. The plaintiff failed to make out such a case, and the nonsuit was properly granted.

Judgment on main bill affirmed; cross-bill dismissed. All the Justices concurring.

(194 Ga. 657)

RANDALL v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)

CRIMINAL LAW—APPEAL—INSTRUCTIONS.

The charge of the court fully and fairly submitted to the jury the issues in the case. If more specific instructions were desired in reference to special points, requests therefor should have been duly made. The verdict was amply supported by the evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1906.]

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Robert Randall was convicted of crime, and brings error. Affirmed.

W. E. Armistead, for plaintiff in error. Alf. Herrington, Sol. Gen., and Evans & Evans, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 657)

TRUITT v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. CRIMINAL LAW—NEW TRIAL—EXCESSIVE PUNISHMENT.

A complaint that a sentence is excessive cannot properly be made a ground of a motion for a new trial. *Bellinger v. State*, 42 S. E. 747, 116 Ga. 545; *McCollum v. State*, 46 S. E. 413, 119 Ga. 308, 100 Am. St. Rep. 171.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2143.]

2. SAME.

The evidence supported the verdict, and the trial judge did not abuse his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

George Truitt was convicted of crime, and brings error. Affirmed.

Moore & Moore, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 657)

FINCH v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)

OBSCENITY—OBSCENE LANGUAGE—EVIDENCE.

The conviction of the accused under Pen. Code 1895, § 396, was warranted, if not demanded; the evidence disclosing that, without any provocation and wholly without excuse, he used vulgar and obscene language in the presence of a female.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Obscenity, § 4.]

(Syllabus by the Court.)

Error from City Court of Lexington; P. W. Davis, Judge.

Lewis Finch was convicted of disorderly conduct, and brings error. Affirmed.

Callaway & Watson, for plaintiff in error. Hamilton McWhorter, Jr., for the State.

EVANS, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 655)

GIVINS v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)

CRIMINAL LAW—EVIDENCE—APPEAL.

There being no complaint that any error was committed on the trial, and there being evidence to authorize the verdict, the judgment refusing a new trial is affirmed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3067, 3068.]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Dip Givins was convicted of crime, and brings error. Affirmed.

Williams & Harper, for plaintiff in error. Allen Fort, for the State.

FISH, C. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 653)

TRICE v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)

CRIMINAL LAW—APPEAL—REVIEW.

The evidence amply warranted the verdict, and no sufficient reason has been shown for reversing the judgment refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

C. T. Trice was convicted of crime, and brings error. Affirmed.

J. F. Redding and Henry O. Fart, for plaintiff in error. O. K. B. Bloodworth, Sol. Gen., for the State.

COBB, P. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 652)

DUNHAM v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)

CRIMINAL LAW—APPEAL—REVIEW.

The verdict in this case was not without evidence to support it; and, the presiding judge having approved the finding and no error of law having been committed, this court will not reverse his judgment.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3084.]

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

W. J. Dunham was convicted of crime, and brings error. Affirmed.

Hitch & Denmark, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

(124 Ga. 547)

HIX v. GULLEY.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. TRIAL—EXCLUSION OF EVIDENCE.

When the court provisionally admits evidence on the statement of counsel that he will subsequently supply a defect in the preliminary proof necessary to its admission, it is not for the judge of his own motion to determine whether such defect has been supplied and rule out the evidence, without a request to that effect from the other party.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 125.]

2. EVIDENCE—LOCATION OF BOUNDARIES—GENERAL RECOGNITION.

In the trial of a case involving the location of a dividing line between coterminous landowners, evidence of a witness examined by interrogatories that a given corner "was recognized by all the adjoining landowners as the true corner" was properly excluded, when it did not appear from the answer of the witness who were the landowners referred to, whether they were owners of the land at the time they recognized the true corner, or at what date this recognition was made by them.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 155; vol. 20, Cent. Dig. Evidence, §§ 1121-1134.]

3. APPEAL—REVIEW.

The evidence, though conflicting, was sufficient to authorize the verdict. There was no complaint of the charge of the judge; and, if any error was committed in the admission or rejection of evidence, it was not of such a character as to require the granting of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Hart County; H. M. Holden, Judge.

Action by E. F. Gulley against J. E. Hix. Judgment for plaintiff, and defendant brings error. Affirmed.

J. N. Worley and A. G. & Julian McCurry, for plaintiff in error. James H. Skelton, for defendant in error.

CANDLER, J. This was an action of ejectment, which involved the question as to the location of the dividing line between two coterminous landowners. The evidence was voluminous, but an examination of the brief of evidence discloses that it was of such a character that a verdict in favor of either party would have been authorized. The trial resulted in a verdict in favor of the plaintiff, and a motion for a new trial, made by the defendant, was overruled, to which ruling he excepted. Therefore it is only necessary to determine whether there was any error of law committed which would require the granting of a new trial.

1. In one ground error is assigned upon the admission of a deed. In the ground the names of the parties, the date, and the names of the attesting witnesses are stated. It does not appear therefrom what land was conveyed by the deed. Objection was made to instrument, on the ground that its execution had not been proved, and it had not been recorded. The court admitted the deed upon the statement of counsel for plaintiff that evidence would be introduced to show that plaintiff's predecessor in title received the deed some 30 years before the suit was brought, and the same had been in the possession of persons claiming the land since that time. It appears that this evidence was not thereafter introduced. The attention of the judge should have been called to this fact before the case was closed, and a motion made to rule out the deed. This not having been done, complaint cannot be made in a motion for a new trial as to the admission of the deed. See *Stone v. State*, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145 (9); *Cawthon v. State*, 119 Ga. 396, 46 S. E. 897 (7). In addition to this the ground was insufficient, in that it did not describe the deed so that it could be determined from the motion alone whether the admission of the deed was erroneous.

2. One of the witnesses was examined by interrogatories. One of the interrogatories was as follows: "State whether or not the corner of the east end of said line was a hickory corner, and state whether or not said hickory was recognized by all the ad-

joining landowners as the correct corner." And the answer to this interrogatory was as follows: "The corner of the east end of said line was a hickory corner, and was recognized by all the landowners as being the true corner." This interrogatory was objected to as leading, and the court sustained the objection and ruled out the question and answer. We do not think the question was a leading question. See *Franks v. Gress Lumber Co.*, 111 Ga. 87, 36 S. E. 314. Neither do we think there was any error in rejecting the evidence. It did not appear therefrom who were the landowners referred to, nor whether they were landowners at the time of the recognition of the corner, nor that the persons referred to as recognizing the corner were landowners at the time the recognition was made.

3. The motion for a new trial contained a number of other grounds relating to the rejection of evidence, but the questions raised are not of such a character as that it will be profitable to enter into an extended discussion in reference to them. Most of the grounds are wholly without merit, and if the court committed any error at all, either in the admission or rejection of evidence, the error was not of such a character as to require the granting of a new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 649)

HALL v. STATE.

(Supreme Court of Georgia. Jan. 12, 1906.)

1. CRIMINAL LAW—NEW TRIAL—COMPETENCY OF JURORS.

In passing upon a ground of a motion for a new trial based upon alleged expressions of opinions of jurors before the trial as to the guilt of the accused, the trial judge occupies the place of a trier, and his finding that the jurors were competent will not be reversed, unless under all the facts the discretion of the judge was manifestly abused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3070.]

2. HOMICIDE—DYING DECLARATIONS—INSTRUCTIONS.

While the testimony of a witness, whose evidence goes to the jury through the medium of dying declarations, is to be considered under the same rules that govern them in determining the credibility of other witnesses who testify from the stand, the failure of the judge to charge upon the subject of such rules will not be a sufficient reason for granting a new trial, in the absence of an appropriate and timely written request asking instructions upon the subject.

3. SAME—EVIDENCE.

The evidence authorized the verdict, and the judgment refusing the new trial will not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

L. M. Hall was convicted of murder, and brings error. Affirmed.

W. C. Wright, W. L. Stallings, B. F. McLaughlin, and J. W. Shell, for plaintiff in

error. W. G. Post, H. A. Hall, J. R. Terrell, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, P. J. Hall was convicted of the offense of murder, and sentenced to the penitentiary for life. He assigns error upon the refusal of the judge to grant him a new trial.

1. It is alleged in the motion that two of the jurors who were selected for the trial of the case were not impartial. Numerous affidavits appear in the record as to statements claimed to have been made by these jurors prior to the trial, indicating that their minds were not in such condition as that they could accord to the accused a fair trial. There also appear the affidavits of these two jurors in which they either deny or explain the statements accredited to them; each swearing that, at the time they were sworn upon their voir dire and selected, their minds were perfectly impartial, and they went into the trial of the case free from bias or prejudice either on the one side or the other, and that the verdict to which they agreed was the result of a conscientious consideration of the evidence produced. Under such circumstances, the judge was the trier who was to pass upon the question of the competency of the jurors, and his judgment will not be reversed, unless it is apparent from the record that he has abused the discretion which the law vests in him. *Perry v. State*, 117 Ga. 719, 45 S. E. 77, and citations. See, also, *King v. State*, 119 Ga. 427, 46 S. E. 633. No such abuse of discretion has been shown as to authorize this court to interfere.

2. Complaint is made that the court erred in failing to charge the jury that, in considering the weight and credit to be given to the alleged dying declarations of the deceased, the character of the deceased for wickedness and his disregard of the laws of God should be taken into consideration by the jury. The credibility of witnesses whose testimony goes to the jury through the medium of dying declarations is subject to the same attack, and should be determined under the same rules governing the testimony of living witnesses who testify upon the stand. Such a witness may be impeached by proof of contradictory statements, by proof of general bad character, or in any other way by which the law authorizes the impeachment of a witness. In *Nesbit v. State*, 43 Ga. 238, Mr. Chief Justice Lochrane said: "The peculiar character of the deceased for wickedness and disregard of the law of God in his outpourings of blasphemy would have invoked the consideration of the jury; for, if a man, even without hope of life in this world, nevertheless without belief in God or in the divine revelation, while his declarations would be admissible, their weight and consideration should be weighed by the jury." See, also, 10 Am. & Eng. Enc. L.

(2d Ed.) 384. While all of this is true, in order to render the failure of the judge to charge upon the subject available for an assignment of error, it must appear that there was a timely and appropriate written request, and, as none appears in the present case, the failure of the judge to charge upon the subject, even if the evidence was of such a character as to authorize it, is not a sufficient reason for reversing the judgment.

3. The evidence in behalf of the state made out an atrocious case of murder. The claim of self-defense set up by the accused in his statement bears the evident impress of afterthought. The credibility of the witness whose dying declarations were introduced was a question for the jury, and, as they have resolved the case by believing this testimony, and as the trial judge has declined to interfere with their finding, under the established rules of this court, his discretion will not be interfered with.

Judgment affirmed. All the Justices concurring.

(124 Ga. 532)

FRIEDMAN v. GOODMAN.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. NEW TRIAL—GROUNDS.

The general grounds of the motion for a new trial were without merit.

2. SAME—FAILURE TO INSTRUCT.

Failure of the trial judge to give a particular instruction to the jury, which the losing party in his motion for a new trial contends should have been given, is not cause for a new trial, even if such instruction would have been abstractly correct, if neither the pleadings nor the evidence in the case required it to be submitted to the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 59-61.]

3. DAMAGES—PERSONAL INJURIES.

The verdict in favor of the plaintiff was not excessive in amount.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by Bertha Goodman against Sam Friedman. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. Bertha Goodman brought an action for damages against Sam Friedman, alleging that while she "was proceeding quietly along Margaret street," in the city of Savannah, "on her way home," she was living on one side of this street and the defendant upon the other, and "as she got to a point on said street opposite his house, a vicious dog," of which the defendant was the owner or keeper, "sprang upon her and bit her severely, throwing her to the ground and fastening his teeth in her right breast, inflicting dangerous, severe, and painful wounds," and that she was also severely bitten in other places upon her body. She further alleged that the defendant knew of the viciousness of the animal, but failed and refused "to

keep his dog shut up." The defendant in his answer, admitted that he kept the dog in question, and that it had bitten the plaintiff, and denied that he knew that it was vicious, and alleged that it was not, and that his own little children and those of his neighbors were accustomed to play with it, without being harmed or injured by the animal in any way. He further alleged that "the members of plaintiff's family would irritate and tease the dog and throw rocks and other missiles at him; that upon one occasion a member of the family, with their dogs, was passing the house, and, the dogs becoming engaged in a fight, she took a stone or brick and struck this dog, injuring him so seriously that he was unable to walk for some time; that this treatment caused the dog to have an intense aversion to the members of the family, and that one day one of the girls was passing and he caught her cape and tore it; that the dog was not vicious, however, because when this happened one of the other children present caught the dog around the neck and held him so that he could not do her any harm." He further alleged that when he "heard of this occurrence he took the dog out in the country, so that it could not be possible for these people to come in contact with him, but on the day that the plaintiff was bitten one of the hands had loosed the dog for the purpose of helping him to catch a sheep, * * * and the dog, as was perfectly natural, ran away and came back home"; and "when near defendant's home he met the plaintiff, and, evidently seeking to avenge a wrong which he considered had been done him, he bit her." On the trial of the case the plaintiff showed that the attack of the dog upon her was wholly unprovoked, and the character and extent of her injuries. There was evidence, pro and con, as to the dog's previous viciousness. The evidence for the plaintiff showed that the animal, prior to its attack upon her, had bitten other people, among them her niece, Miss Rachel Friedman, who testified that, without provocation on her part, the dog had bitten her, torn her cape, and torn the clothes off her, and that she carried these clothes to the defendant, showed them to him, and told him about the occurrence, and to keep the dog in the house. The defendant testified that Miss Rachel Friedman had come to him and told him that the dog jumped on her somewhere on the street, and, if it had not been for Millie Davis, he would have bitten her, that the dog tore her cape up, and that she showed him a cape and waist. He also testified that he took the dog "out to the country, and he was tied, and one of the colored men out there unloosed him to catch sheep, and the dog came back to the city on the day this thing happened to Mrs. Goodman." The jury found a verdict for \$400 in favor of the plaintiff. The defendant made a motion for a new trial, which was overruled, and he excepted.

W. B. Stubbs and Osborne & Lawrence, for plaintiff in error. Twiggs & Oliver, for defendant in error.

FISH, C. J. (after stating the facts as above). 1, 2. There was no merit in the general grounds of the motion for a new trial. By an amendment to the motion error was alleged as follows: "(1) Because the court, though not requested, failed to submit to the jury the question as to whether the defendant was negligent, and failed to charge the jury that, though the defendant might have known that the animal was vicious, still, if it escaped and was at large without fault upon his part, the defendant would not be liable. (2) Because the court charged the jury as follows: 'If she [the plaintiff] does show that the dog was vicious, and the defendant knew it was vicious and that the injury was without fault upon her part, she would be entitled to recover.'" The assignment of error upon this charge was that "it authorized plaintiff to recover, although the defendant used ordinary care and diligence to keep the dog from getting at large." Whether, in this state, the gist of an action against the owner or keeper of a vicious domestic animal for injuries inflicted by such animal is the mere keeping of the animal with knowledge of its vicious propensities, as is held in some jurisdictions, or is the negligent keeping of the animal after such knowledge, as is elsewhere held, we need not determine in this case. For, in the view which we take of the case, it is immaterial whether the defendant would or would not be liable, if he exercised due and proper care in the keeping and management of the dog, after notice of its vicious propensity. Civ. Code 1895, § 3821, declares: "A person who owns or keeps a vicious animal of any kind, and by careless management of the same, or by allowing the same to go at liberty, another without fault on his part is injured thereby, such owner or keeper shall be liable in damages for such injury." It has been held that under this section it is still necessary, as at common law, to show, not only that the animal was vicious or dangerous, but also that the owner or keeper knew of this fact. *Harvey v. Buchanan*, 121 Ga. 384, 49 S. E. 281, and citations. It would seem, from the language of the section, that liability for injuries inflicted by such an animal would result from negligence in the manner of keeping or confining the animal, or the care exercised in confining it, after notice of its dangerous or vicious propensity, and not from the mere keeping of the animal after such notice; but, as above intimated, it is unnecessary to determine this question. It is clear that if the defendant, after knowledge of the viciousness of the dog, allowed it to go at liberty, he became responsible to any one whom the dog, while at liberty, might attack and injure. Therefore, if the question whether the defendant allowed the dog to go at liberty on the occasion when

the plaintiff was injured by the animal was really not involved in the case as made by the pleading and the evidence, it matters not that the judge failed to instruct the jury that the defendant would not be liable if he "used ordinary care and diligence to keep the dog from getting at large," even if this be sound law. Both the answer and the testimony of the defendant amounted to an admission that after being informed of the attack which the dog, while at large upon the streets of Savannah, had made upon a member of the plaintiff's family, he had not exercised such care and diligence to prevent the animal from going at liberty; but, on the contrary, had allowed it to go at liberty. He knew that the dog had "an intense aversion to the members of the [plaintiff's] family," and had already made a violent attack upon one of them, and yet, according to both his answer and his testimony, he merely took the dog from its home in the city out into the country and left it, and the place where he left it was sufficiently near to the city for the dog to reappear at its old haunts on the very day that it was turned loose in the country. There is not the slightest intimation in his answer or his testimony that he gave any instructions whatever as to the care to be exercised in reference to the animal to those in whose keeping he left it. He admitted in his answer that on the day that the plaintiff was injured the dog was turned loose by one of the hands on the place where he had left it for the purpose of catching a sheep, and that it "was perfectly natural," when this was done, for the animal to run away and come back to its home in the city. If the "perfectly natural" consequence of turning the dog loose in the country to chase a sheep was that it ran away and came back to its home in the city, then it necessarily follows that to thus allow the animal its freedom was to allow it to go at liberty, not only in the country, but upon the street in the city of Savannah where it met and bit the plaintiff. And as the defendant was responsible for the want of care or diligence of those in whose keeping he had left the dog, when one of them allowed it to go at liberty, the defendant, in the eye of the law, allowed it to do so. The dog was at liberty, upon a public street in the city, when it attacked and injured the plaintiff. The defendant admitted this, and that he was the keeper of the animal. It was shown that before this knowledge of the dog's dangerous and vicious propensity was brought home to the defendant. It would seem that these facts made out a prima facie case of negligence on the part of the defendant. But, admitting that they did not, the defendant undertook to show the kind and degree of care which he exercised to restrain the animal of its liberty, after notice of the attack which it made on a member of the plaintiff's family, and, in so doing, he not only wholly failed to show any facts from which the jury would be author-

ized to find that he was not negligent, but, in effect, admitted that, when the plaintiff was bitten, the dog was at large upon the streets of Savannah, because he had, through those for whose negligence he was responsible, allowed it to go at liberty. For these reasons, if for no others, there was no merit in the exceptions to the charge of the court.

3. Another ground of the motion for a new trial was that the verdict was excessive in amount. The physician who attended and treated the plaintiff after she was bitten by the dog testified that he found her very much excited, and "that she had a very deep wound in her right breast, and on the abdomen, going down, there were long scratches. These didn't seem to be teeth marks so much. It seemed as if something else had pulled down on there. That extending, probably, from her breast down here [indicating], the marks would skip a little and then appear lower down again. The wound in her breast was possibly one-fourth or one-half inch deep. * * * I treated her off and on, probably for six or seven days. Sometimes in the early part I called twice a day, then once a day, and then once every two days. Probably I paid her seven or eight visits, or something like that. I think it healed up in about 10 days." The plaintiff herself testified that the dog jumped on her, bit her, and threw her down and held her; that a man came over and knocked the dog off; that her "bosom was full of blood"; that she was bitten in three places, once on the breast and twice on the stomach; and that she did nothing to provoke the animal. We think a verdict in her favor for \$400 was, as to amount, fully authorized by this evidence.

Judgment affirmed. All the Justices concurring.

(24 Ga. 754)

STONER v. PATTEN et al.

(Supreme Court of Georgia. Jan. 13, 1906.)
WATERS AND WATER COURSES — DIVERSION — INJUNCTION.

When, on the interlocutory hearing of an equitable petition to enjoin an alleged unlawful diversion of a stream of water which furnishes to the plaintiff his only unfailing water supply, the judge, upon conflicting evidence, reaches the conclusion that the plaintiff has established his right to an injunction, the same should be granted without qualification, when the evidence shows that the damages which he may suffer will be incapable of ready computation and ascertainment; for, in such a case, a bond given by the defendant to answer for any recovery of damages which may be had against him cannot afford adequate protection to the plaintiff.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 390.]

(Syllabus by the Court.)

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by W. B. Stoner against Z. C. Patten and Reuben Lusk. Judgment for de-

fendants, and plaintiff brings error, and Patten assigns cross-error. Reversed on main bill of exceptions; on cross-bill, affirmed.

W. B. Stoner filed his petition against Z. C. Patten and Reuben Lusk to enjoin the diversion of a certain stream of water. It appeared from the allegations of the petition that Stoner is the owner of a portion of lot No. 70 in the ninth district and fourth section of Walker county, Ga., and Mrs. Carrie Powell owns lot No. 71, on which is located a spring, the waters from which flow down upon and through the property of petitioner, furnishing him and his tenants with a never-failing water supply, which is used for domestic purposes. The defendant Patten, claiming the right under Mrs. Powell, has constructed a pipe line from this spring to his dwelling house for the purpose of conveying the waters of the spring to his premises. He has constructed a catch-basin upon her land, with a view to conveying the waters therefrom by means of pipes to his dwelling, and intends to make an unlawful diversion of the waters from the natural course or stream, whereby they are transmitted to the land of petitioner, to his irreparable injury and damage. Patten is a nonresident, and his codefendant, Lusk, is, as petitioner is informed and believes, insolvent. The defendant Patten filed an answer in which he admitted that he had, under a contract with Mrs. Powell, the owner of lot No. 71, entered upon her premises, and had by blasting discovered a stream of water above the Powell spring; but he averred that the waters of this stream, if indeed they entered the spring from which petitioner claims he obtains his source of supply, did so by percolation and seepage merely, and not through any well-defined subterranean passage or channel. He further averred that the waters flowing from the Powell spring had no such passage or channel through which they were conveyed to the premises of petitioner; and that, if any of the waters of that spring passed to his land, they did so only in cases of overflow, and by percolation, and not by means of any surface or subterranean stream. Patten admitted that he was constructing a pipe line for the purpose of supplying his residence, then in course of construction, and that the waters thereby conveyed would not be turned back upon petitioner's land. He also averred his solvency and ownership of the property in Walker county, and that his codefendant was only his employé and had no interest whatever in the controversy. On the interlocutory hearing, the evidence was conflicting as to whether there was any subterranean connection between the stream from which Patten proposed to get his water supply and the stream from which the plaintiff claimed to have derived his supply; and, if so, whether there was a well-defined channel through which the waters emerging upon the Powell land were transmitted to the premises of

petitioner. The nonresidence of Patten was not controverted, nor was his ownership of property in Walker county denied. The court passed an order dissolving the temporary restraining order previously granted, on condition that Patten would give bond in the sum of \$1,000 obligating himself to pay to the plaintiff such recovery as he might obtain in any suit thereafter instituted to recover damages by reason of the diversion of water alleged in his petition, occurring within one year from that date, September 27, 1905. Stoner sued out a bill of exceptions alleging error in the refusal of the court to grant the injunction as prayed, instead of permitting a bond to be given in avoidance of the restraining order; and Patten sued out a cross-bill of exceptions, complaining that the court erred in requiring him to file a bond and in not revoking unconditionally the restraining order theretofore passed.

Payne & Payne, for plaintiff in error. Williams & Lancaster, R. M. W. Glenn, and Z. D. Harrison, for defendants in error.

EVANS, J. (after stating the facts). Generally, an underground stream of water may be diverted without liability to a proprietor whose land it might reach in its natural and ordinary course; yet, where it has once emerged and afterwards sinks, if its exact course can be traced to where it emerges again, so as to render it certain that it is the same water, the proprietor of the surface at the latter point will be protected in its use, the same as if it were not a subterranean stream. *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62, construing the provisions of section 3019 of the Code of 1873, now embraced in Civ. Code, § 3880. There was a sharp conflict as to whether the stream of water which Patten seeks to divert is the same as that from which water emerges upon the surface of the plaintiff's land. There was also some conflict as to whether the water flowing over the surface of the plaintiff's land was in point of fact used for domestic purposes, as claimed by him. Unless it was the same stream of water, Patten had the undoubted right to the use of the water emerging at the point on Mrs. Powell's land where he proposed to connect his pipe line, and could, with her consent, divert it from its natural course, so far as the plaintiff was concerned. On the other hand, if one and the same stream flowed beneath the surface of both the Powell tract and that owned by the plaintiff, and its course was well defined and could be traced with certainty, then Patten would have no more right to divert it from the plaintiff's land than he would if the stream flowed continuously upon the surface. In the latter instance, if the water was the only unfailing supply which could be used by the plaintiff or his tenants for domestic purposes, the damage caused by its unlawful

diversion would be irreparable, because incapable of ascertainment and exact computation, and the restraining order should not have been dissolved upon the giving of a bond. *Woodall v. Cartersville Min. & Mfg. Co.*, 104 Ga. 156, 30 S. E. 665. Before the judge would have been authorized to grant even a conditional injunction, he would necessarily have had to reach the conclusion from the evidence that it was the same stream, though running partly underground, which furnished a common supply of water to both the plaintiff and the defendant, and that the damages resulting from a diversion of the water would prove irreparable. The mere fact that Patten was a nonresident would not entitle the plaintiff to equitable interference. *Morgan v. Baxter*, 113 Ga. 144, 38 S. E. 411. It appeared both from the pleadings and the evidence that Patten had sufficient property located in Walker county to meet any recovery of damages which might be obtained against him; and we are bound to assume that the judge would not have undertaken to afford the plaintiff relief upon the ground of the nonresidence of Patten, unless it was further made to appear that he had in this state no property which could be subjected to the satisfaction of a judgment against him. Since the evidence warranted a finding in favor of the plaintiff upon the issue which was really the only point the judge was called on to determine, we are not prepared to hold that he erred in not revoking unconditionally the restraining order; but, as the giving of a bond will afford the plaintiff no substantial protection, in the event he sustains damages which are incapable of computation, we are of the opinion that the judge should, if he thought the granting of an injunction was proper, have granted it unconditionally.

Judgment on main bill of exceptions reversed; on cross-bill, affirmed. All the Justices concurring.

(124 Ga. 424)

WILLCOX et al. v. KEHOE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. LANDLORD AND TENANT — REPAIRS — COVENANTS IN LEASE.

A covenant in a lease, whereby the lessor expressly stipulates that he will not be bound to make repairs, alterations, additions, or improvements upon the leased premises, but agrees that the lessee, at his option, may make such repairs, etc., as shall be necessary, and that he will reimburse him therefor to an amount named, is a personal obligation on the part of the original lessor, and does not run with the reversion, so as to bind an assignee thereof.

2. SAME — PURCHASE FROM LANDLORD — LIABILITY ON LEASE.

One who buys land subject to a lease containing a covenant of the character indicated in the preceding note is not bound for the breach of the purely personal covenant of his predecessor, made prior to the sale of the land to him.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by William Kehoe against C. H. Willcox and others. Judgment for plaintiff, and defendants bring error. Affirmed.

R. R. Richards and Peeples & Jordan, for plaintiffs in error. O'Connor, O'Byrne & Hartridge, for defendant in error.

CANDLER, J. The Domestic Coal & Wood Company, a firm composed of Willcox and Salas, leased from Harriet C. Jones and others a wharf lot in the city of Savannah for the term of three years and four months; the date of the lease being May 29, 1901. The plaintiffs in error are a partnership doing business under the name of the Standard Fuel Supply Company, and are successors in business to the Domestic Coal & Wood Company. One of the conditions of the lease referred to was as follows: "It is covenanted and agreed by and between the parties of these presents, that the said [lessees] shall take and occupy the said property as it stands at the beginning of this lease, and that the said [lessors] shall not be called upon or be responsible for any additions, alterations, improvements, or repairs upon the said leased property, or any part thereof, or for any dredging or increased depth of the water along said wharf front, and that all such additions, improvements, repairs, or dredging shall be made by the [lessees] at their option and at their own expense. But said [lessors] hereby covenant and agree to reimburse and to pay to the said [lessees] for any necessary repairs, improvements, or dredging made or done by them a sum not to exceed in the aggregate during the term of said lease twelve hundred dollars (\$1,200), to be paid to said [lessees] at the time or times when said repairs or dredging is completed and payment for the same becomes due." The instrument contained various other covenants which are not material to this discussion. Only one of the covenants of the lease is expressly made applicable to the successors or assigns of either party, viz., a stipulation that, in the event of default in the payment of rent, the lessors, "their successors or assigns," shall have the right to re-enter and terminate the lease. During the years 1901 and 1902 the original lessees and their successors, the plaintiffs in error, expended for necessary repairs on the leased premises a sum in excess of the \$1,200 provided by the clause of the contract which has been quoted. Of this amount \$802.30 was reimbursed to the original lessees, presumably at the time the repairs were made. The remainder, \$397.70, has never been reimbursed, though demand for same has been made. In April, 1905, Kehoe, the defendant in error, purchased the wharf lot, and after the expiration of the lease brought suit against the lessees for an amount alleged to be due for three months' rent of the premises. The defendants filed a plea, in which they sought to recoup against the plaintiff's claim for

rent the difference of \$397.70 between the amount that has been paid to them and their predecessors by way of reimbursement for repairs made and the amount of \$1,200 provided for by the covenant to reimburse, which has already been set out. On motion of counsel for the plaintiff the plea of recoupment was stricken as insufficient in law, and the defendants excepted. It will be seen that two controlling questions are presented for decision, viz.: Was the covenant to reimburse one which ran with the land, or a merely personal obligation on the part of the original lessors; and, if it was not a covenant running with the land, was Kehoe, who bought subject to the lease, bound by its terms to the extent that he will be held liable for the previous breach of the covenant by his predecessor in title?

1. At common law a distinction was drawn between the land—i. e., the right to the possession of leased premises and the reversion, or the right to the estate after the expiration of the lease; and it seems that "covenants ran with the land, but not with the reversion. Therefore the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessor was not." See note to *Spencer's Case*, 5 Rep. 16, 1 Smith's L. C. (9th Am. Ed.) 180, citing *Thursby v. Plant*, 1 Wms. Saund. 300, n. 10, and *Butler v. Archer*, 12 Irish C. L. 104. To remedy this inequality the statute of 32 Henry VIII, c. 84, was passed, whereby it was enacted, in effect, that assignees of lessors should "have like advantage against the lessees, their executors, administrators, and assigns, by entry, for nonpayment of the rent, or for doing waste or other forfeitures, and by action only, for not performing other conditions, covenants, or agreements, expressed in the indentures of leases, * * * as the said lessors and grantors, their heirs or successors, might have had," and that "all lessees and grantees of lands, * * * their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, or of any other person of the reversion of the said land and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs or successors." From the sweeping language of this statute it would seem that Parliament intended that all covenants in leases should run both with the land and the reversion, or in other words, that assignees of both lessor and lessee should be entitled to all the benefits and subject to all the burdens of covenants contained in the lease. But in *Spencer's Case*, 5 Rep. 16, 1 Smith, L. C. (9th Am. Ed.) 174, two important limitations were placed upon covenants running with the land. Quoting from the language

used in that case, they were: (1) "When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words, but, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being," and in order for the assignee to be bound he must be expressly named in the covenant. (2) "But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged." The first of these rules was, in the subsequent English case of *Minshull v. Oakes*, 2 H. & N. 793, attacked as unreasonable, and the opinion was expressed that *Spencer's Case* was decided contrary to the rule (note to *Spencer's Case*, 1 Smith's L. C. 186); but it has, nevertheless, been followed generally by the courts, both of England and the United States. In the opinion of the writer, the second rule quoted was intended merely to protect the assignee of the lease or of the reversion against whimsical or unreasonable covenants in leases; but it has been given a much more restricted application, and accordingly this court has held that, "to constitute a covenant running with the land, the covenant 'must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.'" *Atlanta Consolidated R. Co. v. Jackson*, 108 Ga. 638, 34 S. E. 184, citing 1 Ballard's Real Prop. § 491.

Now, as to the application of these rules to the covenant under consideration. The trial judge, in an able opinion delivered when the judgment was rendered striking the plea of recoupment, held that the covenant related to a thing merely in posse, and therefore that it could not bind the assignee, in the absence of an express stipulation that they should be bound. He seems to have proceeded upon the idea that because the lessor was not bound under the lease to make any repairs, but might or might not do so at his option, the subject of the covenant was "floating," or uncertain. His honor was doubtless for the moment confused with the idea that the covenant was one by which the landlord agreed at the option of the tenant to make repairs, whereas he in fact expressly declined to undertake any such obligation, and agreed, not to repair, but to reimburse. But, assuming the correctness of the premise taken, we cannot agree to the correctness of the conclusion reached. The fact that the tenant might or might not make repairs to the wharf or dredge the channel is, in our opinion, unimportant. The question is, was the thing to be repaired or dredged in existence at the time the covenant was made?

The affirmative of this question is not disputed. And so, had the covenant been that the landlord should repair, it would not have been necessary, in order to bind the assignees of the reversion, that they should be expressly named. But, as we have seen, the covenant was to reimburse for repairs which the lessee was permitted to make; and the pivotal question for us to decide is whether this was a covenant so related to the estate or interest created as to run with the land, whether the word "assigns" was used or not. A case very closely in point, and one which has been very frequently cited by the text-books and the courts of various states, is that of *Bream v. Dickerson*, 2 Humph. 126. There it appeared that a lease was made for a term of years at a stipulated rental; the lessor covenanting for himself and heirs "to pay and satisfy [the lessees], their heirs and assigns, at the expiration of the lease, the full and fair cash valuation of such improvements as might be standing on the premises at the expiration of the lease, provided it did not exceed the sum of \$1,500. This sum, whatever it might be, he reserved to himself the right to pay in one, two, and three years from the expiration of the lease, or to pay the same out of the rents of said improvements, if they would rent for an amount sufficient to pay it." During the term both the lease and the reversion were assigned, and improvements to an amount greater than \$1,500 were placed on the land by the lessees and their assignees. At the expiration of the lease the assignees of the reversion refused to pay any amount for the improvements on the land, and the tenants sought to enjoin them from bringing an action of ejectment for the land until they had either paid the value of the improvements or permitted the plaintiffs to receive such value out of the rents and profits. In the opinion the court, speaking through Turley, J., said: "Whether a particular express covenant sufficiently touches and concerns the thing demised as to be capable of running with the land is not unfrequently a question of difficulty, but such as we do not feel it to be in the case now under consideration. There is no covenant on the part of the lessees to improve. They may do so, or not, at their option. The covenant is on the part of the lessor to pay for improvements if they should be made and left standing at the expiration of the lease. A covenant, to run with the land, must touch and concern it, and it is difficult to see how a covenant to pay a pecuniary consideration for a house, if the tenant shall think proper to erect it, can be said to touch and concern the estate." See, also, *Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135; *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282; *Etowah Mining Co. v. Wills Valley Mining Co.*, 121 Ala. 672, 25 South. 720. So, in the present case, we fail

to see how a covenant to pay money for purely contingent repairs, to be made at the option of the lessor, can be said to touch or concern the land, or to have relation to the estate or interest conveyed, so as to constitute it a covenant running with the land. The case of *Atlanta Consolidated R. Co. v. Jackson*, 108 Ga. 634, 34 S. E. 184, while different as to its facts, contains strong authority arguendo for the ruling now made. Whether, had the lessee been bound by the lease to make the repairs, the covenant to reimburse would have been tantamount to a covenant to repair by the lessor, and would have run with the land, quære?

2. Having reached the conclusion that the covenant to reimburse did not run with the land, it is easy to decide that the assignee of the reversion, Kehoe, was not bound by its terms by reason of the fact that he took with notice of it and subject to the lease in which it was contained. It is not necessary to decide whether, had the repairs been made subsequently to the purchase by Kehoe, he would have been bound to reimburse by reason of his notice of the covenant in the lease. It appears that there had been a complete breach of this purely personal obligation before Kehoe bought. The only notice with which he was charged was notice that his predecessors in title owed their tenants money for repairs which the latter had made on the property. While it may be argued with force that he bought the property subject to the subsequent obligations imposed by the lease, it cannot seriously be contended that he purchased, along with it, the previously incurred personal debts of his grantors, growing out of their ownership of the property.

Judgment affirmed. All the Justices concurring.

(124 Ga. 251)

FORLAW et al. v. AUGUSTA NAVAL STORES CO.

AUGUSTA NAVAL STORES CO. v. YOUNG.
(Supreme Court of Georgia. Nov. 13, 1905.)

1. DOMICILE—QUESTION FOR JURY.

Under the evidence in this case, the question of domicile raised by the plea to the jurisdiction was one of fact, and it was properly submitted to the jury for determination.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Domicile, § 40.]

2. TRIAL—INSTRUCTIONS—NECESSITY OF REQUEST.

In the absence of a proper request to that effect, it is not error for a judge, in his charge upon the question of one's domicile, to fail to draw the distinction between "actual residence" and "legal residence."

3. DOMICILE—QUESTION OF FACT—INSTRUCTIONS.

As the jury was to determine the question of fact as to whether the defendant had a family, and there was some evidence to show that the defendant's business caused a frequent change of residence, there was no error in giving in charge to the jury sections 1824 and 1825 of the Civil Code.

4. TRIAL—INSTRUCTIONS.

The court properly refused a written request to give a charge which assumed that there was no dispute as to an issuable fact.

5. PRINCIPAL AND AGENT—FRAUD OF AGENT—ACTION BY PRINCIPAL.

There was evidence warranting the jury to return the verdict as made by them, and the court did not err in refusing to grant a new trial upon the issue raised by the plea to the jurisdiction.

6. SAME—DUTIES OF AGENT—TRUST RELATION.

The relation of principal and agent is a fiduciary one, and the latter cannot make advantage and profit for himself out of the relationship, or out of knowledge thus obtained, to the injury of his principal; and, the agency being established, the agent will be held to be a trustee as to any profits, advantages, rights, or privileges under any contract made and obtained within the scope and by reason of such agency, and he will be compelled to transfer to the principal the benefit of his contract upon repayment to him of such sums as he may have expended in consideration of the same.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 132-140.]

7. FRAUD—PETITION—SUFFICIENCY.

As to one of the defendants, it does not appear that he acted other than as an agent for a codefendant; and there being nothing clearly and distinctly alleged to show mala fides on his part, nor any allegation showing that he participated in the profits arising from the alleged fraudulent scheme or conspiracy, his demurrer, wherein he contended that the petition did not set out any cause of action against him, was properly sustained.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Bill by the Augusta Naval Stores Company against D. J. Forlaw and others. From the judgment, both parties bring error. Judgment in each case affirmed.

The Augusta Naval Stores Company, a partnership composed of Hogan and Heath, filed an equitable petition against D. J. Forlaw, Frank D. Christie, the Woodward Lumber Company, and the Ellis-Young Company, alleging in substance as follows: The petitioners formed a partnership for the purpose of conducting a turpentine business. For this purpose they acquired leases to about 3,713 acres of land in the county of Richmond, and in order to obtain such leases they had to pay the owners of the properties partly in cash, and the balance out of the profits of the business. To make the cash payments, they borrowed money from the Ellis-Young Company, a corporation of Savannah, and transferred to said company the leases as security. "Said leases thus obtained were of the value of \$2,500, * * * and said company advanced the necessary money to make the payment called for thereby," which amounted to about \$900. Petitioners took possession of the tracts of land, and by their agent are still in possession thereof. Some time subsequent to this transaction, petitioners entered into an agreement with the Woodward Lumber Company, under the terms of which the lumber company agreed to lease to petitioners the turpentine privileges on what is

known as the "Cashin Mill Tract," containing 2,000 acres, for \$6,000 cash and one-half of the net profits realized on said tract, which was to be ascertained by making certain deductions and allowances and then dividing the profits according to the agreed stipulations. Petitioners went into possession of the Cashin mill tract and commenced operations thereon. This lease covered a period of three years. Thereafter, pursuant to an agreement with the Ellis-Young Company, petitioners drew on them for \$6,000, attaching to the lease a transfer thereof to the Ellis-Young Company. Petitioners based their authority for drawing on the Ellis-Young Company upon the following letter which was received from said Ellis-Young Company shortly after the first draft: "Yours of the 20th at hand, with leases, which seem to be in order. Your drafts will be paid as advised. When you need anything in the way of axes or tools, let us know." The Ellis-Young Company, instead of paying said draft of \$6,000, telegraphed petitioners to "hold draft until papers could be examined and Wade conferred with"; Wade being the agent or inspector of the Ellis-Young Company, who had examined the properties covered by the lease. The matter was suspended until the arrival of J. R. Young, agent of the Ellis-Young Company, "who brought with him one D. J. Forlaw." These persons caused the title to the property to be examined, and inspected the property, and expressed themselves as more than pleased with the turpentine privileges thus obtained by petitioners, but objected to the arrangement whereby the Woodward company should share in the net profits made by petitioners in said turpentine business on said property, whereupon petitioners agreed to make any reasonable change in the contract desired by the Ellis-Young Company. Said Young as agent, as aforesaid, and said Forlaw proposed to petitioners that, instead of conducting the business in the form of a partnership, it would be best to immediately form a corporation to be known as the "Augusta Naval Stores Company," with a capital stock of \$7,500, which amount the Ellis-Young Company would lend to the new corporation, the stockholders of which should be as follows: Young, owning one-third; Forlaw, owning one-third; and petitioners, owning one-sixth each—and that this corporation should own all of the leases that had theretofore been transferred by petitioners to the Ellis-Young Company for advances theretofore made, amounting to about \$800, and also the lease on the Cashin mill tract. Young and Forlaw further proposed to petitioners that the capital stock to be owned by petitioners in the new corporation could be obtained from the Ellis-Young Company and paid for out of the profits of the business, "petitioner Heath's firm [Heath & Cooper] in the meantime to sell goods to the company and the hands working for the turpentine farms, acting as commissary; and petitioner Hogan to

be paid, in addition to the stock aforesaid, the sum of \$500 for his services up to that time in obtaining said turpentine privileges." Forlaw was to get a salary to superintend the farms, Hogan to be employed to assist Forlaw when found to be necessary. Said Young stated that rather than have the Woodward Lumber Company interested in the profits of the business, his company would be willing to pay the Woodward Lumber Company more money than the \$6,000.

Relying upon these propositions and believing that they would be carried out in good faith, petitioners agreed thereto and thereupon opened negotiations with the Woodward Lumber Company, through Forlaw, which resulted in another agreement being reached under the terms of which the Woodward Lumber Company agreed to waive all of its interest in the net profits and to sell the turpentine privileges in said Cashin mill tract for the sum of \$10,000—\$5,000 cash, and \$5,000 in 12 months. Forlaw then drew two drafts upon the Ellis-Young Company, one sight draft for \$5,000, which was paid, and one for \$5,000 payable one year after date, which was accepted by said Ellis-Young Company; the lease from Woodward Lumber Company being transferred to the Ellis-Young Company as security for the \$10,000. "That during all this time, from November, 1908, down to the present time (being since the time when petitioners brought from Screven county 15 negro hands, and put them to work upon the turpentine farms hereinbefore referred to), said work has been going on, has been conducted in the name of petitioners; petitioners being in possession of said property, both of the 3,713 acres, and also of the said 2,000 acres of the Cashin mill tract. That since January 9, 1904, petitioners, under the promise aforesaid, having been expecting the said parties, Forlaw, Young, and the Ellis-Young Company, to proceed with the corporation agreed upon, and have allowed the said Forlaw to go upon the turpentine farms aforesaid and supervise the same, they also being still under the control of one Frank D. Christie, who was put in charge by petitioner when the work first started." Forlaw, Young, and the Ellis-Young Company refused to pay petitioner Heath the \$500 as agreed, paying him only \$300, and refused to fulfil said contract made with petitioners and to recognize their rights in said property, and their refusal to so do was a breach of the contract which released petitioners therefrom. Moreover this breach was the part of a fraudulent scheme on the part of defendants, except the Woodward Lumber Company and Christie, to get control of the turpentine privileges aforesaid. Petitioners have made demand upon Forlaw to discontinue his control over said property and all further operations on the same, as well as to cease his supervision of the employees and Christie; but to no avail. Petitioners have tendered, and continue to tender,

to Forlaw, Young, and the Ellis-Young Company, all money heretofore advanced to them by said defendants, and demanded a reconveyance of the leases heretofore described; but defendants would neither accept the tender nor comply with their demand. Forlaw, Young, and the Ellis-Young Company obtained said original leases under their contract with petitioners to act as factors, and defendants cannot change their status towards petitioners without petitioners' consent. Defendants occupy a trust relation with petitioners, which they have abused; and by their propositions as aforesaid they have imposed upon petitioners' confidence and induced them to act contrary to their interests. The defendants, with the exception of the Woodward Lumber Company, are joint trespassers upon petitioners' property, and their continuing to supervise the operations of the property is a daily trespass and damage to petitioners, which is irreparable and cannot be measured in damages. Forlaw is insolvent, and his claim to own the lease interest from the Woodward Lumber Company is a cloud upon petitioners' title. The Woodward Lumber Company refuses to recognize petitioners as the owners of the lease executed by it to Forlaw, although in equity petitioners are the owners of said lease; but the Woodward Lumber Company claims in no way to be bound by the fraudulent imposition put upon petitioners by Forlaw, Young, and Ellis-Young Company. Christie, whom petitioner put in charge of said property, and who is still in possession and control as the agent of petitioners, claims to be uncertain as to his duty and status, saying that he does not know whose orders to obey, whether to obey Forlaw or to carry out the commands of petitioners; and he refuses to recognize the rights of petitioners, thereby becoming a joint trespasser with Forlaw. He is insolvent. Owing to this condition of affairs the work is not progressing as it should, and, if continued, will result in great damage to petitioners. They pray that a receiver be appointed to take charge of the properties; that Forlaw and Christie be enjoined from further interfering therewith in any way; that Forlaw, Young, and the Ellis-Young Company be required to transfer back to petitioners all of the leases obtained from petitioners; and for general relief.

The petition was amended by the allegation that Forlaw and his associates had formed a corporation known as the "D. J. Forlaw Company," for the conduct of said turpentine business, without naming petitioners as incorporators, although petitioners had fully complied with their contract; and that the failure of the defendants to carry out their agreement has endamaged petitioners in the sum of \$10,000; and they pray "that defendants be required to account with petitioners as to the proceeds of the business done under said leases." Upon motion the Woodward Lumber Company and Chris-

tie were stricken as parties defendant; to which no exception was taken. Forlaw filed a plea to the jurisdiction, claiming Chatham county as his residence. The jury found against his plea. He made a motion for a new trial, upon the general grounds, and because the court erred in charging the jury that: "If you find that Mr. Forlaw was a resident of Richmond county at that time, the form of your verdict will be: 'We, the jury, find that at the time this suit was filed D. J. Forlaw was a resident of Richmond county.' If you find that he was not a resident of this county at that time, the form of your verdict will be: 'We, the jury, find that D. J. Forlaw at the time this suit was filed was not a resident of Richmond county'"—the error being that the charge fails to draw the proper distinction between being a casual resident of a county and a legal resident. Error was alleged upon the following charge: "The domicile of every person of full age and laboring under no disability is the place where the family of such person shall permanently reside, if in this state. If he has no family, or they do not reside in this state, then the place where such person shall generally lodge shall be considered his domicile," the error being in charging the jury at all as to where the domicile of a person is who has no family; the evidence being that Forlaw had three children all of whom were minors. Error was further assigned upon the following instructions to the jury, as not being applicable to the facts of the case: "If a person shall reside indifferently at two or more places in this state, such person shall have the privilege of electing which shall be his domicile; and if such election be made notorious, the place of his choice shall be his domicile. If no such election is made, or, if made, is not generally known among those with whom he transacts business in this state, third persons may treat either one of such places as his domicile, and it shall be so held; and in all such cases a person who habitually resides a portion of the year in one county, and another portion in another, shall be deemed a resident of both, so far as to subject him to suits in either for contracts made, or torts committed in such county." "Transient persons whose business or pleasure causes a frequent change of residence, and having no family permanently residing at one place in this state, shall be held and deemed as to third persons, to be domiciled at such place as they at the time temporarily occupy." Error was also assigned, because the court refused a request to give in charge the following: "There being no dispute as to the fact that D. J. Forlaw has a family of which he was the legal head, the only question of fact for you to determine under this plea is as to the place where the family resided at the time of the service of the writ." The court overruled the motion for a new trial, and Forlaw excepted.

The evidence as to the question of jurisdiction was practically as follows: Forlaw is a widower with three minor children. During a portion of the year two of his minor children are away, in Milledgeville, at school. He considered Savannah his home, and for two years his children had been living there at the home of his brother-in-law, as aforesaid. When he went to Savannah he carried his household goods, and there they have remained in the house occupied by his children. He is a turpentine prospector, and that carries him away from home most of his time. During the two years preceding the trial he had spent portions of his time in different places in Florida, Georgia, and South Carolina. He usually went to Savannah three times a week to see his children. While in Savannah he did not always stay at the house of his brother-in-law, but sometimes stayed at a hotel. He did not return his taxes in Savannah, but paid them after this suit had commenced, for the current year and the year preceding. "I went to Savannah two years ago," he testified, "intending to make that my home, and did make it my home. I have never changed that intention." He communicated this intention to W. H. Fleming prior to the filing of the suit, who testified that he notified counsel for the plaintiffs that Forlaw was not a resident of Richmond county before these legal proceedings were commenced. Counsel for plaintiffs acknowledged being so notified by Fleming, but said: "I remember the conversation, but don't think it occurred before we filed the suit." Forlaw had lived in Richmond county about two months before the suit was filed, spending his time at a turpentine camp which he referred to as "home." He brought bed-clothes and other necessities with him when he came to Richmond county, with which he fitted up his "shanty" at the camp. At the time of the trial, he had been in Richmond county about nine months, during which time he had made five or six trips to Savannah. Forlaw and the Ellis-Young Company filed demurrers to the petition upon the following grounds: (1) The petition does not set forth a cause of action against "this defendant." (2, 3) The contract of lease set forth in the petition is void, for the reason that it was not in writing, and was not to be performed within a year from its date, and there has been no such part performance as to take it out of the statute of frauds. (4, 5) Defendants made no valid and binding contract for the formation of the corporation named in the petition; and Forlaw made the lease from the Woodward Lumber Company not as the agent of the petitioners, but in his own name. The court overruled these demurrers, and the defendants excepted. Young also demurred, upon the ground that the petition set forth no cause of action against him, as it appeared that he acted only as agent, and not individually. His de-

murrer was sustained, and the plaintiffs excepted.

Wm. H. Fleming, for plaintiff in error. W. K. Miller, for defendant in error.

BECK, J. (after stating the facts). 1. If the three minor children of the plaintiff in error, Forlaw, had resided permanently under a roof which he had provided and under which he himself lodged when on his visits to them, we might have been able to hold as a matter of law that even though the greater part, or practically all, of his time was passed at other places in other counties or in other states, he had a family. But that is not the case presented by the record in the cause arising out of the issue made by the plea to the jurisdiction. "A family is defined as a collective body of persons who form one household, under one head, and one domestic government, including parents, children, and servants, and, as sometime used, even lodgers or boarders." 12 Am. & Eng. Enc. L. (2d Ed.) 866. Again: "A family is a collective body of persons who live in one house and under one manager." Webster's Dictionary. And again: "Parents with their children, whether they dwell together or not; * * * in a narrow use the children of the same parents, considered collectively or apart from the parents." Century Dictionary. "In a broad sense the word 'family' may include all the person's children, whether living with him or not, and even their relatives; but in a more limited sense it includes only those living together as one household." Hart v. Goldsmith, 51 Conn. 479. "'Family' is defined as (1) persons who collectively live together in a house or under one head; a household; (2) those who are of the same lineage, or who are descended from one common progenitor; a race or tribe; a house." Peeler v. Peeler, 68 Miss. 141, 8 South. 392. The word "family" has no one fixed, technical definition. Its meaning varies very greatly according to the subject of the law in which it is used; it varies in different statutes, and has received various definitions in different jurisdictions, even in the interpretation of statutes substantially identical. The very extensive range of these definitions is well illustrated in the numerous citations of authorities given under the first definition of the subject, from the American & English Encyclopedia of Law, above quoted. It follows that the meaning of the word "family," in the section of the Code defining domicile is not necessarily identical with the meaning of the same word as used in the homestead and exemption laws; and we find still further variations of its meaning when we pursue it to criminal laws and police regulations. See Goode v. State, 16 Tex. App. 414; Bones v. State (Ala.) 23 South. 485.

Without attempting to select from the numerous definitions of the word "family" one that would be so comprehensive and general as to be applicable in all cases, we think that

no definition of the word as used in Civ. Code, § 1824, would be acceptable or satisfactory that does not convey the idea of unity of the household in which are gathered the members of the family as one collective body under the management or control of the head thereof, or to which the head of the family, though called away by the demands of business for periods of longer or shorter duration, constantly returns or expects to return. There was evidence in the case at bar from which the jury would have been authorized to find that Forlaw was, in this sense of the word, the head of a family. And, as we view the case, the preponderance of the evidence was in support of his contention on this point. But there was evidence to the contrary, which authorized a different finding. From Forlaw's own testimony we are left in doubt as to the terms upon which his children were living with the brother-in-law, when they were in the latter's house. His son was "there all the time," whether as a boarder or as a member of the brother-in-law's household the record is silent. His daughters "are there when they are through with school," but how much time they spend at school as compared with the duration of their stay under the brother-in-law's roof we are left to conjecture. His household goods and furniture were also at his brother-in-law's, but whether in use as the furniture in any particular room, or whether stored away in the house, we have no means of discovering. The defendant whose domicile is in question had not paid taxes in Chatham county, not even a poll tax, nor had he returned any property for taxation in that county until after this suit was filed against him and his codefendants. When he visited his family in the city of Savannah he stayed at a hotel when he did not stay at the place with his children; but what proportion of this time when in Savannah he spent at the latter place, and what at the hotel, we are again left to infer from indefinite and very general statements. As was pertinently suggested in argument here, in the event suit against Forlaw had been brought in Chatham county and it had been desired to serve the writ upon him at his "Most notorious place of abode," should it have been left at the residence of his brother-in-law or at the hotel where he frequently lodged? Or again, suppose that one of his children had resided permanently in Chatham county and the other two in Baldwin while he was sojourning in Richmond, where would his domicile have been? That would be determined from intention, declarations, and acts, making it a fact to be determined by the jury under the instructions of the court, and not by the court, as a matter of law. "The existence or nonexistence of a domicile in a given locality, where the facts are conflicting, is a mixed question of law and fact. So far as it involves questions of fact, including the ascertainment of the intention of the party, it is solely within the

province of the jury, whose determination is conclusive, unless the verdict is set aside as having been against the evidence. * * * As generally speaking the question of what should be considered the domicile of a party is in all cases rather a question of fact than of law." 9 Cyc. 865. What we have ruled touching the meaning of the word "family" is altogether in reference to the sense in which it is used in Civ. Code, § 1824, defining domicile. In other connections the word might have a broader, or a more limited, or a more technical meaning; as, for instance, in the laws relating to homestead and exemptions. *Rountree v. Dennard*, 59 Ga. 629, 27 Am. Rep. 401. See, also, *Fulghum v. Strickland*, 123 Ga. 258, 51 S. E. 294.

From what we have said above, the conclusion reached in headnotes 2, 3, 4, and 5 necessarily follows.

6. This case is clearly within the fundamental equitable principle laid down in the sixth headnote. It is true that Forlaw was not nominally the agent of the plaintiffs in this case. He was the agent of the Ellis-Young Company, who were the factors of the plaintiffs; but he brought himself within confidential relations of a fiduciary character with Heath and Hogan when he and Young, by advising with the former and suggesting material changes in the terms of the lease which had been contracted for with the Woodward Lumber Company, induced them to waive their (plaintiffs) interest and right in the turpentine privileges in the Cashin mill tract, so that a new lease might be obtained from the lumber company of the turpentine privileges on this valuable tract of land. It is true that Forlaw took the lease from the lumber company to himself individually, but this was under an agreement and understanding between him and the plaintiffs, according to which a corporation should be formed and a one-third interest of the stock thereof taken by Heath and Hogan, the Ellis-Young Company furnishing them the money with which to pay for the same. So the new lease of the mill tract, whether Heath and Hogan, or the Ellis-Young Company, or Forlaw were named therein as lessees, was for the benefit of the corporation which was to be created; that is, for the benefit of the incorporators, two of whom were, under the stipulations set forth in the petition, to be these plaintiffs. When Forlaw went to the Woodward Lumber Company to secure the new lease, he went armed with knowledge, with authority, with power he had acquired because of the confidential relations into which he had been brought with the two men who are now seeking equitable relief. The plaintiffs themselves, through Forlaw, had opened negotiations with the Woodward Lumber Company, which resulted in an agreement being reached whereby the lumber company agreed to sell the entire turpentine privileges on the Cashin mill tract for a fixed sum, waiving its rights to a part of the

profits arising from the business which had been stipulated for in the first contract. The lease to Forlaw could not have been obtained but for the agreement and consent of the plaintiffs that it should be made, or that agreement and consent had but for the confidence reposed by the plaintiffs in Young and Forlaw. The latter and certain named associates, neither of whom were Heath or Hogan, proceeded to secure a charter for a corporation under the name of the "D. J. Forlaw Company," but with the identical object and the same rights, powers, and privileges as had been contemplated for the corporation agreed upon between himself, Young and the plaintiffs. To rule that the Ellis-Young Company was to be permitted to hold the leases assigned to it to the turpentine privileges in the 3,713 acres and the lease to the Cashin mill tract, executed to Forlaw and assigned by him to the Ellis-Young Company, would be a holding at variance with the doctrine established by numerous authorities, and it would be unsupported by any authority to which our attention has been directed.

The safe principle and sound, under the facts of a case like this, seems to be one announced in the American note to *Keech v. Sandford*, 1 Lead. Cas. Eq. 53, where it was thus forcibly and comprehensively expressed: "Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." And in the case of *Conant v. Riseborough*, 139 Ill. 391, 28 N. E. 791, it was said: "The principles applicable to the facts of this case are well settled by the authorities. 'If confidence is reposed, it must be faithfully acted upon and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interest and cunning and overreaching bargains.' 1 Story's Eq. Jur. § 308. Where a person is intrusted as a confidential agent with the conduct of business where he professes not to act for himself, but for others who have placed their confidence in him, he is disabled in equity, even though he may be a volunteer, from dealing in the matter of his agency on his own account. 'The agency being established, he will be compelled to transfer the benefit of his contract, although he may swear that he purchased on his own account.' *Dennis v. McCagg*, 32 Ill. 429. The rule applies, not only to persons standing in a direct fiduciary relation towards others, but also to those who occupy any position out of which a similar duty ought, in equity and good morals, to arise. No party can be permitted to purchase an interest when he has a duty to perform which is inconsistent with the character of a purchaser. *Davis v. Hamlin*,

108 Ill. 39, 48 Am. Rep. 541; Vallette v. Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502." And the facts demanding the application of these rules and principles, the statute of frauds cannot be invoked to prevent it.

If the allegations of the equitable petition in this action are true (and they are to be taken as true as against the demurrer), the Ellis-Young Company, the factors of plaintiffs, stand in a fiduciary relation to them, and, if the fraud and conspiracy alleged can be proved, are trustees *ex malificio*; and the same is true of Forlaw, in whose name the lease from the Woodward Lumber Company was executed, should the same charges be established by the evidence. In another well-reasoned opinion from the court last quoted, we have the following ruling which strengthens the conclusion we have reached in the case at bar. "Where a confidential agent of one having a lease of a theater, who, from his position, was well acquainted with the profits of his principal in the use of the building, and who knew, some months before the old lease expired, that the latter was desirous of renewing his lease, offered privately to lease the theater of the owner, proposing to give a larger rental than was reserved in the old lease, and denied to his principal that he was competing with him for the lease, but in fact did procure a lease to be made to himself, it was held, that the benefit of such lease a court of equity would hold to inure to his principal, and that the agent would be held to hold the same as trustee for his principal." *Davis v. Hamlin*, cited *supra*. It was contended by counsel for the losing party in that case that the rule which the court applied, which holds an agent to be a trustee for his principal, had no particular application to the case, because *Davis*, the agent, was not an agent to obtain a renewal of the lease, and was not charged with any duty in regard thereto; that his was but the specific employment to engage amusements for the theater, and that he was only an agent within the scope of that employment; that *Hamlin*, having a lease which would expire on a certain date, had no right or interest in the property thereafter, and that *Davis* "in negotiating for the lease did not deal, with any property wherein he had an interest, and that the leased property was not the subject-matter of any trust between them." It was further argued that the relation there between *Hamlin* and *Davis* was only one of master and servant or of employer and employé, and that the rule had never been applied to that relation as a class, "that the classes coming within that doctrine are embraced within the list of defined confidential relations, such as trustees and beneficiary, guardian, and ward, etc." But the court replied that the subject was not comprehended within any such narrowness of view, but that in applying the rule, it is the nature of the relation which is to be regarded, and not the designation of the

man filling the relation. Or, as clearly expressed in an elementary work on equity, "The rule under discussion applies not only to persons standing in a direct fiduciary relation towards others, such as trustees, executors, attorneys, and agents, but also to those who occupy every position out of which a similar duty, in equity and good morals, ought to arise." *Bishop*, Eq. § 93. See, also, *Fricker v. Americus Mfg. Co.* (Ga.) 52 S. E. 65. And we have no hesitancy in affirming the judgment overruling the demurrers of *Forlaw* and the *Ellis-Young Company*.

7. As to *J. R. Young*, since it does not appear that he acted other than as agent for the *Ellis-Young Company*; and there being nothing clearly and distinctly alleged to show mala fides on his part, nor any allegations showing that he participated in the profits arising from the fraudulent scheme or conspiracy, his demurrer was properly sustained.

Judgment in each case affirmed. All the Justices concurring.

(194 Ga. 275)

WALKER v. WADLEY et al.

(Supreme Court of Georgia. Nov. 13, 1905.)

1. LANDLORD AND TENANT — LEASE — CONSTRUCTION—CONTINUANCE—OPTION OF LESSEE.

A lease contract, wherein the owner of land demises the premises for one year, with an option to the tenant during that year to extend the lease for four years upon "notice of intention to take this option," and a further option of renting the premises for an additional term of five years at an increased rental, notice of acceptance of which to be given by the tenant at a stated time preceding the commencement of such additional term, is a lease for ten years at the election of the lessee, absolute for the first year, and optional with the lessee as to the future continuance under the terms and conditions prescribed in the lease contract.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 275.]

2. SAME — ASSIGNMENT — SUBLETTING — RENEWAL OF LEASE.

A covenant in such a lease contract that the lessee, "his heirs, executors, and administrators, shall not be at liberty to assign this lease or sublet said premises or any part thereof for the whole or any part of said term, or place any tenant upon said premises or any part thereof, without the consent" of the lessor, is not confined to the first year, but extends during the continuance of the lease, where the term has been extended at the election of the tenant.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 275.]

3. SAME—BREACH OF COVENANT.

Where by such lease the premises are demised to the lessee, his executors and administrators, and upon the death of the lessee letters of administration upon his estate are granted to one of his heirs at law, a written assignment of the lease by all of the heirs at law, without the assent of the lessor, and an entry by the assignee with the knowledge and acquiescence of the administrator, constitute a breach of the covenant as to subletting.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 228.]

4. SAME—WAIVER OF BREACH.

Acceptance by the lessor of rent after the commission of such breach will not amount to

a waiver of the covenant against subletting, unless at the time of receiving the rent the lessor had full knowledge of the facts. Where the rent is due and payable annually, knowledge by the lessor that there has been a breach of the covenant during the year for which the rent is received will amount to a waiver of the covenant so far as that year is concerned, but cannot be treated as an acquiescence in the assignment for the full term of the lease, when the lessor had no knowledge that such an assignment had been made.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 345.]

5. SAME—PLEADING.

A waiver of a breach of covenant may be pleaded in bar to an action brought by the lessor against the lessee and his assignee to recover possession of the premises because of an alleged forfeiture of the lease growing out of such breach of covenant; but the establishment of this defense will not entitle the lessee or his assignee to be reimbursed for expenses incurred in making valuable and permanent improvements upon the premises during their occupancy of the same.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 593.]

6. DISMISSAL—SEVERAL DEFENDANTS.

A plaintiff may, as a matter of right, strike the name of one of several defendants, where there is no relief prayed by such defendant against the plaintiff or her codefendants, taking the risk of the effect which the exercise of this right may have on his case.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 44.]

(Syllabus by the Court.)

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action by Mrs. M. J. Walker against Mrs. M. J. Wadley and others. Judgment for defendants, and plaintiff brings error. Reversed.

On the 17th day of March, 1903, Mrs. M. J. Walker brought a complaint for land against Mrs. M. J. Wadley, as administratrix of the estate of W. M. Wadley, and Daniel Sons & Palmer, J. F. Carter, and William Warnock. Two of the defendants, Mrs. Wadley as administratrix and the firm of Daniel Sons & Palmer, filed an answer, in which they denied the right of the plaintiff to recover and set up the following special defense: On November 17, 1899, the plaintiff conveyed the land sought to be recovered to William M. Wadley for one year, with the option of four more, at and for the yearly rental of \$325, with a further option of five years longer at \$350 a year. Wadley took possession, remained the first year, and subsequently, on October 1, 1900, exercised his option to remain four years longer. He died on November 17, 1900, in possession of the property, after he had become bound for four years more at a yearly rental of \$325 a year, with the right and privilege of keeping the premises for five years longer at an increased rental of \$350 a year. After his death his administratrix continued the possession of her intestate, and expects, in behalf of his estate, to exercise the option for five years longer, at the time he was required to do so, to wit, on October 1, 1904.

Acting under the contract of rental, Wadley incurred a great deal of expense preparatory to carrying on farming operations upon the leased premises, and erected valuable improvements thereon, paid the rent when due, up to the time of his death, and his administratrix has since paid the rent as it fell due. In order to carry on the farming operations, care for the premises of the plaintiff, and protect the interest of the estate therein, the administratrix has associated with her the other defendants in the use, occupation, and cultivation of the land; and, "with full knowledge of the situation," the plaintiff has accepted payment from the defendants for the use and occupation of the property, and no rent is due the plaintiff. As she "elects to turn out these defendants, she must in equity return to defendants \$1,104, the value of the permanent improvements placed by them on said property, and for which the said property is in equity chargeable, said improvements being necessary and [having] increased the value of the land, and also return to the estate of Wadley his expenditures used on the property rented from her of \$1,000, and also pay his estate the further sum of \$2,500, the value of said premises for the unexpired term of rental over and above the contract rate." The answer concluded with a prayer that the defendants have judgment against the plaintiff for these several amounts. The plaintiff demurred to the defendants' special plea, on the grounds (1) that the allegations of fact therein set forth presented no legal or equitable defense, and (2) that they did not present any equity for the consideration of the court, or entitle the defendants to invoke the equitable powers of the court. The court overruled the demurrer, whereupon the respective parties agreed that the presiding judge should, without the intervention of a jury, try the case upon an agreed statement of facts and certain evidence to be submitted in connection therewith. Pending the hearing before the judge the plaintiff sought to amend her petition by striking therefrom the name of Mrs. Wadley, as administratrix, as it appeared from the evidence that she was not in possession of the premises at the date of the institution of the action; but the judge declined to allow the proffered amendment to be made.

From the agreed statement of facts the following appears:

The title to the land sued for is in Mrs. Walker, the plaintiff, and was at the commencement of the action; and she was in the legal and quiet possession of the premises up to January 1, 1900. On November 17, 1899, she executed a lease to W. M. Wadley, since deceased, in which she was designated as party of the first part and he as party of the second part, and which embraced the following recitals and provisions: "That the said party of the first part, for and in consideration of the rents hereinafter reserved

to be paid, and the covenants to be performed by the said party of the second part, hath demised, leased, and to farm let, and by these presents doth demise, lease," etc., the plantation in Burke county known as the "Walker Place," containing 900 acres, more or less, "to have and to hold said plantation unto the said party of the second part, his executors, administrators, or assigns, when permitted, from the 1st day of January, in the year 1900, for the full end and term of the year thence next ensuing. And the said party of the second part doth covenant and agree to pay the said party of the first part, her executors, administrators, and assigns, the sum of \$825, annually during the term aforesaid, in one payment on November 1, 1900, and that without any abatement." The party of the second part also covenants to keep the premises in repair while he continues to occupy the same. "And it is further covenanted that the said party of the second part, his heirs, executors, and administrators, shall not be at liberty to assign this lease or sublet said premises, or any part thereof, for the whole or any part of said term, or place any tenant upon said premises or any part thereof, without the consent of the said party of the first part. And the party of the second part shall have the option of renting the said plantation for the further term of four years after the completion of the first term, at a yearly rental of \$325, payable on the 1st day of November in each year; notice of intention to take this option to be given by October 1, 1900. And in the event of acceptance of said option, the party of the second part shall have a further option of renting the said plantation for a further term of five years, at an annual rental of \$375, payable on the 1st day of November in each year; notice of intention to take this option to be given by the 1st day of October preceding the commencement of said term. And it is further covenanted that if default shall be made in the payment of the rents reserved to be paid within one month from the time the same shall become due, or if any of the covenants agreed to be kept by the said party of the second part in the foregoing indenture shall be broken, it shall and may be lawful for the said party of the first part to determine this lease by 24 hours' notice in writing; and upon giving the said notice, this lease, and every part and parcel thereof, shall become void, except to enable the party of the first part to collect all rents which may be due up to the time of said notice; and upon such notice, all right of the party of the second part shall cease and utterly determine, and it shall be lawful for the said party of the first part to resume and retake possession of said premises, either by personal entrance or by any process under the acts of the General Assembly of the state of Georgia in that behalf provided." This contract of lease was executed under seal by each of the parties thereto, and Wadley

entered into possession under this lease on January 1, 1900. On or about August 29, 1900, he notified Wm. Jones Walker, agent for Mrs. Walker, that it was his intention to accept the option under the lease for an additional term of four years after the expiration of the first term. Wadley died November 17, 1900, in possession of the premises, after having paid the rent for 1900. Mrs. Wadley obtained temporary letters of administration upon his estate on November 21, 1900, and permanent letters on January 7, 1901. She made repeated efforts to induce Mrs. Walker to permit her to sublet the land or assign the lease, which Mrs. Walker declined to assent to. Neither in the appraisal of the estate of Wadley nor in the returns of his administratrix was any reference made to the lease of the Walker place.

In the year 1900, during the lifetime of Wadley, he, without the consent of Mrs. Walker, sublet portions of the plantation to certain tenants for that year, taking rent notes from them; but the remainder of the plantation was farmed by him on the cropper or wages system. In the summer or fall of 1900 he also, without the consent of Mrs. Walker, rented various farms on the place to tenants for the year 1901; but these tenants did not, as such, cultivate the land in 1901, having given up their leases upon the death of Wadley. In the month of December, 1900, Mrs. Wadley and the other heirs at law of W. M. Wadley, sold the personal property of his estate and assigned the aforesaid contract of lease to Daniel Sons & Palmer; the transfer of this lease being reduced to writing and dated to correspond with the time the sale was effected. The consideration for the assignment of the lease was the payment by the assignee of \$150 over and above the annual rental provided for in the lease. The firm of Daniel Sons & Palmer took possession of the Walker place under this assignment on January 1, 1901, and remained in possession, through persons acting under authority as its representatives, up to the time the present action was filed on March 17, 1903, "relying upon the warranty of Mrs. M. J. Wadley and her promise to keep them in possession." Neither Mrs. Walker nor her agent or attorneys had knowledge of this assignment until March 31, 1905, when the writing was exhibited to them, having been impressed by correspondence had with the attorney representing the estate of Wadley that "the administratrix was undertaking to carry on the farms of the estate by Daniel Sons & Palmer and by herself," and this attorney being under the impression, at the time this correspondence was had, that the plantation would be run as stated in his letters. Nor was the plaintiff chargeable with anything more than implied notice of the fact that the firm of Daniel Sons & Palmer based its right of possession under or by virtue of the assign-

ment mentioned. Plaintiff believed, from the apparent connection that firm had with the place, that some arrangement had been made by the administratrix with its members which it was hoped by them would have the same effect as an assignment of the lease, but that this arrangement sought nominally to preserve the lease to the estate. This belief was based on the fact that, notwithstanding the representations made in the letters received from the attorney for the Wadley estate to the effect that the administratrix proposed to carry on the farming operations on the Walker place, and notwithstanding Daniel Sons & Palmer had endeavored in the latter part of 1900 to purchase the lease and desired possession of the place, but were informed of plaintiff's refusal to consent to an assignment of the lease, yet the farming operations were apparently being conducted by that firm, though its members did not reside on the place. The plaintiff understood that the administratrix had not actually assigned the lease to Daniel Sons & Palmer, because of plaintiff's refusal to give her consent; but the circumstance above recited, coupled with the fact that under the law an administratrix cannot continue the business of an estate beyond the year of the death of her intestate, induced the plaintiff to believe that the administratrix had, "if not directly or in form, assigned to Daniel Sons & Palmer some interest in the lease and in her alleged right of possession under the same, if not her entire interest. But plaintiff had no information or knowledge as to what the arrangement was, other than a surmise from the letters * * * and the circumstances aforesaid, until the bringing of the pending action. She made the said Daniel Sons & Palmer parties defendant upon the theory that, whatever said arrangement was, it was entered into in pursuance of an attempt or scheme to evade what plaintiff claims is the law and the expressed terms of the contract, which defendants deny," and she "claims that said arrangement was in effect an assignment, either partial or total, in violation of the law and the contract."

On January 8, 1901, Mrs. Walker gave formal written notice to Mrs. Wadley, as administratrix, to vacate the premises, on the ground that there had been a "breaking of the covenants of said lease by the tenant in subletting a part of said premises and the failure to keep the said premises in repair." By a letter written on the same day by the agent of Mrs. Walker to the attorney representing the estate of Wadley, in which letter this written notice was inclosed, he was informed by the writer that he had visited the plantation and found it in a worse condition than when it was leased, and that he had information that Mr. Wadley had sublet two portions of the place without Mrs. Walker's consent; that she considered this as two dis-

tinct violations of the covenants of the lease, and had accordingly authorized the writer to give notification to this effect. In a subsequent letter, dated January 13, 1901, written in behalf of Mrs. Walker by her attorneys, and addressed to the attorney representing the estate of Wadley, he was notified that she desired them to state that, if the administratrix would keep the covenants of the lease and make the repairs stipulated therein, Mrs. Walker would not proceed to dispossess her or to terminate the tenancy; that the notice previously sent was intended to remind the tenant of the failure to perform the covenants of the lease and of the consequences that would follow a continued violation of its terms; and that Mrs. Walker would not consent to an assignment of the lease or to the subletting of the premises. On October 31, 1901, the attorney just mentioned, acting as the representative of the administratrix of the Wadley estate, sent to Mrs. Walker a check drawn in favor of Mrs. Mary J. Walker for \$325, stating in a letter in which the check was inclosed that it was for rent of Walker place, due November 1st under the terms of the lease. On November 4, 1901, the agent of Mrs. Walker returned this check, with the statement in a letter accompanying it that he did so because it had not been drawn payable to the order of Margaret J. Walker, the real name of his principal. On the following day the attorneys acting for Mrs. Walker mailed to Mrs. Wadley, as administratrix, a notice to quit at the expiration of the year, because the rent had not been paid when due, stating in their letter that "under the law of Georgia the landlord has the right to say who shall occupy her premises. In this case, as the tenant is dead, and as you, his representative, do not care to occupy the premises, she does not care to have people there without her consent." They also inclosed a copy of a letter written on the same day to the attorney of the administratrix, in which they said: "Without conceding that the administratrix had any legal right to occupy the premises under the contract entered into by W. M. Wadley with Mrs. Walker, we think that, even under your construction of that contract, her failure to pay the rent when due worked a forfeiture of whatever right the administratrix may have had. We submitted the proposition that you made some time since to purchase of Mrs. Walker the right to sublet the premises, which proposition she declined, advising us that she would under no circumstances permit Mrs. Wadley to sublet the premises, even if she had the right to occupy them herself. A portion of the land was sublet last year without Mrs. Walker's consent, and we regard the transaction under which the farm was operated this year as equivalent to subletting, if not so as a matter of fact." On the same day, November 5, 1901, the attorney representing the administratrix inclosed in a letter sent to the agent of Mrs. Walker a check made payable to

"Margarett J. Walker," which check she accepted and negotiated.

Thus matters rested until the fall of 1902. On October 30th of that year, Mrs. Walker's attorneys sent to the representative of the administratrix a letter, the contents of which were as follows: "We are instructed by Mrs. M. J. Walker, through her agent, William Jones Walker, to acknowledge the receipt of \$325 sent her as 'rent' for her plantation in Burke the present year. As Mrs. Walker does not recognize Mrs. Wadley, either individually or in any representative capacity, as her tenant, but as a person holding her place without her consent, but against her earnest protest, she can only credit the amount forwarded her on Mrs. Walker's demand for use and occupation. Mrs. Walker claims that the true rental value of the place for the year 1902 is \$600. Representing her, we beg that you will at once present to Mrs. Wadley, in whatever capacity she assumes to act, the demand of Mrs. Walker for the balance due her for the use and occupation of the place for 1902, to wit, \$275. These are our instructions." On March 14, 1903, Mrs. Walker caused a written notice to vacate the premises to be served upon Mrs. Wadley in her capacity as administratrix, therein stating that, even if she ever acquired any rights under the lease, she had forfeited the same by reason of her violations of its covenants with respect to subletting the premises and keeping the same in repair, "which violations have occurred during each of the years since January 1, 1901, and the whole of said place being practically, in contemplation of law, if not actually, sublet for the present year, and being occupied by strangers not under [her] personal supervision and guidance." On October 29, 1903, after the plaintiff had instituted the present action, she gave to Mrs. Wadley a receipt for \$325, therein stating their respective contentions, and reciting that the payment was received without prejudice to either, and was to be credited accordingly as the issue between them might be ultimately determined. Counsel for Mrs. Wadley consented that the money might be retained by Mrs. Walker upon the conditions stated in this receipt, and on November 10, 1904, another payment of \$325 was accepted, and a similar receipt given, upon the same understanding.

It further appeared from the agreed statement of facts that W. M. Wadley resided in Burke county at the date of his death, but at that time Mrs. Wadley lived in the county of Richmond, where she has since continuously resided. The plaintiff, her agent and attorneys, had notice prior to January, 1903, that W. M. Wadley did, in the year 1900, sublet a one-horse farm to one tenant by the name of Harris, and another one-horse farm to a tenant named Williams, but did not, prior to the fall of 1902 or the early part of 1903, have any information as to other subletting. Mrs. Wadley, the administratrix, not being

allowed under the law to continue the business of her intestate longer, on November 24, 1900, sold the perishable property of the estate, together with the lease of the Walker place, to Daniel Sons & Palmer, at a private sale at Millen, Ga., for some \$4,200, and that firm took possession of the personalty on the Walker place and of the plantation itself, upon an understanding with Mrs. Wadley that they would run the same in her name. Subsequently, during the year 1901, a written transfer of the personal property and of all interest in the lease was executed by all of the heirs of W. W. Wadley, including Mrs. Wadley, to Daniel Sons & Palmer, and that firm has been farming the property, through its agents, ever since, remitting each year to Mrs. Wadley \$325, who, in turn, sent that amount to Mrs. Walker. On August 31, 1904, the attorney representing Mrs. Wadley as administratrix wrote a letter to Mrs. Walker, stating that the estate of Wm. M. Wadley, through its legal representative, desired to exercise the right given him under the lease to continue the same for an additional period of five years at the price stipulated in the lease. This notice was given at the request of Daniel Sons & Palmer, but this fact was unknown to the plaintiff. The other defendants to the action, J. F. Carter and William Warnock, were at the time of bringing suit in possession or occupying the land sued for under authority of Daniel Sons & Palmer.

Evidence touching the claim of the plaintiff to mesne profits was introduced in her behalf; and the defendants introduced evidence bearing on this issue, as well as evidence in regard to the value of the improvements which had been placed upon the premises subsequently to the entry under the lease. After hearing the argument of counsel, the presiding judge rendered judgment in favor of the defendants on the ground that, on the admitted facts, the plaintiff was not entitled to prevail. Exception to this judgment was taken by Mrs. Walker, who in her bill of exceptions also assigns error upon the overruling of her demurrer to the defendant's plea, and complains of the refusal of the court to allow her to strike from her petition the name of Mrs. Wadley as a codefendant.

Phil P. Johnston, H. J. Fullbright, and Saussy & Saussy, for plaintiff in error. W. K. Miller and Lamar & Callaway, for defendants in error.

EVANS, J. (after stating the facts). 1. The lease, the provisions of which appear in the foregoing statement of facts, bound the lessor for the term of 10 years, at the election of the lessee. The term was absolute for the first year, and, upon the lessee giving the stipulated notice of his acceptance of the option to extend the term four years from January 1, 1901, the lease contract became binding on both parties for that period of time. If there was any irregularity in giving the notice to Wm. Jones

Walker, as agent for the lessor, instead of to the lessor herself, such irregularity was waived by the subsequent recognition on the part of the lessor of the continuance of the lease. The extended term of four years was not a new demise, but only an extension of the term of the lease from one to five years according to its express provisions.

2. Therefore the covenant against the assignment of the lease or subletting related not only to the first year's existence of the lease, but was likewise coextensive with the continuance of the lease. Manifestly it was the intention of the contracting parties that the same covenants were to be binding during the continuance of the lease, save as to the amount of rental to be paid, whether its existence continued one, five, or ten years. *Corporation of the London Assurance v. Paterson*, 106 Ga. 538, 32 S. E. 650; *Taylor's Land. & Ten.* § 332.

3. The lease being made to Wadley, his executors and administrators, it was clearly the right of his administratrix to continue in possession of the leased premises as long as, under the law, she was authorized to continue his business, which was until the expiration of the current year of his death. *Civ. Code 1895*, § 3436. By accepting rent paid by the administratrix under the terms of the lease for the year 1901, the lessor recognized her as a tenant lawfully in possession thereunder for the additional term of four years therein provided for. So, unless the administratrix committed a breach of the covenants upon which the lease was made, the lessor was estopped from claiming that she was a mere intruder. That she did commit a breach of the covenant against assigning the lease or subletting is evident; for, after the lessor had positively declined to give assent to the assignment of the lease to Daniel Sons & Palmer, the administratrix turned over the possession of the plantation to that firm upon the understanding that it was to be run in her name, but for its benefit, in order that effect might be given to the written assignment of the lease which she and the other heirs of the estate had executed. This transaction was colorable, was concealed from the lessor, and was in direct violation of the covenant against subletting. A violation of this covenant could only be avoided by the operation of the plantation by the administratrix in person or through authorized agents for the benefit of the estate she represented. She could not accomplish by indirection what the lease expressly forbade her to do without the assent of the lessor. Indeed, the defendants' plea practically admitted the breach of covenant, and their defense was that there had been a waiver of this breach on the part of the plaintiff.

4. The lessor was not informed or apprised of the assignment of the lease by the heirs of Wadley to Daniel Sons & Palmer until after the institution of her suit. She "be-

lieved from Daniel Sons & Palmer's apparent connection with the place that some arrangement had been made by the administratrix with them, which it was hoped by them would have the same effect as an assignment, but that such assignment sought nominally to preserve the lease to the estate," and certain facts "induced plaintiff to believe that the administratrix, if not directly or in form, had assigned to Daniel Sons & Palmer some interest in the lease, and in her alleged right of possession under the same, if not her entire interest, * * * and that it was entered into in pursuance of an attempt or scheme to evade what plaintiff claims was the law and the express terms of the contract." Entertaining such suspicions and inferences, she gave notice that the lease had become forfeited because of the violation of the covenant against subletting. The lessor admits that the facts of which she has had knowledge raised the inference that this covenant of the lease had been violated. With such knowledge, and after giving notice insisting upon a forfeiture of the lease, she in the fall of 1902 accepted rent tendered under the provisions of the contract. When the administratrix sent to the lessor the money contracted to be paid, upon the express condition that it was to be accepted as rent pursuant to the terms of the contract, if this condition was not satisfactory to the lessor, she should either have returned the money to the administratrix of Wadley, or have notified her that she held the same subject to her order. *Jenkins v. National Ass'n*, 111 Ga. 732, 36 S. E. 945. The lessor could not apply the money tendered in pursuance of the contract as rent to a claim which she asserted independently of the contract. Her retention of the money under these circumstances was equivalent to its acceptance under the provisions of the contract, as rent from a tenant lawfully in possession of the premises, notwithstanding the disclaimer of the tenant's right of possession made in the receipt which the lessor sent to the administratrix. Acceptance by the lessor of rent accruing after the breach of a covenant, with knowledge thereof, amounts to a waiver of a forfeiture resulting from that particular breach. *Taylor's Land. & Ten.* § 499. And, where rent is payable annually, the acceptance of the same with knowledge by the lessor that there has been a breach of covenant during the previous year and before the accrual of the rent which is tendered, it is to be regarded as a waiver of that breach of the covenant. But, where the lessor is ignorant of an assignment of the lease for the full term of the tenancy, acceptance of the rent with knowledge limited to inferences drawn from facts which give no information as to the existence of a written assignment of the lease for the full term will not extend the waiver to the full period of the term covered by the lease assigned. When the rent for 1902 was tendered, the ad-

mitted facts justify the inference that the lessor knew that the covenant against subletting had been violated during the years 1900, 1901, and 1902. For the violation of the covenant during these years, her acceptance of the rent with knowledge of such violation was a waiver of the forfeiture for such breaches. "When, however, there is a continuing cause of forfeiture, the landlord will not be precluded from taking advantage of it by receiving rent which accrued after the breach was originally committed." Taylor's Land. & Ten. § 500. Thus, when the lessee's administratrix continued to allow Daniel Sons & Palmer to remain in possession of the land and operate the farm under the assignment of the lease by the heirs of her intestate, there was a continuing breach, and the acceptance of rent by the lessor only waived the right to forfeit the lease for such breaches as occurred prior to the accrual of the rent of which she had knowledge. When the lessor notified the administratrix of Wadley, in March, 1903, that she claimed a forfeiture because of the violation of the covenant against assignment or subletting, then, after the expiration of the time stipulated in the contract, the lease became forfeited by reason of the violation of that covenant, and the lessor could sue for possession. This she did in a few days, and under the admitted facts she was entitled to maintain her action from that time. It was, therefore, erroneous for the court, upon the agreed statement of facts, to render judgment for the defendants.

5. A waiver of a breach of covenant may be pleaded in bar to an action brought by the lessor against the lessee and his assignee to recover possession of the premises because of an alleged forfeiture of the lease growing out of such breach of covenant. So much of the plea as set up this defense should not have been stricken. But the establishment of this defense would not entitle the lessee or his assignee to be reimbursed for expenses incurred in making valuable and permanent improvements on the land during their occupancy of the same. Hence so much of the plea as sought to recover a money judgment against the plaintiff should have been stricken on demurrer.

6. The Code provides (Civ. Code 1895, § 5104), when two or more persons are sued in the same action, either on a contract or for a tort, the plaintiff may amend his declaration by striking out one or more of such defendants, and proceed against the remaining defendant or defendants, if there is no legal difficulty in the way. The pleadings in the present case do not suggest any legal difficulty to the elimination of the administratrix of Wadley from the case. She has not prayed any relief to which she is entitled, either against the plaintiff or her codefendants; and, as the plaintiff brought her into court, the plaintiff should be allowed to discontinue the case as to her by having her

name stricken from the petition, the plaintiff taking whatever risk to her case that may result to her by the exercise of this statutory right. *Coston v. Coston*, 66 Ga. 382. The court should have allowed the amendment striking the name of Mrs. Wadley, as administratrix, as a party defendant. Judgment reversed. All the Justices concurring.

(124 Ga. 423)

WASHINGTON v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. SEDUCTION — ACCOMPLICES — EVIDENCE — NECESSITY OF CORROBORATION.

The ruling made in *Keller v. State*, 31 S. E. 92, 102 Ga. 506, that the woman seduced is not an accomplice in the crime of her own seduction, within the meaning of the word "accomplice" as used in section 991 of the Penal Code of 1895, is, upon a review of that case approved and adhered to.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, ¶ 83-86.]

2. CRIMINAL LAW—INSTRUCTIONS—MEASURE OF PROOF.

Where, upon the trial of a criminal case, the court fully and correctly instructed the jury as to the presumption of the innocence of the accused, the burden upon the state to prove his guilt to the moral and reasonable satisfaction of the jury and beyond a reasonable doubt, and as to the meaning of a reasonable doubt, there was no error in charging the jury that, if the state had shown to their "satisfaction" the facts necessary to constitute the offense charged in the indictment, they should find the accused guilty, without informing them, in this immediate connection, "what should constitute satisfaction, or what amount of proof would create a state of mind and conscience covered by the word 'satisfaction,' or to what extent the evidence should go to bring the mind of the jury to the state of satisfaction."

3. SEDUCTION—PREVIOUS CHASTITY OF PROSECUTOR.

Upon the trial of one charged with the crime of seduction, the test by which to determine whether the woman was virtuous at the time of her alleged seduction is physical, not moral, chastity.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 55.]

4. SAME—INSTRUCTIONS.

The charge of the court did not fail to differentiate the offense of fornication from the offense of seduction, and, if more specific instructions as to the nature of the lesser offense were desired by the accused, he should have made a timely and appropriate request for the same. The charge did not, in effect, instruct the jury that, if they were satisfied that the accused was guilty of the offense of fornication, they should find him guilty of seduction.

5. SAME.

The charge of the court, that the jury should arrive at their verdict "solely from the evidence and the law and by nothing else," considered in the connection in which it was given, was not erroneous.

6. SAME—STATEMENT OF PRISONER.

The fact that the instructions of the court in reference to the prisoner's statement were given at the conclusion, instead of elsewhere in the charge, is not ground for an exception.

7. WITNESSES—CONTRADICTION—USE OF PREVIOUS WRITTEN STATEMENT.

Before a written statement by a witness, contradictory of his testimony in the case, can be

proved against him, it must, if in existence, be shown to him, or read in his hearing, unless it be a written statement made under oath in connection with some judicial proceeding.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1233-1242.]

8. SEDUCTION—EVIDENCE.

There was no error in allowing the woman alleged to have been seduced to testify that her love for the accused caused her to yield to the sexual intercourse.

9. CRIMINAL LAW—EVIDENCE—COMPARISON OF HANDWRITING.

The defendant's signature to pleas in abatement which had been filed in the case by him, and which had been passed upon and disposed of by the court, could not, by mere reason of the filing of such pleas, be shown to the jury by his counsel as standards of the genuine handwriting of the accused, with which to compare the handwriting and signature of a letter introduced in evidence by the state as having been written by the accused, for the purpose of determining, by such comparison, whether he really wrote or signed such a letter.

10. SEDUCTION—TRIAL.

The fact that the woman alleged to have been seduced sat in the presence of the jury and wept during the argument of counsel for the state is not cause for a new trial, when no objection was made to this at the time it occurred, and the court was not requested to take any action whatever in reference to the matter.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2136.]

11. CRIMINAL LAW—NEW TRIAL.

Evidence as to the good character of the accused, offered after verdict to support a motion for a new trial, is not cause for granting such motion.

12. SAME—AFFIDAVITS.

Affidavits introduced upon the hearing of a motion for a new trial, purporting to contain newly discovered evidence which is nowhere referred to in such motion, cannot be considered by the court.

13. SAME — CUMULATIVE AND IMPEACHING EVIDENCE.

There is no abuse of discretion in refusing to grant a new trial because of alleged newly discovered evidence, introduced upon the hearing of the motion, when such evidence is merely cumulative of evidence introduced upon the trial of the case, or impeaching in its nature, and all of it is contradicted by affidavits introduced by the opposite party.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2306-2336.]

14. SAME.

A letter received by the accused since the trial, purporting to have been written to him by the woman alleged to have been seduced, in which it was stated that he was not guilty of having seduced her, but another named person was, even if proved to have been written by her, would afford no cause for granting a new trial.

15. SEDUCTION—EVIDENCE—SUFFICIENCY.

The evidence was sufficient to authorize the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Jessie Washington was convicted of seduction, and brings error. Affirmed.

See 50 S. E. 920.

T. J. Dempsey and R. L. Berner, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

FISH, C. J. Jessie Washington was convicted of the crime of seduction, and brought the case here for review by excepting to the overruling of his motion for a new trial.

1. "The victim of a seduction is not an 'accomplice' to the offense committed, in the sense in which the word just quoted is used in section 991 of the Penal Code of 1895, requiring the testimony of at least two witnesses to convict of a felony, or corroborating circumstances, 'where the only witness is an accomplice.'" This ruling was made by a full bench in *Keller v. State*, 102 Ga. 506, 31 S. E. 92. In the present case leave was granted to review that decision, but upon a careful re-examination of the question we are thoroughly satisfied of the correctness of the ruling then made, and now adhere to the same. In addition to what was said on the subject in the *Keller Case*, it is very clear to our minds that, when the crime of seduction is committed, the woman who is seduced and induced to yield to the lustful embraces of the man, by his persuasions and promises of marriage or other false and fraudulent means employed by him, is not an accomplice to the crime, but obviously a victim of the seducer. We do not see how she can be an accomplice in a crime the very gist of which consists in persuasions and promises, or other false and fraudulent means, directed against herself. Can she plot and plan, persuade and promise, for the purpose of overcoming her own will and accomplishing her own ruin? Can she employ false and fraudulent means upon herself? Clearly, as to the crime of seduction, she cannot be an accomplice. The statutes of some of the states in reference to the crime of seduction contain a provision that a person cannot be convicted of this offense upon the uncorroborated testimony of the woman who is claimed to have been seduced. 25 Am. & Eng. Enc. L. 243. The authority cited by the plaintiff in error, to the effect that the testimony of the woman alleged to have been seduced must be corroborated, is the decision of a court in a state where the statute so requires. There is no such statute in this state.

2. The court instructed the jury as follows: "The state is not confined to the day named in the indictment, necessarily; but if the state has shown to your satisfaction that he seduced her, that she was a virtuous unmarried female, and that it was in this county within four years prior to the finding of the indictment, and that he seduced her by persuasions and promises of marriage to yield to his lustful embraces and let him have carnal knowledge of her—if the state has shown this to your satisfaction, you should find him guilty of seduction." The error assigned upon this instruction is that it did not inform the jury "what should constitute satisfaction, or what amount of proof would create a state of mind and conscience covered by the word 'satisfaction,' or to what extent the evidence should go to bring the mind of the

jury to the state of satisfaction." There is no merit in this exception. It appears from the charge of the court in the record that the jury were fully and correctly instructed as to the presumption of the innocence of the accused, the burden upon the state to prove his guilt to the moral and reasonable satisfaction of the jury and beyond a reasonable doubt, and as to the meaning of a reasonable doubt. In view of these instructions, the jury evidently must have understood the court's use of the words "to your satisfaction" to mean to their satisfaction beyond a reasonable doubt. The court having fully instructed the jury as to the degree of conviction of the guilt of the accused which the evidence must produce in their minds before they would be authorized to convict him, the jury were obliged to understand, when the court charged them that certain things must be shown to their satisfaction before they could convict, that the proof in reference thereto must produce this requisite degree of mental conviction before a verdict of guilty could be rendered.

3. The court instructed the jury that it was a question for them to determine, from the evidence submitted, whether the woman alleged to have been seduced was virtuous at the time of the alleged seduction; "that is, had she at that time had sexual intercourse with another man? If she had, she was not a virtuous woman; if she had not, she was a virtuous woman." This charge was excepted to on the ground that it confined the jury to a consideration of her physical chastity, and eliminated all consideration by the jury of any fact or circumstance tending to show her want of moral chastity. This exception was not well taken. The court, in this instruction, was giving to the jury the legal meaning of the expression "a virtuous

* * * female," as applied to a woman who had never married, in reference to the crime of seduction; and the definition given was substantially correct. The general rule is that "unmarried females who are virgins are virtuous; and those who, by their own consent, have ceased to be virgins, are not virtuous." *O'Neill v. State*, 85 Ga. 383, 407-408, 11 S. E. 856, 857. "The jury should treat [the woman alleged to have been seduced] as virtuous unless the evidence, direct or circumstantial, should satisfy them that she had lost her virtue, by having illicit intercourse." *McTyler v. State*, 91 Ga. 254, 18 S. E. 140. The court charged the jury that they were to determine the question whether the woman was virtuous at the time of the alleged seduction from the evidence submitted. This included the evidence of want of moral chastity, if, indeed, there was such evidence, as well as all other evidence submitted. It is true that, if there be evidence of want of moral chastity of the female alleged to have been seduced, it may be considered by the jury on the question whether she, though a virgin, was really

seduced, or whether she shared the illicit intercourse for the gratification of lascivious propensities, not inflamed by the arts or importunities of the accused (*O'Neill v. State*, supra); but if the court, in such a case, should fail to instruct the jury that they might consider such evidence for the purpose indicated, the accused should make a timely and appropriate request that such instructions be given.

4. Another instruction to the jury which is excepted to was: "If you should not be satisfied that the defendant is guilty of the offense of seduction, but are that he was guilty of sexual intercourse with the woman, you could then find him guilty of fornication if both were unmarried at the time the intercourse took place, if you find it took place at all. If you are satisfied he is guilty of fornication, you should find him guilty. If you are not satisfied he is guilty of fornication, you should acquit him." One error assigned upon this charge was that it failed to differentiate fornication from seduction, and that "the court should have charged the jury that if the woman yielded to defendant in response to her lustful desire, or if she did so simply because defendant promised to marry her, without more, it would have been fornication." Another error assigned is that the effect of this charge was to instruct the jury that if they were satisfied that the accused was guilty of fornication, they should find him guilty of seduction. The court had, more than once, in the charge to the jury fully and correctly instructed them as to the essential elements of the offense of seduction, and the charge now under consideration, in effect, defined the offense of fornication. If the accused desired a more specific charge as to the offense of fornication, it should have been properly requested. The instruction that, if the jury were satisfied that the accused was guilty of fornication, they should find him guilty, could not have been understood by the jury as meaning that if they were thus satisfied they should find him guilty of seduction, for this instruction immediately followed the charge: "If you should not be satisfied that the accused is guilty of the offense of seduction, but are that he is guilty of sexual intercourse with the woman, you could then find him guilty of fornication, if both were unmarried at the time the intercourse took place." The meaning of the instruction excepted to in this assignment of error was clear from the connection in which it was given, and the jury could not have been misled by it.

5. Error was assigned upon the following excerpt from the charge of the court: "Arrive at your verdict solely from the evidence and the law, and by nothing else." The exception was that this excluded from the jury all consideration of the defendant's statement, especially as no instructions were given as to the statement of the accused until at the close of the judge's charge. This

excerpt from the charge should be considered in the connection in which it was given. The court instructed the jury to "take the evidence in the case and find what the truth of this transaction is, and when you find it let your verdict speak the truth. Arrive at your verdict solely from the evidence and the law, and by nothing else. Let no outside circumstances influence you in the least, but take the case and consider it as honest, conscientious jurors, and find the truth." So considered, the excerpt was not erroneous, especially in view of the oft-repeated rule that "the general tenor of the charge of the court on the trial of a criminal case should be shaped by the evidence alone and the law applicable thereto, adding, or at some stage of the charge incorporating, the statutory provisions touching the prisoner's statement." *Hays v. State*, 114 Ga. 25, 40 S. E. 13, and citations; *Foskey v. State*, 119 Ga. 72, 45 S. E. 967.

6. There was no merit in an exception that the judge did not instruct the jury in reference to the prisoner's statement until after the rest of the charge had been given. The fact that these instructions were given at the conclusion, instead of elsewhere in the charge, is not ground for an exception.

7. On the cross-examination of the woman alleged to have been seduced, counsel for the accused asked the following question: "Don't you remember writing a letter in which you stated he had not given you the ring?" She answered, "No sir." Upon objection by the solicitor general, this answer was excluded, unless the letter should be exhibited. No letter was shown to the witness. She, on direct examination, had testified that the accused had given her a ring. The evident purpose of defendant's counsel was to lay the foundation for impeaching the witness by proof of a contradictory statement made in writing. The rule is that before a contradictory written statement can be proved against a witness, unless it be a written statement made under oath in connection with some judicial proceeding, it must be shown to him, or read in his hearing, if in existence. Pen. Code 1895, § 1026. The ruling of the court was, therefore, not erroneous.

8. Nor did the court err in allowing, over the objection of the accused, the woman alleged to have been seduced to testify that her love for the accused caused her to yield to the intercourse. The objection urged was that it was for the jury to determine from the facts why she so yielded.

9. Prior to the trial of the case on its merits, the accused filed an original and an amended plea in abatement, to which his signatures were attached. The court passed on these pleas. During the trial of the case on its merits, counsel for the accused, during his argument to the jury, undertook to use the signatures to such pleas for the purpose of comparing them with a letter which had been introduced by the state, purporting to

have been written and signed by the accused, and to show by such comparison that the letter and signature thereto were not in his handwriting. The court refused to allow defendant's counsel to make such use of the signatures to these pleas, because they were not such parts of the pleadings as could be so used without being introduced in evidence. There was no error in this ruling. The issue raised by these special pleas had been disposed of, and they were no part of the pleadings in the issue before the jury. They were in no sense before the jury, and could not be unless they had been introduced as evidence.

10. Another ground of the motion for a new trial was that during the argument for the state the woman alleged to have been seduced sat in the presence of the jury and wept. The court certifies that counsel for the accused saw and heard this, but raised no objection to it. We do not think such conduct of the woman cause for a new trial, especially as counsel for the accused made no objection to the same, and did not request the court to take any action in reference to the matter. This court has frequently held that, where counsel make unauthorized and improper remarks in their arguments before juries, opposing counsel should call attention to the same and either move for a mistrial or request the court to instruct the jury to disregard such statements. *Bowens v. State*, 106 Ga. 764, 32 S. E. 666, and citations. "The failure of the court to interpose of its own motion in a case of impropriety in its presence will not generally be a sufficient reason to set aside a verdict at the instance of a party, when no objection to the impropriety was made pending the trial, and no ruling in reference thereto was invoked from the court." *O'Dell v. State*, 120 Ga. 152, 47 S. E. 577 (5). So where the disqualification of a juror was known to the accused before the jury was sworn, it is no cause for a new trial. *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *Cohron v. State*, 20 Ga. 752. So where one of the jurors was asleep during a portion of the trial, this was held not to be ground for a new trial, unless it affirmatively appeared that the accused and his counsel did not know of this circumstance before the jury retired to make a verdict. *Cogswell v. State*, 49 Ga. 103. In *State v. Laxton*, 78 N. C. 564, it appeared that during the trial of one accused of rape certain members of the family of the prosecutrix sat within the bar of the court and occasionally wept during the argument of the State's counsel, and withdrew when the prisoner's counsel began to address the jury. No complaint was made or objection offered during the trial. It was held that the failure of the judge to restrain such conduct was not cause for a new trial.

11. Evidence as to the good character of the accused, offered after verdict to support a motion for a new trial, is not cause for granting such motion.

12. On the hearing of the motion for a new

trial, movant put in evidence the affidavits of certain persons to the effect that they knew the handwriting of the accused, and that since the trial they had examined a letter introduced by the state on the trial, purporting to have been written by him to the woman alleged to have been seduced, and that such letter and the signature thereto were not, in their opinion, in his handwriting. The evidence of such witnesses was nowhere referred to in the motion for a new trial, and therefore could not be considered by the court.

13. On the hearing of the motion, the movant submitted other affidavits containing alleged newly discovered evidence, which, however, were merely cumulative or impeaching in their character, and all of which were contradicted by affidavits introduced by the state. The trial judge passed upon this alleged newly discovered evidence in view of the contradicting affidavits submitted by the state, and either considered it unworthy of belief, or as not of such a character as would likely produce a different result on another trial. It is well settled that alleged newly discovered evidence of this character is not generally cause for a new trial, even where it is uncontradicted; and it is perfectly clear that, where it is contradicted by evidence introduced by the state on the hearing of the motion, there is no abuse of discretion in refusing to grant a new trial upon the ground of the existence of such evidence and its discovery since the rendition of the verdict.

14. The motion for a new trial alleged that since the conviction of the accused he had received, by due course of mail, a letter, purporting to have been written and signed by the woman alleged to have been seduced, in which it was stated that he was not guilty of seducing her, but another named person was; that she had heard that the accused had been granted a new trial, and if he would send her \$100 she would leave the country and stop the trouble. Affidavits of several persons were submitted by the movant to the effect that the affiants saw him receive this letter, that they were acquainted with the handwriting of the woman, and the letter and signature thereto were in her handwriting. The state submitted the affidavits of several persons to the effect that they knew her handwriting, and that she did not write and sign this letter; also her affidavit that she did not write the letter. Even granting that she wrote such a letter, it was not cause for a new trial. Evidence that a state's witness, since the trial, has made declaration, even under oath, that his testimony given upon the trial was false, was not cause for a new trial. *Jordan v. State* (this day decided) 52 S. E. 768 and cases cited; Civ. Code 1895, § 5363.

15. We have carefully scrutinized the evidence submitted by the state on the trial,

and, while the testimony of the woman alleged to have been seduced was self-contradictory as to the month when she claimed to have been seduced, she was at all times positive as to the place where the seduction occurred, and that the offense was committed in the summer of a given year. The jury were the judges of her credibility, the trial judge approved the verdict, and this court cannot say that he committed error in so doing.

Judgment affirmed. All the Justices concurring, except BECK, J., disqualified.

(124 Ga. 433)

CAMPBELL v. STATE.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. **CRIMINAL LAW—OBJECTIONS TO EVIDENCE.**
A general objection to evidence consisting of a series of questions and answers is not well taken, if some of the evidence is admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1637.]

2. **HOMICIDE—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.**

The fact that in a trial for murder circumstantial evidence is relied on to prove both the corpus delicti and the connection of the accused with the killing does not render inapplicable a charge that "upon the unlawful killing of a human being malice is presumed by law, and that presumption remains unless it is rebutted by satisfactory testimony."

3. **CRIMINAL LAW—INSTRUCTIONS—EXPRESSION OF OPINION.**

Where, after the completion of the judge's charge, counsel for the accused requested the court to charge on the law of impeachment of witnesses, stating that it was his contention that a named witness had been impeached, it was not an expression of opinion as to what had been proved for the court to state in the presence and hearing of the jury: "I do not think, under the evidence as the court understands it, that it is necessary to give that in the charge."

4. **SAME.**

It was not error to refuse an oral request to charge on the subject of impeachment of witnesses; and the fact that the judge had previously been accustomed to granting such oral requests when he regarded them pertinent did not relieve counsel of the necessity to put his request for instructions on this subject in writing.

5. **HOMICIDE—EVIDENCE—MOTIVE.**

In a trial for murder, it is not necessary for the state to prove a motive for the crime in order to support the presumption of malice which arises from proof of an unlawful killing.

6. **SAME—EVIDENCE—APPEAL—REVIEW.**

The conviction rested on circumstantial evidence, much of which was not as strong as is desirable in capital cases. Its probative value, however, was for the jury; and as this is the second verdict of guilty, and as the trial judge has twice expressed his approval of the verdict by overruling the motion for a new trial, this court will not interfere.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 703.]

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Nancy Campbell was convicted of murder, and brings error. Affirmed.

See 51 S. E. 644.

Hendricks, Smith & Christian, for plaintiff in error. W. E. Thomas, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

CANDLER, J. Nancy Campbell was convicted of the murder of her husband, Alex. Campbell; and, her motion for a new trial having been overruled, she excepted.

1. Error is assigned upon the refusal by the court to rule out certain specified evidence of a witness for the state. The evidence as set out in the motion consists of numerous questions and answers, many of which, at least, were entirely legitimate and admissible. Under the repeated rulings of this court, therefore, the assignment of error upon the refusal to rule out the entire evidence objected to is without merit. See *Hixon v. Asbury*, 120 Ga. 385, 47 S. E. 901, and cases cited; 5 Enc. Dig. Ga. Rep. 305.

2. It is also complained that the court erred in charging the familiar principle of law that, "upon the unlawful killing of a human being, malice is presumed by law, and that presumption remains, unless it is rebutted by satisfactory testimony." The error assigned upon this charge is that it was not adjusted to the evidence, and that "this principle of law is only applicable, and should only be given, in charge where the killing of the deceased was shown to have been done by the accused by an eyewitness, by confession, or a dying declaration; and especially is this true where the defendant disclaims all knowledge of the killing and explains her presence upon the scene of the homicide, and this is further true when the state has failed to prove the corpus delicti, and where the contention of the defendant was that the homicide was a suicide, or the act of some other person than herself and unknown to her." We find no error in this charge. While it is true that it would not be applicable in the absence of proof of the corpus delicti or that the accused had done the killing, it must be borne in mind that it is for the jury to say whether these essential elements of the crime of murder have been proved; and, in the event either question were decided in the negative, the charge would be harmless because the jury would never get to the point of considering it, as a finding that no crime had been committed, or that the accused had no part in the killing, would necessarily lead to an acquittal without an inquiry into the question of malice. If, however, the jury should find that a crime has been committed, and that the accused killed the deceased (both of which questions are solely for their determination), it is then their duty to take the additional step and inquire into the existence or absence of malice, without which there can be no murder; and consequently it is entirely proper in such a case as the present for the trial judge to give appropriate instructions to guide them in the prosecution of this inquiry.

3. It appears that after the court had finished charging the jury, and before the

jury had retired, counsel for the accused addressed the court as follows: "We would ask your honor to charge the jury on impeachment of witnesses. We are contending that we impeached the witness Ben Ford." To this request the court, in the presence and hearing of the jury, replied: "I do not think, under the evidence as the court understands it, that it is necessary to give that in charge." It is urged that this was "a direct and positive expression of opinion that no contradictory evidence was in the case, and that the jury should, as a matter of law and fact, believe everything that had been testified to by all the witnesses sworn upon the trial," and the refusal of the trial judge to grant a new trial on this ground is assigned as error. The criticism of the charge which we have quoted is, we think, hardly just. There was no intimation by the court of what had been proved, merely an expression as to the necessity of a charge which had been requested; and it was entirely permissible for the court, when called upon, to state what evidence had or had not been introduced. Such a statement is in no sense an expression of opinion, as to the probative value of the evidence. Had the court, without any comment whatever, bluntly refused to give the charge requested, his course would have been no less an expression of opinion as to what had been proved than was the statement that under the evidence as he understood it the charge was not necessary; for the one carried the other with it by necessary implication. The remark appears to have been addressed to counsel, and not to the jury, and was in direct reply to a request made by counsel. While this court has been strict in the limitations placed upon judges as to remarks made in the presence and hearing of the jury, we are clear that the question now under review presents no such improper conduct as to require the grant of a new trial. See *McLendon v. Frost*, 57 Ga. 449 (3); *Marion v. State*, 68 Ga. 290. Of course, what is here said has reference entirely to the propriety of the judge's remark, and not to the accuracy of his conclusion as to whether, in fact, a charge on the subject of impeachment of witnesses was required.

4. We do not hesitate, however, to hold that the trial judge was right in refusing to give this charge. There was no evidence whatever upon which to base it, which was a sufficient reason for refusing the request, and the request was not in writing, which was an additional reason. See cases cited in 7 Enc. Dig. Ga. Rep. 624, 625. The custom of the judge to grant oral requests where he considered them pertinent cannot dispense with the legal requirement that such requests should be in writing.

5. The written request to charge that "there can be no murder without malice, and no malice without motive," was properly refused. Common experience proclaims that many murders are committed where there is

no apparent motive other than that which springs from an abandoned and malignant heart. Courts need not subscribe to the doctrine of original sin or innate depravity, but they are compelled to recognize many evidences which tend to support such views; and, if it were indeed the law, as contended by counsel for the accused, that there can be no malice in a legal sense without a motive, and if it were necessary to prove a motive in order to convict of murder, very many red-handed murderers would go unwhipped of justice. The law presumes malice from an unlawful killing, and dispenses with the necessity of a motive to support the presumption.

6. It appeared from the evidence that the accused and her husband lived alone together; that about 10 o'clock on the night of the homicide several shots were heard, apparently in their house; and that immediately thereafter the deceased ran out of the house, went a short distance, and fell dead. About this time the accused also ran out of the house in her night clothes and went to the house of a neighbor near by. She was very much agitated, and said that Alex (the deceased) was at home shooting, and she believed he was shooting himself. The neighbor to whose house she went was in bed at the time, but he got up and went to the scene of the shooting; afterwards returning with the information that the husband of the accused was dead. This witness testified: "She [the accused] stayed excited from the time she came in there until she found out the man was dead, and then, after I went there and come back and brought the report that he was dead, she seemed to get satisfied then." Immediately after the shooting the house in which it occurred caught fire and was burned to the ground; there being no direct evidence as to the cause of the fire. It appeared that the accused had made statements relative to the positions in the bed that she and her husband occupied just prior to the shooting, and that after the house had burned down the ashes were examined and a pistol was found on the side of the bed on which, according to her statement, she had lain. There was no evidence that any other person than the accused and the deceased had been at the house on the night of the shooting. The testimony of the physician who examined the body of the deceased after the shooting, relative to the position of the wounds, tended to discredit the theory of suicide. There was no evidence of any previous state of bad feeling between the deceased and the accused. The statement of the accused was to the effect that on the night in question she had been asleep, and was awakened by the sound of pistol firing, and that she was badly frightened thereby, and without investigating the cause of the firing fled from the house. She did not undertake to say whether her husband killed himself or was assassinated by an unknown

person who had entered the house while she was asleep; but she denied having any participation in the act herself.

It will be seen that the conviction rests on purely circumstantial evidence; and it must be confessed that the circumstances are not of that clear and convincing character which is desirable to support a verdict of guilty in a capital case. At the same time, we cannot say as matter of law that the jury were not justified in finding that the proved facts were such as to exclude every reasonable theory other than that of guilt. The opportunity of the accused to commit the crime, the entire lack of evidence that any one else had such opportunity, and the improbability of the theory of suicide, were circumstances which, when taken in connection with the other circumstances which have been mentioned, might well authorize the jury to find the accused guilty as charged. This is the second verdict of guilty which has been returned against her. See *Campbell v. State*, 123 Ga. 533, 51 S. E. 644. Two juries have heard the evidence, have looked upon the witnesses and the accused, have observed their demeanor in the courtroom, and have, under circumstances the most favorable for arriving at a correct solution of the difficulties presented by the evidence, pronounced the accused guilty. The trial judge, upon whom the law places the responsibility of correcting the mistakes of juries, has twice, by his refusal to grant a new trial, placed upon the conviction the seal of his approval. Under the settled rules of this court, therefore, this court will not disturb the judgment of which complaint is made.

Judgment affirmed. All the Justices concurring.

(124 Ga. 459)

GEORGIA R. & BANKING CO. v. TICE et al.

(Supreme Court of Georgia. Dec. 21, 1905.)

1. ACTION—JOINDER OF CAUSES—PLEADING—AMENDMENT—SPECIAL DEMURRER.

A petition which contains two distinct causes of action in favor of different plaintiffs against the same defendant is defective; but the defect may be cured by an amendment eliminating one of the plaintiffs and one of the causes of action. Such a defect is one of form, and not of substance, and must be taken advantage of by special demurrer filed at the first term.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 514-522.]

2. NEW TRIAL—IRREGULAR VERDICT—PAYMENT—DISCHARGE OF DEFENDANT.

When two causes of action against a defendant in favor of different plaintiffs are tried at one time as a result of the failure of the defendant to raise the objection to the misjoinder of the causes of action at a proper time, and a verdict for one sum in favor of both plaintiffs is rendered, and no objection is raised at the time the verdict is received to the form in which the verdict is rendered, the irregularity in the form of the verdict is no sufficient reason for granting a new trial. The payment of the verdict as rendered to the parties jointly, or to their attorney of record, will discharge the de-

fendant from liability to both of them on account of all matters alleged in the petition.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 120-123.]

3. TRIAL—SEQUESTRATION OF WITNESSES.

The rule in reference to the sequestration of witnesses does not apply to a witness who is a party to the case, even though there may be several parties on the same side who are all to be examined as witnesses.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 103.]

4. JURY—DISQUALIFICATION—INTEREST.

The operation of a railroad by a lessee, in the absence of express statutory authority exempting the lessor from liability for the acts of the lessee, does not change the relation of the lessor company to the public, and the servants of the lessee company are, as to the acts for which the lessor company may be held liable, in legal contemplation as much the servants of the lessor as of the lessee, and are therefore not competent to serve as jurors in an action by a passenger for damages against the lessor, based upon an injury received as a result of the negligence of the servants of the lessee company.

5. HUSBAND AND WIFE—EARNINGS OF WIFE.

In the absence of any consent or agreement, either expressed or implied, on the part of the husband, that the earnings of the wife shall be retained by her as her separate estate, they belong to him.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 459-464.]

6. SAME—INJURIES TO WIFE—RIGHTS OF HUSBAND.

The damages that may be recovered by the husband for the loss of the services of his wife by reason of personal injuries are not confined to the value of her services in the household, but may include the value of her services rendered in her husband's business, where she was thus engaged at the time of the injury without any contract or expectation of pay for the same.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 767, 768.]

7. CARRIERS—INJURY TO PASSENGER—EVIDENCE—INSTRUCTIONS.

The charge of the court, when considered as a whole, was free from any substantial error of which the defendant was entitled to complain. The evidence authorized the verdict, and the discretion exercised by the trial judge in refusing a new trial will not be controlled.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Mahala J. Tice and others against the Georgia Railroad & Banking Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Mahala J. Tice and her husband, Charles Tice, jointly brought suit against the railroad company for injuries received by Mahala J. Tice while a passenger on a car operated on its railroad. The petition alleged that she boarded the train at a regular station, and entered a car made up of two compartments, and the car started before she reached the apartment provided for ladies, and just as she reached the nearest vacant seat therein a sudden jerk of the train threw her violently to the floor. In falling she struck a drummer's iron-bound sample case, which was leaning against the seat, injuring her leg and back, and received permanent in-

juries, for which she claims damages in the sum of \$5,000. Charles J. Tice sues for the expense of doctors' bills, medicines, and nursing, etc., to which he has been put, and for such future expenses as he will likely incur, and for the loss of her domestic services, as well as her services as a clerk in a business in which he was engaged at the time of her injury. At the trial term the defendant interposed a written demurrer and an oral motion to dismiss the case upon the ground that there was a misjoinder of causes of action. Each was overruled, and the defendant excepted. When the panel of jurors was presented, upon the request of plaintiff's counsel, the court ascertained by inquiry that two of the jurors were employes of the operating company, a lessee of the defendant; whereupon the court ordered these two jurors to stand aside and that their places be filled. To the propounding of the question, and to the setting aside of the jurors, the defendant objected; and, the objection being overruled, the defendant excepted. A verdict for the plaintiffs of \$5,000 was rendered by the jury. At the same term of court the defendant filed a motion in arrest of judgment, upon the ground that there was a misjoinder of causes of action. This motion was overruled, and the defendant excepted. A motion for a new trial was filed by the defendant, which was overruled, and the defendant excepted.

Jos. B. & Bryan Cumming and G. M. Beasley, for plaintiff in error. Henry C. Roney, for defendants in error.

OOBB, P. J. When a married woman is injured by the wrongful conduct of another, two different causes of action may arise—the one in her favor for her own pain and suffering, and the other in favor of the husband for the loss of his wife's services and for expenses incurred as a consequence of the injuries to her. These causes of action are separate and distinct, and in favor of different parties. Therefore they cannot be properly joined in one suit. Civ. Code 1895, §§ 4938-4946. A petition by a husband and wife which sets forth a cause of action in favor of the wife and one in favor of the husband, although both arise out of the same transaction, is subject to the objection that there is in such petition a misjoinder of causes of action. Can this defect be cured by amendment eliminating one of the causes of action? The right to amend is exceedingly broad. Even where a cause of action is very defectively set forth, and parties are joined either as plaintiffs or defendants who have no concern with the cause of action, the defect as to the manner in which the cause of action is set forth may be cured by amendment, and the unnecessary parties may be eliminated in the same way. When a petition sets forth two complete causes of action in favor of different parties, but against the same defendant, there seems to

be no good reason why an amendment should not be allowed striking therefrom one of the causes of action and one of the plaintiffs. The statute expressly authorizes the striking of a plaintiff improperly joined. Civ. Code 1895, § 5105. If one of the plaintiffs can be eliminated by amendment, which would leave the petition standing in favor of the other plaintiff, we see no reason why the cause of action peculiar to the plaintiff stricken might not be eliminated at the same time. Of course, it is, in such a case, for the two plaintiffs who have improperly joined their causes of action to determine between themselves which cause of action shall stand and which shall be eliminated. If, however, they do not voluntarily relieve the petition from the defect resulting from the misjoinder of the causes of action, upon objection raised at the proper time the defendant would be entitled to have the entire case dismissed.

As a general rule a defect in a petition which is amendable is cured by verdict. As under our system a misjoinder of causes of action could be eliminated before verdict by appropriate amendment, under the operation of the rule just referred to, such a defect, unobjected to at the proper time before verdict, would be cured by the verdict. The defect, therefore, must be taken advantage of before verdict; but at what stage of the cause? Is it a defect of form, or a defect of substance? A petition might contain two causes of action in favor of different plaintiffs, each set forth with all the particularity and formality that could be required. In such a case there would be no defect of substance in the allegations of the petition, and the misjoinder of the two perfect and complete causes of action must, therefore, be merely a defect of form; that is, a defect in the manner in which the different plaintiffs have seen fit to bring into court that which each would have had the right to bring in a separate suit. Being a defect merely in the form in which the suit is brought, it must be taken advantage of by special demurrer filed at the first term, and the failure to file such demurrer at such term would be a waiver of the defect. See *Lippincott v. Behre*, 122 Ga. 546, 50 S. E. 467. We are aware that in the case of *Governor v. Hicks*, 12 Ga. 189, it was held that a misjoinder of improper parties plaintiff, as well as distinct causes of action, would be a good reason for dismissing the case on general demurrer, and for arresting the judgment after verdict. We are also aware that this decision is in accord with the rule at common law. But we think since the decision was rendered such radical changes have taken place in the practice and procedure in this state that under the existing law a misjoinder of causes of action between separate and distinct parties would only be ground for a special demurrer filed at the appearance term. The uniform procedure act of 1887

entirely obliterated the distinction between courts of law and courts of equity, so far as the form to be followed in bringing an action was concerned. The compilers of the Code of 1895 have merged into one general subject, dealing with petitions, demurrers, answers, etc., all that which prior to 1887 was dealt with in the Code under the distinct heads of "Procedure at Law" and "Procedure in Equity." The more liberal rules of the equity court have become in many respects a part of the procedure in all cases, whether the cause of action be legal or equitable. The Code distinctly recognizes a misjoinder of parties or causes of action as a ground of demurrer in any case, and the same section in which this is recognized declares that special defects in the petition may always be taken advantage of by demurrer, "and unless cured by amendment the petition shall be dismissed." Civ. Code 1895, § 5048. A court of equity looked with little favor upon a demurrer which raised the question that the bill was multifarious, and, even in those cases where the court was compelled to hold that there was a misjoinder of causes of action, the complainant was generally allowed the right to amend his bill so as to eliminate one or the other of his grounds of complaint. See *Morgan v. Shepherd*, 69 Ga. 308.

2. Error is assigned in the motion for a new trial upon the failure of the judge to instruct the jury, if they found in favor of the plaintiffs, to bring in a verdict for each plaintiff for a given amount, and also error is assigned upon the verdict upon the ground that it is for one sum, not specifying how much is found for the husband and how much for the wife, the manner in which the verdict was rendered thus preventing the court from determining whether a proper or excessive amount had been allowed in each instance. The petition contains two causes of action in favor of different plaintiffs, and properly there should have been a verdict in favor of each plaintiff for a given amount. The judge charged the jury to return one amount to cover the claims of both plaintiffs. There is no assignment of error upon this part of the charge, but error is assigned upon the failure of the jury to find two separate amounts. There should have been a request for the judge to instruct the jury in reference to the form of the verdict rendered by them, or an objection at the time the verdict was received, and a request that the jury should retire and separate the amount found into two amounts, one for each party. There being no request during the progress of the trial for an instruction to the jury on the subject, and the record not showing that there was any objection to the verdict at the time it was rendered, and as a payment of the amount recovered by the plaintiffs to them or their counsel of record would completely protect the defendant from all liability to each of the plaintiffs on account of both of

the causes of action set forth in the petition, the irregularity in the verdict is not sufficient to require the granting of a new trial. The fact that the defendant is by the form of the verdict precluded from entering into the question whether the amount really assessed by the jury to each of the plaintiffs might or might not be excessive as to one or the other was brought about at last by the failure to object to the form of verdict at the time it was rendered. The failure to raise, by special demurrer at the first term, an objection to the petition on account of the misjoinder of the two causes of action therein, renders the entire trial one that is anomalous, and the failure to object to the verdict in the case only adds to the peculiarity of the situation first rendered anomalous by the failure to demur. The defendant lost the right to have the two cases tried separately, by failure to demur, and also lost the right to have a separate verdict rendered in favor of each plaintiff by failure to object to its form when it was received.

3. At the request of counsel each party, all witnesses in the case were sequestered, and Mrs. Tice was called to the stand to testify. Counsel for defendant asked that her husband be sequestered during the examination of Mrs. Tice. The court refused the request, and this ruling is assigned as error. Tice was a party to the cause on trial. He had a right to remain in court during the entire trial. The rule in reference to the sequestration of witnesses does not apply where the witness is a party, although there may be several parties on one side of the case.

4. It appears from the record that the defendant is a railroad corporation, but that it was not operating the cars at the time the plaintiff was injured, but the same were being operated by a lessee. Plaintiff's counsel requested the judge to inquire of the jurors who had been impaneled to try the case whether any of them were employes of the lessee company, and, it appearing that two of the panel occupied this relation to the lessee company, the court required them to stand aside, and other jurors to be summoned. To the ruling holding that such jurors were incompetent the defendant excepted. It cannot be laid down as a general rule that the servants of a lessee are disqualified from service as jurors in a case where the lessor is a party. But the relation existing between two railroad companies, brought about by a lease of one to the other, is different from the relation which exists between an ordinary lessor and lessee. A railroad company, in the absence of express legislative authority, cannot exempt itself from liability for a failure on the part of its lessee, its servants, and agents to discharge the public duties required of those who operate railroad trains, and, though a passenger may be injured by the negligence of the servants of the lessee, he may still look to the lessor for compensation in damages. The servants of the lessee are therefore,

as to duties imposed upon the lessor concerning the responsibility which it can not throw off, the servants of the lessor. The operation of the road by the lessee does not change the relation of the original company to the public; for the servants in its employment in legal contemplation are as much the servants of the lessor as of the lessee. See *Singleton v. Southwestern Railroad*, 70 Ga. 469, 48 Am. Rep. 574; *Central Railroad v. Mitchell*, 63 Ga. 173. If such were not the rule, it would be possible for the question of the liability of the lessor company to be submitted to the determination of a jury composed of the very employes of the lessee who were charged with the wrongful acts bringing about the injury to the plaintiff. A trial before a jury thus made up would, of course, be a travesty upon justice.

5, 6. The petition alleged that Mrs. Tice, before her injury, was "a strong, healthy woman, attending to all her own domestic duties, and by reason of his incapacity, because of his being infirm, she assisted him in the merchandise and other business, and by reason of her injury she is wholly unable to render him any service whatever." There was no demurrer to the petition, other than the demurrer above referred to upon the ground of misjoinder of causes of action. Mrs. Tice testified that her husband would be sick and often have to take to his bed, and that then she would have to attend to the store for him, and often customers would want them to get things down town for them, and she would attend to those matters for her husband, that she collected for him, that she made purchases, and that, in addition to attending to her domestic affairs at home, she was really a clerk in the store. Charles Tice testified substantially to the same facts, and stated that the services which his wife rendered were worth at least \$50 per month. The defendant objected to this testimony, on the ground that it is not in the contemplation of the law that a husband can recover for the value of services of the wife as a manager of a mercantile business for him. This objection was overruled, and the evidence was admitted. The court also refused to charge a written request presented by the defendant in the following language: "While a husband is entitled to recover the value of his wife's services, where another has negligently injured her, this means the usual services rendered by a wife in the household, and it does not embrace the value of her services in running a mercantile business, going out drumming for business, and purchasing and collecting for the mercantile business." The question presented by the objection to this evidence and by the refusal of the request is whether in an action of the character now under consideration the husband can recover for the loss of the services of the wife other than such services as are rendered by the wife to the husband as a legal consequence of the marriage relation.

Prior to the enactment of the married women's act of 1866, the earning of the wife belonged to the husband, unless they were living separate and apart, or she had been declared a free trader in conformity to law, or unless the husband expressly relinquished his right to such earnings in her favor. *Oglesby v. Hall*, 30 Ga. 386; *Cavenaugh v. Ainchbacker*, 36 Ga. 500, 91 Am. Dec. 778; *Gorman v. Wood*, 73 Ga. 370; *Wood v. Wilson Sewing Machine Co.*, 76 Ga. 104. In *Dumas v. Neal*, 51 Ga. 566, Judge McCay expressed a doubt as to whether a wife was entitled to compensation from her husband for services rendered for keeping a boarding house. This case involved services rendered both before and after the act of 1866. In the opinion Judge McCay said "It was her duty to her husband while she lived with him to do these things. She is not to be a drone in the hive." In *Sasser v. Sasser*, 73 Ga. 276, Mr. Justice Hall intimated that while the husband was, notwithstanding the act of 1866, still entitled to the domestic services of his wife, her earnings resulting from labor performed in other ways were her own, saying, however, that his remarks were made out of abundant caution, and solely for the reason that he did not desire at that time to be committed even by implication to a contrary view. In *Eichberg v. Brandman*, 74 Ga. 834, it was held that where a married woman living with her husband owned a separate estate which consisted in part of a house and lot where they resided, and carried on therein the business of keeping a boarding house since 1866, her earnings in that enterprise belonged to her, and she could bring suit for the same in her own name. While it does not appear from the headnote, it does appear from the reporter's statement, that she engaged in this business with the husband's consent, and with the agreement on his part that she might have the proceeds resulting from such business. In *Brunswick Light Co. v. Gale*, 91 Ga. 813, 18 S. E. 11, which was an action by a husband and wife for personal injuries to the wife, it was held that, "inasmuch as the earnings of a wife belonged to her husband, her individual and personal damages could be measured only by the enlightened consciences of impartial jurors." In the opinion Mr. Justice Simmons said: "But where, as in this case, a married woman sues for physical injuries and the pain and suffering resulting therefrom, and cannot recover for loss of earnings, medical attention, etc., the principle of the section [Code 1882, § 3067; Civ. Code 1895, § 3907] is applicable, inasmuch as her damages can be measured only by the enlightened conscience of an impartial jury." This was a distinct ruling that since the act of 1866 the husband was entitled to the earnings of the wife, in the absence of evidence showing his consent to the appro-

priation of her earnings to her own use, or that she was living separate from him. In *Lee v. Savannah Guano Co.*, 99 Ga. 572, 27 S. E. 159, 59 Am. St. Rep. 243, Mr. Justice Lumpkin said that the earnings of the wife are "oftentimes exclusively her own, certainly so when her husband expressly consents to her engaging in the occupation or business from which they arise." In *Sams v. Thompson Hiles Co.*, 110 Ga. 648, 36 S. E. 104, while the language in the opinion is very broad, still, in the light of the facts, the ruling there is simply to the extent that the wife is entitled to her own earnings when her husband consents that she should receive the same. In *Roberts v. Haines*, 112 Ga. 842, 38 S. E. 109, it was held that "in the absence of any consent or agreement, either express or implied, on the part of a husband, that the earnings of his wife shall be retained by her as her separate estate, they belong to him." Mr. Justice Lewis in the opinion said: "While it is true that the act of 1866 has wrought many changes in the law with reference to the separate estate of a married woman, there is still imposed upon the husband the obligation to support his wife, with the corresponding right to her services and earnings during coverture." Mr. Justice Lewis remarked that this principle is recognized in *Brunswick Light Co. v. Gale*, supra. See, also, cases cited in 7 Enc. Dig. Ga. Rep. 132 et seq.

It must be treated, then, as the settled law of this state that even since the act of 1866, where a husband and wife are living together, the husband is entitled to her earnings, unless he consents that she may receive them as her own. If a wife who is living with her husband and is engaged in a business or avocation from which earnings result receives an injury at the hands of a wrongdoer which incapacitates her either in whole or in part from performing the work of such business or avocation, she is not entitled to recover on account of the loss thus occasioned, unless the husband has given his consent to her engaging in this business and receiving her earnings therefrom as her own. If the husband did not consent, and the wife is therefore not entitled to recover, and the husband should not be allowed to recover, the wrongdoer would be under a legal obligation to compensate no one on account of his tortious act. There are instances, probably many of them, where the wife has a peculiar talent which, if exercised, results in large earnings, and she is willingly exercising this talent, and allowing her husband to receive the benefit by appropriating the earnings. It certainly cannot be the law that in such a case the wrongdoer whose act entirely destroys the power of the wife to exercise the talent would be liable to no one for such damages resulting from his conduct. Such an injury to such a wife results in

damages to somebody which must be compensated in money, and, if the wife is not allowed to recover, the husband should be. But it is said that in such a case the wife is under no legal obligation to use her talent for the benefit of her husband. Let this be granted. At the time of the injury she was using it, and it was lawful for her to do so, and it does not lie in the mouth of a wrongdoer to say that a wife actually engaged in a business or avocation which results in earnings to the husband may at some time in the future decline to further engage in such occupation. We do not think that merely because a wife can earn money for her husband by engaging in business he would be entitled to recover from a wrongdoer; but, when at the time of the injury she is actually engaged in a business or calling or avocation which results in earnings for the husband, and there is nothing to indicate that there was any agreement between the husband and wife that this should terminate at any time in the future, we think that as against a wrongdoer the inference is to be indulged that the wife will continue the work for the benefit of her husband during that period of her life in which she is able to perform the services. While in the case of *Metropolitan St. R. Co. v. Johnson*, 91 Ga. 466, 18 S. E. 816, the services rendered were those of an ordinary domestic nature, the language is very broad.

While this ruling is authoritative only as to domestic services, the reasoning in the opinion is of such a character as to support a right to recover for earnings of any character that were actually being made by the wife at the time she suffered the injury. Mr. Sutherland in his work on Damages says: "If she is voluntarily rendering services for her husband by carrying on his business, he is entitled to recover for the loss of her services therein, if the facts are properly alleged." 4 *Suth. Dam. (3d Ed.)* § 1252. The authority cited by this author to sustain this proposition is the case of *Citizens' St. Ry. v. Twiname*, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352. It was there held that damages for the loss of services of plaintiff's wife by reason of personal injuries are not confined to her services within the household, but may include the value of her services as manager of her husband's business, where she was engaged at the time of the injury without any contract to pay for such services. This was held notwithstanding a statute of Indiana which declares that the earnings and profits of a married woman accruing from a trade or business, or her services or labor, other than those for her husband and family, shall be her sole and separate estate. The husband there was engaged in a millinery business, and his wife, by reason of their marital relations, devoted her energy and services to the business for the benefit of her husband, without any con-

tract or expectation of pay. In the opinion, *Olds, J.*, says: "There might be circumstances existing which would entitle the wife, in an action for damages, to recover for the value of her own services, but prima facie the husband is entitled to recover for the value of such services, and especially is this true when the wife is not engaged in carrying on a business or trade on her own account, or performing labor for persons other than her husband, and, on the contrary, is voluntarily rendering services for the benefit of the husband; and he is entitled to recover for one class as well as another. In other words, the husband is entitled to recover for the damages sustained on account of the loss of the services of the wife; and the value of her services, and loss sustained by reason of her inability to perform them, must necessarily depend on the character and value of the services which she is capable to perform, and is accustomed to perform for her husband." There was a ruling to the same effect in *Blair v. Chicago R. R.*, 89 Mo. 334, 1 S. W. 367. See, also, in this connection, *Holcomb v. Harris*, 166 N. Y. 257, 59 N. E. 820. In case of an injury resulting in disability which would prevent the wife from rendering domestic services, which the wife is legally bound to render, the husband may recover for the loss of such services, even though such services had not been performed in the past, and the husband had never realized anything from the wife's services before she was injured. 4 *Suth. Dam. (3d Ed.)* § 1252. In regard to those services which the wife is not legally bound to render, but which she is capable of rendering and which she is actually rendering at the time of the injury, the husband is also entitled to recover. There was no error in admitting the evidence, nor in refusing to charge as requested.

7. There is only one other special assignment of error which need be referred to. It is claimed that the court erred in charging the jury "that the declaration sets out the claims of the plaintiffs, and states the ground of negligence of the railroad company. If the evidence sustains any or all of the grounds, the plaintiffs would be entitled to recover." It is claimed that, as one of the allegations of negligence was that the defendant was negligent "in starting train of cars before she had opportunity to reach her seat," the effect of the charge would be to render defendant liable merely because the cars started before the plaintiff had opportunity to reach her seat, and that this might or might not be negligence, according to the circumstances of the case. By reference to the charge, it appears that immediately following the language quoted in the assignment of error, the court added: "If you think that the railroad company was not in the exercise of extraordinary care and diligence." This qualification relieves the extract of the charge complained of from any error. The effect of

the charge with the qualification was to inform the jury that plaintiff could recover upon the allegation that the defendant was negligent in starting the train of cars before she had opportunity to reach her seat and be seated, provided that at the time of the injury the defendant was not in the exercise of extraordinary care and diligence. When the charge is considered as a whole, we do not think there is anything therein calculated to impress the jury with the fact that the mere starting of the train before the plaintiff reached her seat could be used as a basis for recovery; but, if the train was started in a negligent manner, and as a result of such negligence the plaintiff was injured before she reached her seat, then the plaintiff would be entitled to recover. Such is the claim of the plaintiff when her petition is considered as a whole, and such is the effect of the charge when it is considered in a like manner.

It was further claimed that the charge was erroneous because it in effect instructed the jury as to what was negligence. We do not think it was subject to this criticism. Of course, we cannot tell how much the jury allowed the wife for pain and suffering, and how much was allowed the husband for loss of services. But the evidence was of such a character that the aggregate sum of \$5,000 for both items was not excessive. The evidence as to the negligence of the defendant was conflicting, but there was evidence upon which the jury could base a finding in favor of the plaintiff. The discretion of the trial judge, exercised in refusing a new trial, will not be controlled.

Judgment affirmed. All the Justices concurring.

(124 Ga. 553)

RABURN v. BRADSHAW.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. EXECUTORS AND ADMINISTRATORS — PERSONS ENTITLED TO ADMINISTRATION.

In the granting of letters of administration, where there is no surviving husband or wife, the next of kin of the intestate at the time of his death, according to the laws declaring relationship and distribution, is entitled to such letters. Civ. Code 1895, § 3367, subd. 2. In such a case, the law of relationship should not be relied on to the exclusion of that of distribution. *Murdock v. Hunt*, 68 Ga. 164.

2. DESCENT AND DISTRIBUTION — HEIRS OF THE HALF BLOOD.

When there is no surviving husband, wife, child, or lineal descendant, the brothers and sisters of the intestate inherit; the half blood on the paternal side inheriting equally with the whole blood, and the father, if living, inheriting equally with the brothers and sisters. Civ. Code 1895, § 3355, subds. 5, 6.

3. EXECUTORS AND ADMINISTRATORS — SELECTION OF ADMINISTRATOR.

"If there be several of the next of kin equally near in degree, the person selected in writing by a majority of those interested as distributees of the estate and who are capable of expressing

a choice shall be appointed" administrator. Civ. Code 1895, § 3367, subd. 3.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 57.]

4. SAME.

Accordingly, in a contest for letters of administration between a sister of the whole blood and a brother of the half blood, on the paternal side of the intestate, when such sister was selected in writing by another sister of the whole blood, and such brother of the half blood was so selected by the father of himself and of the intestate, and also by four sisters of the half blood on the paternal side of the intestate, all of the distributees so making selections being capable of making a choice, the ordinary did not err in appointing the brother of the half blood administrator.

(Syllabus by the Court.)

Error from Superior Court, Warren County; H. M. Holden, Judge.

Action between E. V. Raburn and W. A. Bradshaw. From the judgment, Raburn brings error. Affirmed.

L. D. McGregor, for plaintiff in error. E. P. Davis, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concurring.

(124 Ga. 557)

HAWES v. BANK OF ELBERTON.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. BANKRUPTCY—APPEAL BY TRUSTEE—COSTS —PROCEEDINGS IN FORMA PAUPERIS.

A trustee in bankruptcy may take a case to the Supreme Court of this state in forma pauperis by filing an affidavit which discloses his inability, as the representative of the bankrupt estate, to pay the costs.

2. SAME—PREFERENCES—BELIEF OF CREDITOR.

Under the express provisions of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), a transfer of property by an insolvent debtor, which operates as a preference in favor of one of his creditors, is not, though made within four months next preceding the filing of a petition in bankruptcy, voidable at the election of the trustee, unless such creditor, or persons acting in his behalf, "had reasonable cause to believe that it was intended thereby to give a preference."

3. SAME—EVIDENCE—SUFFICIENCY.

In the present case the plaintiff failed to establish his contention that the creditor alleged to have been given a preference had implied notice of the debtor's insolvency and purpose in making the transfer.

4. SAME—SECURITY TAKEN IN GOOD FAITH—ENFORCEMENT.

When a creditor in good faith takes collateral security for a debt at a time when his debtor is solvent, and more than a year before a petition in bankruptcy is filed, the creditor is entitled to realize on the security, notwithstanding he may, before undertaking to do so, learn that his debtor has become insolvent.

5. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE—CURING OF ERROR.

Though error may have been committed in excluding certain evidence offered to show the debtor's insolvency, yet this affords no ground for ordering a new trial; the plaintiff, after being allowed to establish the fact by other evidence, having failed in other respects to prove his case as laid.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4194-4196.]

6. EVIDENCE—OPINIONS—INSOLVENCY.

It is not within the province of a witness to inform the court or jury whether a hypothetical state of facts would or would not, in his opinion as a business man, constitute implied notice to a creditor of his debtor's insolvency.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2245, 2246.]

(Syllabus by the Court.)

Error from Superior Court, Elbert County;
H. M. Holden, Judge.

Action by A. S. Hawes, as trustee in bankruptcy of J. J. Stephenson, against the Bank of Elberton. There was judgment for defendant, and plaintiff brings error. Affirmed.

A petition was filed in the superior court of Elbert county by A. S. Hawes, as trustee in bankruptcy of J. J. Stephenson, against the Bank of Elberton, to set aside an alleged preference in favor of the bank, made by the bankrupt within four months next preceding the filing of the proceedings in bankruptcy. The case made by the petition was substantially as follows: Stephenson had been conducting business as a wholesale grocer in Elberton, Ga. On or about July 15, 1902, he sold out his business to D. C. Smith, J. R. Mattox, and D. H. Arnold for approximately \$12,000, accepting in payment three notes given by the purchasers, one for \$4,500, one for \$5,000, and the other for \$1,461.72, due December 1, 1902. He was at the time indebted to the bank of Elberton in the sum of \$6,000, and transferred to the bank the note for \$4,500, receiving a credit for that amount upon his indebtedness to it. Stephenson also had an equity in a house and lot in Elberton, being the holder of a bond for titles from the owner, Mrs. N. E. Hudson; and after disposing of his interest in the premises, he paid to the bank \$1,000 of the amount realized therefrom, this payment, as well as that above mentioned, being made within four months prior to the filing of the petition in bankruptcy. When these payments were made, Stephenson was hopelessly insolvent, and they constituted a preference in favor of the bank over other creditors, and enabled the bank to obtain a greater per cent. of its debt than was received by other creditors of the same class. This debt was then in existence, being an antecedent debt of some length of standing, and it was the intention of Stephenson to prefer the bank over his other creditors. The bank knew, had notice of, or had reasonable grounds to suspect, the intention of Stephenson to prefer it, as well as notice of his insolvency; and the preference was made with the intent and purpose on his part to hinder, delay, and defraud his creditors, and such was his practical effect. The bank knew or was chargeable with knowledge of this intention on his part. Plaintiff has no property of the bankrupt estate in his hands out of which to pay the debts against it, and has not received any. The action was in renewal of one commenced

August 25, 1903, in which a judgment of nonsuit was rendered at the March term, 1904, of the court; the petition having been filed within six months from the date of that judgment. On the trial under review the court, after the close of the plaintiff's evidence, again granted a nonsuit. Exception is taken to the disposition thus made of the case, as well as to various rulings of the court touching the admissibility of evidence which the plaintiff sought to introduce, but which was excluded.

Z. B. Rogers and C. D. Maddox, for plaintiff in error. L. C. Van Duzen, for defendant in error.

EVANS, J. (after stating the facts). 1. On the call of the case in this court a motion to dismiss the writ of error was made on the grounds (1) that Civ. Code 1895, § 5553, allowing a "plaintiff in error" to carry a case to the Supreme Court in forma pauperis, does not apply to a trustee in bankruptcy; and (2) even were this otherwise, the pauper affidavit filed by the trustee is insufficient, inasmuch as he does not swear that because of his poverty he is unable to pay the costs, but merely that the estate he represents is unable to do so, notwithstanding "the contemplation of this section is that, if the actual party litigant is able to pay the cost, he must do so." Neither of these positions is well taken. *Barfield v. Hartley*, 108 Ga. 435, 33 S. E. 1010, and citations. The pauper affidavit filed in this case is in the correct form, since it discloses that the plaintiff in error, A. S. Hawes, as the "trustee in bankruptcy of J. J. Stephenson, is, because of the poverty of said bankruptcy estate, unable to pay the costs."

2. The petition was framed under chapter 6, § 60b, of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), which provides that "if a bankrupt shall have given a preference within four months before the filing of" bankruptcy proceedings, "and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." On the trial the plaintiff did not contend that any of the officials or agents of the bank had any actual knowledge either that Stephenson was insolvent when he transferred to it the note for \$4,500, or that he intended thereby to prefer the bank. As a witness in the plaintiff's behalf, Stephenson himself swore he did not at that time know he was insolvent, and that he had no intention whatever to give to the bank a preference. There was, however, testimony from which the jury might have found, not only that Stephenson was in point of fact insolvent, but that he realized his financial condition and sought to

protect his brother, who had indorsed notes held by the bank, by discharging this indebtedness to it in part before the crash came. The most the plaintiff sought to establish concerning notice to the bank of the alleged preference was that its officers had reason to suspect that Stephenson had become financially involved, and had reasonable cause to believe that the transfer of the \$4,500 note was intended by him to operate as a preference to it over other creditors. They testified, in behalf of the plaintiff, that they did not suspect anything of the sort, and dealt with Stephenson in good faith in the usual course of business, believing his solvency was beyond question. The plaintiff, nevertheless, insists that the officials of the bank could and ought to have known of Stephenson's real financial standing, and of his motive in transferring the note.

The facts relied on as authorizing this conclusion are substantially as follows: At the time of the transfer, in July, 1902, there were outstanding against Stephenson, as shown by the court records, justice's court execution, issued in February, 1898, for \$6.98 principal, besides interest and costs, and another execution, for the principal sum of \$36.30, issued from a different justice's court on June 23, 1902. The bank had, during that year, made various loans to Stephenson, and he owed the bank a considerable amount. He was frequently permitted to overdraw his account temporarily, and sometimes had no money in the bank to his credit. The records of the bank showed that between June 1, and July 18, 1902, 23 drafts drawn by various parties upon Stephenson had been returned unpaid. One was for \$1,042.93; another for \$606.76; four were for \$185.42 each; and still another was for \$120. The others ranged in amount from \$5.70 to \$93, and aggregated \$924.30. From the 1st to the 18th of July, 10 of these drafts were dishonored, while during the corresponding period in 1901, 14 drafts were returned unpaid. The bank's records did not disclose for what reasons any of the drafts were dishonored, though two of them were returned with the statement that the drawee said he would send check, one with the statement that he said he had sent a check, and another with the explanation that he would write in regard thereto. Another draft for \$47.50, sent to the bank for collection in April, 1902, was by it turned over to an attorney, upon direction from the drawer to do so in the event it was not paid. The cashier of the bank was informed, when the \$4,500 note was transferred to the bank, that it was given in part payment of the stock of goods sold by Stephenson, and that he had disposed of them in bulk. He then owed the bank between \$7,000 and \$9,000, which at that time held a note for \$5,600, signed by him and indorsed by his brother, L. L. Stephenson. The cashier knew, before the sale of the stock of goods, that J. J. Stephenson was negotiating

with several parties; had "heard in a business way that he was trying to sell out." The reason he assigned for wishing to sell out was that he intended to go to Birmingham and engage in business with his brother. Stephenson and his family lived well while in Elberton. He dressed as neatly as anybody, and owned a horse and buggy; the horse alone costing some \$220. He conducted a wholesale grocery store, had a large volume of business, and required a good deal of money in connection therewith. It is not unusual, but customary, for a large number of drafts to be drawn upon one conducting a grocery business of such magnitude.

The two justice's court *fi. fas.*, each for a trivial amount, were not calculated to furnish an index to the financial stability of Stephenson, and would not suggest to even an unusually apprehensive man a doubt as to his solvency. The testimony, viewed as a whole, shows that the dealings of the bank with Stephenson were in due course of business, and that the officers of the bank, acting as reasonably cautious men, had no reason to suspect that he had become involved in debt and would soon have to suspend business, if pressed by his creditors. He was apparently successfully conducting a large mercantile business, in the course of which he was to be expected to deal with numerous supply houses, not only for cash but on credit. There seems to have been not even a rumor that he was financially embarrassed, or that he had creditors who were pressing him for payment. He made no secret of his purpose to sell out his stock of goods and remove from the state. Not until some time after he had sold out and transferred one of the purchase-money notes to the bank did the true state of his affairs come to light. The only circumstance from which the officials of the bank could have inferred that Stephenson was not promptly meeting his obligations was that during the period between June 1 and July 18, 1902, he had declined to honor 23 drafts drawn upon him and presented to him for payment by the bank. It appears that in no instance did he assign as a reason for non-payment that he was without ready funds to meet just demands made upon him. These drafts did not represent the demands of 23 different creditors; some of them being drawn by the same persons for the identical amounts for which two or more demands for payment had been made during that period. With but few exceptions the drafts were for inconsiderable amounts, and the sum total of them was not out of proportion to the volume of business Stephenson was conducting. Even a prudent man, it would seem, could not be alarmed by the number of drafts returned dishonored, taking into consideration the amounts for which they were drawn, and assuming as a fact that all were just demands against which he failed to satisfy when due, and which he allowed to remain outstanding against him up to July 18, 1902. We are

therefore of the opinion that a jury would not have been justified in finding, as matter of fact, that the failure to pay these drafts upon presentation was a circumstance from which the officials of the bank were bound to assume, not only that Stephenson was pressed for ready money, but that, despite all outward appearances of prosperity, he was insolvent and had formed an intention to give the bank a preference over other creditors. The doctrine of implied notice, relied on by the plaintiff in error, should not be given a harsh and unreasonable interpretation. The ends of justice often require its recognition and a strict adherence thereto. See, in this connection, *Jordan v. Pollock*, 14 Ga. 157, 158; *Bryant v. Booze*, 55 Ga. 438; *Hunt v. Dunn*, 74 Ga. 120; *Clarke v. Ingram*, 107 Ga. 570, 33 S. E. 802, et seq. But this doctrine cannot justly be invoked against one who has neither studiously avoided knowledge of facts which he might readily have ascertained, nor is chargeable with a lack of that ordinary diligence which a reasonably prudent man would observe in making inquiries and keeping himself informed as to matters which may affect his interest. So far as the transfer to the bank of the note for \$4,500 is concerned, the plaintiff failed, we think, to show that the transaction amounted to a preference, within the meaning of the above-cited section of the bankrupt act.

As to the alleged fraudulent payment by Stephenson to the bank of \$1,000, within four months prior to the filing of the petition in bankruptcy on September 20, 1902, the following undisputed facts were brought to light on the trial: Stephenson had purchased from Mrs. Hudson a house and lot in Elberton on credit, and had received from her a bond for title. On February 12, 1901, he transferred this bond for title to the bank as security for his indebtedness to it, and the bank held the bond as collateral security up to September 5, 1902, when Stephenson closed a trade with one Almand, whereby Almand was to pay \$2,000 for the house and lot, assuming the indebtedness of \$1,000 thereon, and allowing Stephenson \$1,000 for his equity in the premises. In pursuance of this agreement Almand, on the date last named, paid to the bank \$1,000, and procured from it a transfer of the bond for title. The bank gave Stephenson credit for this payment upon his indebtedness to it. At the time of this transaction the officials of the bank had knowledge of Stephenson's insolvency. The fact last mentioned did not affect the vested right of the bank to realize on the security which it in good faith took from Stephenson in February of the preceding year. In no sense did the original transfer of the bond for title constitute a preference in favor of the bank over other creditors, nor was the payment received by the bank after Stephenson's insolvency became known a fraud upon them. Upon this branch of the case the

plaintiff signally failed to show any right to a recovery.

8. The evidence which the court excluded was offered by the plaintiff to establish the insolvency of Stephenson at the time of the alleged preference. With all of it admitted, the case would be no stronger; and, this being so, we shall not undertake to pass upon its admissibility. We have dealt with the case upon the assumption that the insolvency of Stephenson at the time of the transfer was shown beyond question, and we uphold the judgment of nonsuit for the sole reason that the plaintiff was unable to go further and show that the bank was chargeable with implied notice of Stephenson's financial condition and of his intention to create a preference in favor of the bank.

4. Exception is taken to the refusal of the court to allow a witness to answer the following hypothetical question: "Where a man is in business and allows drafts after drafts every occasionally to be drawn on him and returned unpaid, giving first one reason, then another, allows himself to be sued for little amounts, and judgments to stand open against him on the record, and does not keep up with his financial affairs, would he or not, in the business world, in your opinion as a business man, or rather, would these facts be sufficient to put a prudent business man on notice or inquiry that something was wrong with the man financially—that he wasn't in the proper financial condition?" The answer was excluded, and properly so, on objection that the plaintiff sought to make the witness draw a bare conclusion from an assumed state of facts. The witness was not competent to express his opinion in regard thereto. In view of the evidence introduced the effort was really to call on the witness to decide a question of law. Had there been an issue of fact involved, the jurors were the chemists, and the witness could not properly have been allowed to invade their province.

Judgment affirmed. All the Justices concurring.

(124 Ga. 563)

ALFRIEND et al. v. FOX et al.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. TRIAL—INSTRUCTIONS.

When a charge correctly sets forth a rule of law, it is not rendered erroneous merely for the reason that the rule is not stated in the exact language of the Code.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 512, 524.]

2. APPEAL — REVIEW — REFUSAL OF NEW TRIAL.

The evidence not being of such a character as to demand a finding in favor of the plaintiff, and there being some evidence to authorize a finding in favor of the defendant, the discretion of the trial judge in refusing to grant a new trial will not be interfered with.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 8872.]

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Action by B. A. Alfriend and others against E. R. Fox and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

The land which is the subject-matter of this suit was originally owned by James Hall. He died testate, devising the land to his two children, Sarah Hall and Nancy Watts, wife of William Watts, jointly. William Watts and Sarah Hall were named in the will of James Hall as coexecutors. It was the contention of plaintiffs that the land was divided by agreement, or otherwise, between Sarah Hall and Nancy Watts, and the property sued for came into the possession of the latter, and that William Watts reduced the property into his possession (this being prior to 1866), and at his death it passed to his devisees under the terms of his will. By the will of William Watts the portion of his property inherited by Mary Watts, afterwards Mrs. Alfriend, was to be conveyed to a trustee for her separate use during coverture, and at her death to go to her children. The plaintiffs are the only sons and heirs of Mrs. Mary Alfriend. It was denied by the defendants that there had been a division of the estate of James Hall by his two heirs, Sarah Hall and Nancy Watts. The property, they claimed, was partitioned after the death of William Watts, and the land sued for was set apart to Sarah Hall. She died intestate, and Nancy Watts was appointed her administratrix. The land was sold under proper order of court, and Nancy Watts, presumably by purchase, went into possession of it. It was the contention of the defendants that the land so owned by Nancy Watts was never reduced to possession by William Watts, and that their daughter, Mary Watts, afterwards Mrs. Alfriend, mother of petitioners, inherited the property as the heir at law of Mrs. Watts. Mrs. Alfriend deeded the property to the vendors of the defendants. Mrs. Alfriend died in 1881. Her four sons, and only heirs, brought suit for the property and mesne profits against the present occupants, the vendees of the purchasers from Mrs. Alfriend, the plaintiffs claiming that under the will of William Watts, whereunder Mrs. Alfriend came into possession of the land, she had only a life estate in the land; the remainder being in the plaintiffs. After a trial the jury found a verdict for the defendants. The plaintiffs moved for a new trial upon the general grounds, and excepted to certain portions of the charge of the court. The motion was overruled, and to this judgment the plaintiffs excepted.

R. L. Merritt, T. M. Hunt, and Seaborn Reese, for plaintiffs in error. Wm. H. Burwell and Saml. H. Sibley, for defendants in error.

COBB, P. J. The motion for a new trial contains three special grounds. One com-

plaints that the verdict is contrary to a specified portion of the charge. This need not be considered. This raises no other question than those raised by the general grounds of the motion. Another ground complained that the court failed to charge that, there being no debts shown after 10 years have elapsed, the law presumes the assent of the executor to the legacy. We know of no law which declares that in the absence of proof of debts the presumption of the assent of the executor to a legacy arises after 10 years. The counsel for plaintiff in error cited no authority to sustain this contention. In addition to this, if such is the law, it should have been made the subject of a timely appropriate written request. In the other ground complaint is made of a certain specified portion of the charge. The charge correctly sets forth the rule of law in reference to an executor's assent to a legacy. The assignment of error was that he did not charge in the exact language of the Code. Of course, this assignment is without merit. If the charge set forth the rule of law, it is immaterial what language is used by the judge, so long as it is of such a character that it is intelligible to the jury.

2. The counsel for plaintiff in error candidly state in their brief that their case depends upon two facts being established: (1) That there was a division of the land of the estate of James Hall between his two heirs, Sarah Hall and Nancy Watts; and (2) that during the lifetime of William Watts, the husband of Nancy Watts, he reduced to his possession the land received by his wife under this division. It is claimed by the plaintiffs in error that the evidence demands a finding in their favor on both of these questions. There is evidence authorizing a finding in favor of the plaintiffs in error on both of these questions, but the jury having found to the contrary, and the court having approved the finding of the jury, the judgment refusing a new trial must be affirmed, unless the evidence demanded a finding in favor of the plaintiffs in error on both of these questions. That is the question to be determined by this court—whether there is any evidence which would authorize a jury to find there was no division, or, if there was a division, that William Watts did not, during his lifetime, reduce to possession that portion of the land which his wife received under the division. William Watts and Sarah Hall were coexecutors of the will of James Hall. All of his land was devised to Sarah Hall and Nancy Watts jointly. There was no provision in the will which defeated the marital rights of William Watts. After the death of James Hall Sarah Hall took possession of a portion of the land, and she continued in possession of this portion until her death, which occurred in 1866, working the same with her own slaves during the existence of slavery, and with hands employed by her thereafter, and, so far as

the record discloses, appropriating to her own use the crops made thereon. The other portion of the land, which is the land now in dispute, was worked by William Watts with his own slaves up to the time of his death, which occurred in 1852; James Hall having died in 1840. Neither William Watts nor Sarah Hall, the coexecutors of the estate of James Hall, was ever discharged from the trust. The records of the court of ordinary showing an account of the sale of the perishable property of the estate of James Hall and a tract of land in Lee county, and one return setting forth the receipts and disbursements, were introduced in evidence. There is nothing in the record of the court of ordinary disclosing either a division of the lands in Hancock county, where the land in dispute is situated, or a sale of the same by the executors. The evidence relied upon to establish a division of the land between Sarah Hall and Nancy Watts, as legatees under the will of James Hall, is that Sarah Hall was in possession of one part of it and William Watts in possession of another part of it. Each of these parties had a right to possession in the capacity of legal representative of the estate of James Hall. They could jointly possess the land as executors, or one could take possession of a part as executor and the other of another part. The mere fact of possession would not be conclusive of the right in which the possession was held. The presumption would be, until the contrary appeared, that they were in possession in their representative capacity; and the burden is upon the plaintiff in the present case to show that the possession was not in such a capacity, which would be legal and regular, in the absence of proof of a division of the estate between the legatees.

The evidence as to a division of the land between the legatees depends upon the testimony of aged negroes, who were the slaves of William Watts. While a reading of the testimony of these negroes impresses one with the fact that they are endeavoring to tell the truth as they recall it, the testimony at best simply establishes the fact that the crops raised upon one part of the land were appropriated by Sarah Hall, and the crops raised upon another part were appropriated by William Watts. This would probably be sufficient to show that William Watts had reduced the crops to possession, and to that extent had taken advantage of his marital rights; but as it was possible for him to be in possession of the land as executor, and assert his right to reduce the property of his wife to possession simply as to the crops, the burden is upon the plaintiffs to show by satisfactory evidence that the land was actually divided between the legatees, and that the possession was in his own right, and not in his right as executor of the will of James Hall. The evidence might possibly be sufficient to authorize a finding that there was a division between Sarah Hall

and Nancy Watts, as legatees under the will of James Hall, and that the executor had assented to this division, and took possession of the land in dispute by virtue of his marital rights. But the evidence is not of such a character as to authorize us to say that the jury was constrained to find that this was the fact. It is more than possible—is is even probable—that there was an agreement between the two executors that each should hold a portion of the land in their representative capacity, and that each should not be accountable to the other for the crops raised upon the land. The burden being upon the plaintiff to show the fact of a division, and the evidence upon this point being altogether unsatisfactory, and the jury having found that there was no division, and this finding having been approved by the trial court, we do not feel authorized to control his discretion in overruling the motion for a new trial.

Judgment affirmed. All the Justices concurring.

(124 Ga. 541)

BURNETT v. W. A. DAVIS & CO.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. USURY—PLEADING—DEMURRER.

The essential requirements of a plea of usury, where the usury is sought to be recovered back or set off, being prescribed by statute, any defect in such a plea which results in a failure to comply with the statutory requirements is a defect in substance, and may be taken advantage of by a general demurrer in writing or an oral motion to strike.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, § 280.]

2. BILLS AND NOTES—PLEA—SUFFICIENCY.

The plea which set forth that the amount sued for was larger than that really due, as a result of a mutual mistake of the parties, was sufficient, as against the demurrer filed thereto.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 504.]

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by W. A. Davis & Company against J. R. Burnett and one Brown. Judgment for plaintiff, and Burnett brings error. Reversed.

W. A. Davis & Co. brought suit upon a promissory note against Burnett and Brown. Burnett filed an answer at the appearance term, in which he admitted the execution of the note, but alleged that he had executed it under a mistake, and that the amount of his indebtedness was less than the amount of the note. Plaintiff demurred to the answer on the ground that it set out no legal defense, and demurred specially to various paragraphs therein. Burnett then filed an amendment to his answer, more specifically setting out his plea of mistake. During the trial term the defendant further amended his answer by a plea of usury as to a part of the indebtedness sued on. The demurrer was sustained, and the answer and amend-

nments were stricken, and judgment was rendered for the plaintiff. Burnett excepted.

J. P. Burnett and Steed & Ryals, for plaintiff in error. Hardeman & Jones, for defendant in error.

COBB, P. J. The first amendment filed by the defendant was verified as to the facts therein set forth, but the affidavit did not conform to the other requirements of the act of 1897. Acts 1897, p. 35. The second amendment was verified in strict conformity to the act above referred to. It does not appear from the record that the judge disallowed either of the amendments, but it would seem that he allowed the amendments and then struck the plea as amended, as insufficient in law. The order, after reciting that the defendant had offered two amendments to his plea, and that the plaintiff insisted "upon his demurrer thereto," proceeded to declare that the demurrers were sustained, and that the plea and amendments "are all hereby stricken." The only demurrer contained in the record is a demurrer filed to the original plea, which is broad enough in its terms to raise objections to the plea as amended. In addition to this, the original plea put the plaintiff upon notice that the defendant relied upon a mistake, but the plea was defective, in that it did not allege that the mistake was mutual, and in other respects. The first amendment merely amplified the plea, and cured some of the defects therein, and was therefore not an amendment which is required to be verified in the manner prescribed by the act of 1897. See *Conant v. Jones*, 120 Ga. 568, 48 S. E. 234 (2). We will therefore deal with the case as the judge seems to have dealt with it, by determining whether the pleas were good in substance. The requirements of a plea of usury, where the purpose of the plea is either to recover back usury paid or set off the same against the plaintiff's demand, are fixed by statute. Civ. Code 1895, § 5090. The purpose of this statute is to require the defense of usury to be so pleaded that the amount that is sought to be recovered or set off may be determined accurately from the allegations in the plea, without aid from extraneous sources. Any defect, therefore, in such a plea, which would prevent the determination of the amount, would be a defect in substance, and can be taken advantage of by a general demurrer in writing or an oral

motion to strike. When this test is applied to that portion of the plea which is relied upon as a plea of usury, it is at once seen that the plea is defective, if for no other reason than that there were in the plea blanks as to the date and maturity of some of the notes. Without these blanks being filled, of course, the amount of usury could not be calculated. As to the effect of blanks in a plea of usury, see the remarks of Mr. Chief Justice Bleckley in *Odom v. New England Mortgage Co.*, 91 Ga. 508, 18 S. E. 131 (2). The plea of usury was, therefore, properly stricken.

2. As to the other plea, the facts alleged are sufficient to show that there was a mutual mistake between the parties as to the amount due at the time that the note sued on was given, and the plea was good in substance. Even if, as contended, the plea is contradictory as to the sum represented by the mistake, this would not make the plea bad, in the absence of a special demurrer raising that objection. If no amendment were made to such a plea, the defendant might be held to the least amount set forth. Counsel for plaintiff in error in their brief state that the plea was really stricken upon the ground that, being an equitable plea in its nature calling for affirmative relief, the city court had no jurisdiction to entertain it. There is nothing in the record to indicate that this point was made in the court below, nor does it appear that the judge struck the plea of mistake for this reason, nor does counsel for defendant in error seek to uphold the judgment on this ground. Of course, if this is true, the court would have no jurisdiction, and the judgment would be affirmed without reference to the ground upon which the judge based it. But we think the city court has jurisdiction of such a plea. A city court has jurisdiction to entertain an equitable plea which is purely defensive in its nature, and which, if sustained, would result simply in a verdict finding generally in favor of the defendant, or reducing the amount of plaintiff's recovery, when such reduction is not brought about by the exercise of any of the extraordinary powers of a court of equity, such as cancellation, reformation, equitable set-off, and the like. See *Hecht v. Snook & Austin Co.*, 114 Ga. 927, 41 S. E. 74; *House v. Oliver*, 123 Ga. 784, 51 S. E. 722.

Judgment reversed. All the Justices concurring.

(140 N. C. 381)

BOND et al. v. BRANNING MFG. CO.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. CANCELLATION OF INSTRUMENTS—INSTRUCTIONS—INAPPLICABILITY TO ISSUES.

In an action to vacate and void a deed, a charge "that it requires more mental capacity to execute a deed than a will," and defining the capacity necessary to execute a will, suggests an abstract and collateral question not involved in the issues on trial, and may be refused without error.

2. DEED—VALIDITY—MENTAL CAPACITY OF GRANTOR.

To execute either a will or a deed the party must have sufficient mental capacity to understand what property he is disposing of, the person to whom he is giving or selling it, and the purpose for which he is disposing of it, the question involved in either case being one of fact, and it cannot be affirmed as a proposition of law that it requires more mental capacity to execute a deed than a will.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 144, 155; vol. 49, Cent. Dig. Wills, §§ 66-68.]

Appeal from Superior Court, Bertie County; Long, Judge.

Action by Stewart Bond and others against the Branning Manufacturing Company. From a judgment for defendant, plaintiffs appeal. **Affirmed.**

Action to vacate and avoid a deed made by the ancestor of plaintiffs to defendant John Darden, who thereafter conveyed the land and timber on the land to defendant, Branning Manufacturing Company. Plaintiffs urged mental incapacity on the part of the grantor and undue influence by the defendant grantee. By consent the issue in regard to the second cause of action was answered in the negative. The jury answered the other issues for the defendant. Judgment and appeal by plaintiffs.

St. Leon Scull, for appellants. Winston & Matthews, for appellee.

CONNOR, J. But two exceptions were urged in this court. The plaintiff requested the court to instruct the jury: "It requires more mental capacity to execute a deed than a will, and while it is sufficient proof to show that a person knows the nature of the property he undertakes to will away, and to whom he wills it, that amount of mental capacity alone will not be sufficient in a person undertaking to execute a deed." His honor declined to give the instruction, and the plaintiff excepted.

There are several objections to the instruction. There was no issue involving the several degrees of mental capacity suggested. No will had been made, nor was there any effort to set up a will by setting aside a deed. It would not aid a jury who were inquiring in respect to the capacity to make the deed in controversy to inquire into an entirely collateral question. It is true, as contended by defendant's counsel in his well-prepared brief, that courts have used the ex-

pression that it required less mental capacity to make a valid will than a deed. We find, however, by a careful examination of the cases cited, that the expression has been used upon trials of an issue devisavit vel non, and as illustrative of the capacity requisite to the execution of a will, rather than the announcement of a principal of law. In the cases cited from West Virginia the instruction was given and sustained. We find no case in which it has been held error to refuse to give it. It was entirely competent for counsel to argue the proposition as illustrative of the degree of capacity necessary to the execution of a will, but we cannot see how it would, if established and accepted by the jury as correct, aid them in answering the question propounded, whether the grantor had sufficient capacity to execute the deed to the defendant. It is elementary that instructions involving abstract propositions of law, having no reasonable connection with or bearing upon the testimony, should not be given, and that it is not error to refuse such instruction. It is by no means clear that the expression, carefully considered, is correct. To execute either a will or a deed, it is abundantly established that the party must have sufficient mental capacity to understand what property he is disposing of, the person to whom he is giving or selling, and the purpose for which he is disposing of the property. In *Smith v. Beatty*, 37 N. C. 456, 40 Am. Dec. 435, it is said: "Weakness of mind alone, without fraud, does not appear to be a sufficient ground to invalidate an instrument. It is said that a court of equity will not measure the size of people's understandings. Excessive old age, with weakness of mind, may be a ground for setting aside a conveyance obtained under such circumstances. But old age alone, without some proof of fraud, will not invalidate a transaction." *Rippy v. Gant*, 39 N. C. 443; *Suttles v. Hay*, 41 N. C. 124. These were cases in which it was sought to set aside deeds. We are unable to see any good reason why a different standard of mental capacity should be established for the execution of a will and a deed. It is apparent that a court would scrutinize with more care and hold the grantee to a stricter account to show fair dealing, or rebut any presumption of undue influence, than a devisee, but in the ultimate decision of the question of capacity the standard is or should be the same—was the execution of the paper the free, voluntary act and deed of the party, knowing what he was doing?

The question of undue influence or fraud is eliminated by the consent of the plaintiff to the answer of the issue upon that question. The sole question is one of fact—whether at the time the grantor executed the deed he had sufficient mental capacity to understand what he was doing. This is the standard laid down by this court in *Horne v. Horne*, 31 N. C. 99; *Lawrence v. Steel*, 66 N. C. 584. In

Paine v. Roberts, 82 N. C. 451, **Smith, C. J.**, said that the standard fixed by the law was that the party "knows what he is about." We are not cited to any case in which this court has made or recognized the distinction. On the contrary, our investigation discloses a clear rejection of it in **Barnhardt v. Smith**, 86 N. C. 473, in which **Smith, C. J.**, says: "The rule laid down by Lord Coke 'that the person must be able to understand what he is about,' approved in **Moffit v. Witherspoon**, 32 N. C. 185, **Horne v. Horne**, 81 N. C. 99, and more recently in **Paine v. Roberts**, 82 N. C. 451, as a general and practical rule for the guidance of juries, approximates an accurate statement of the law as to the degree of mental capacity required to make a valid disposition of property as the subject will admit." This case involved the validity of a deed. **Bost v. Bost**, 87 N. C. 477; **Horah v. Knox**, Id. 483; **Williams v. Hald**, 118 N. C. 481, 24 S. E. 217; **Cameron-Barkley Co. v. Power Co.**, 138 N. C. 365, 50 S. E. 695.

There was no error in refusing the plaintiff's prayer. The exception to the instruction given was not pressed. We have examined it and find that it is in strict accordance with the settled law of this state. The grantor provided for the payment of a mortgage indebtedness which was outstanding and threatening to deprive him of his home. He also provided for the support of himself and his wife. There is no suggestion that the grantee did not fully discharge his duty in the matter.

The judgment must be affirmed.
Affirmed.

(140 N. C. 373)

KNOWLES v. SAVAGE, SON & CO.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. FACTORS—NEGLIGENCE—FINDINGS.

In an action against a commission merchant to whom plaintiff sent a quantity of peanuts for storage and sale, evidence held sufficient to sustain a finding that defendant failed to properly store and care for the nuts.

2. NEW TRIAL—TIME FOR APPLICATION.

A motion to set aside a verdict for insufficient evidence must be made before the judge who tried the cause at the same term at which the trial was had.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 239.]

3. JUDGES—SIGNING JUDGMENT.

If for any reason the signing of a judgment is omitted, it can be done at a succeeding term.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 555.]

4. STIPULATIONS—EFFECT.

An agreement between the parties empowering the judge to sign the judgment after adjournment of the term did not authorize the judge to hear and determine a motion to set aside the verdict after such adjournment.

Appeal from Superior Court, Washington County; Shaw, Judge.

Action by A. T. Knowles against Savage, Son & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

W. C. Rodman, for appellant. Ward & Grimes, for appellee.

CONNOR, J. Plaintiff shipped to defendant, commission merchant, in Norfolk, a quantity of peanuts for storage and sale. Plaintiff alleged that he negligently failed to store and sell the peanuts, by reason whereof he sustained damage. The defendant upon conclusion of the evidence moved for judgment of nonsuit. The motion being denied, defendant excepted. The court submitted the cause to the jury under instructions to which there was no exception. There was evidence on behalf of the plaintiff that the peanuts were in good condition when delivered to defendants, and that they were dry and cured. The evidence in this respect was conflicting. His honor's instruction to the jury in regard to the degree of care required to be exercised by the defendant is not set out; there being no exception thereto. The defendant contends that there was no evidence of negligent storage by him. It must be conceded that, if the jury had credited the testimony offered by defendant, it fully exonerated him from any liability. The plaintiff's testimony, on the contrary, which was accepted by the jury, showed that the peanuts were in good condition when shipped to defendants on January 2, 1904, and plaintiff testified that, "if they had been properly stored and cared for, they would have remained in same condition as when received by him." It seems from the correspondence that on or about January 25, 1904, defendant made sale of the peanuts to be delivered in 10 days, and that, when he undertook to deliver them, they were found to be "thoroughly mixed with peanuts that were not merchantable. There were some good ones in them, and it looked as if they were mixed with rotten ones." This is the testimony of the part of defendant of the purchaser who rejected them. The motion to nonsuit was, of course, based upon the admission that the plaintiff's evidence was all true and must be so considered by us. There was an irreconcilable conflict, and the jury alone could settle the controversy. We cannot say that there was an absence of evidence from which the jury could not have reasonably drawn the conclusion that the defendant had failed in the discharge of his duty to safely store and care for the property. We must assume, in the absence of any suggestion to the contrary, that his honor correctly instructed the jury in regard to the measure of duty imposed upon the defendant. The record states: That counsel, desiring to leave the court pending the deliberation of the jury, agreed that upon the return of the verdict the judge could sign judgment "out of term." That neither of the counsel were present at the rendition of the verdict. The court announced from the bench that it would set the verdict aside if any one was present to make the motion. That while the judge was in another county counsel, by

letter, requested him to set the verdict aside, which he declined, because, in his opinion, he had no power to do so after the expiration of the term.

From a judgment upon the verdict defendant appealed, assigning as error the refusal of the court to grant his motion to nonsuit plaintiff, and the refusal to set the verdict aside. Neither exception can be sustained. It is conceded that a motion to set aside the verdict for insufficient evidence must be made before the judge who tried the case upon his minutes and at the same term at which the trial is had. *Revisal 1905, 554; Moore v. Hinnant, 90 N. C. 163.* It is equally clear that, unless otherwise agreed by the parties, the judge has no power to sign a judgment out of term. The defendant contends that the agreement empowering the judge to sign the judgment after adjournment included the form to hear and determine the motion to set the verdict aside. We do not concur in this view. Such is not a reasonable construction of the agreement. Signing the judgment involved no judicial discretion or ruling. This, if omitted for any reason, could be done at a succeeding term. *Ferrell v. Hales, 119 N. C. 199, 25 S. E. 821.* Hearing and determining a motion to set the verdict aside is quite another matter, involving recollection of the testimony, manner and demeanor of witness, and other incidents of the trial not likely to be impressed upon the memory of the judge that he may safely act upon them after adjournment. While convenience of counsel often occasion and usually justify outside agreements of the character made in this case, they frequently lead to confusion and irregularity in the administration of justice. The courts will not by construction extend their terms beyond the fair and reasonable import of the language used. We concur with his honor that he had no power after the adjournment of the term to hear and pass upon the motion.

The judgment must be affirmed.

(140 N. C. 393)

CORBETT BUGGY CO. v. DUKES.

(Supreme Court of North Carolina. Feb. 27, 1906.)

1. TROVER AND CONVERSION — PROCEEDS OF GOODS — FAILURE TO RETURN NOTES FOR PRICE—EFFECT.

Where complaint for conversion claimed the proceeds of buggies alleged to have been delivered to defendant under a contract binding him to hold the proceeds subject to the order of plaintiff, and set out the contract, the delivery of the buggies to defendant, and the execution of notes by him for the price, and defendant merely denied receiving the buggies under the contract alleged without making any point of plaintiff's failure to tender the notes, the failure of plaintiff to tender the notes before bringing suit was not in issue.

2. APPEAL—HARMLESS ERROR—INSTRUCTIONS—CORRECTION OF ERRONEOUS CHARGE.

Where, in an action for the conversion of the proceeds of buggies delivered to defendant under contract binding him to hold the proceeds subject to the order of plaintiff, defendant al-

leged that the buggies were delivered under a subsequent verbal contract unaccompanied by any fiduciary relation, and the court charged that plaintiff insisted that defendant's claim of a new contract was unreasonable because he had come to trial without the new contract and without serving notice on plaintiff to produce it, the action of court, in recalling the jury and withdrawing the charge and correcting the wrong impression made by reason of the court's misapprehension of the fact that the alleged new contract was oral, was not prejudicial to defendant.

Appeal from Superior Court, Hertford County; Peeble, Judge.

Action by the Corbett Buggy Company against H. T. Dukes. From a judgment for plaintiff, defendant appeals. Affirmed.

On September 28, 1901, defendant entered into a contract with plaintiff corporation in writing, the terms of which were: "It is agreed that all goods shipped on this contract, and also all other goods hereafter shipped to the maker of this contract, are consigned and the said goods and proceeds of sales of goods received under this contract, whether in cash, notes, book accounts or other proceeds, are to be held in trust and subject to the order of the Corbett Buggy Company. No agreement, verbal or otherwise, is binding on the Corbett Buggy Company, unless embodied in this contract." At the time of the execution of the contract, three buggies were delivered to defendant which were paid for. Afterwards plaintiff alleges other buggies were delivered to him upon and pursuant to the terms of the contract, for the price of which he executed his notes. Plaintiff alleged that defendant had disposed of the buggies so delivered, and received therefor the sum of \$521.97, which he had converted to his own use. Defendant admitted the delivery of the buggies, but denied that they were delivered or received under or upon the terms of the contract. That, after the first three buggies were shipped, a new verbal contract was made, and that thereafter all buggies were delivered pursuant to such new contract, unaccompanied by any trust or fiduciary relation, etc. That the notes were executed for the purchase price of said buggies. He tendered to plaintiff judgment for the amount due on the notes. The jury, upon an issue submitted, upon the controverted allegation, found that defendant received the buggies for the price of which the notes were given on consignment under the terms of the contract to account to plaintiff for the proceeds of the buggies. His honor rendered judgment for amount found to be due and directed execution against the person of defendant, etc. Defendant excepted and appealed.

Winbourne & Lawrence, for appellant. J. R. Mitchell and F. D. Winston, for appellee.

CONNOR, J. (after stating the facts). Two exceptions to his honor's ruling were argued in this court. Defendant contends that, conceding the fact to be as found by the jury, the acceptance by plaintiff of the promissory

notes for the price of the buggies merged the original cause of action, or at least suspended it until the notes are returned or tendered at the trial. That plaintiff cannot retain his promissory negotiable notes, and at the same time prosecute an action against him for the recovery of the amount received by him as his agent. This exception was raised by a request to charge the jury. The issue did not involve the controverted proposition; it was directed simply to the question of fact respecting the capacity in which, or the contract under which, the buggies were delivered and received. The question is, however, presented upon the admitted facts considered in connection with the verdict. It is true, as contended by defendant, that the acceptance of a negotiable security for an open account suspends the right of action until the maturity of the note, and then, if the plaintiff will resort to his original cause of action, he must surrender the security. The acceptance of the promissory note, unless expressly so agreed upon, will not discharge the original cause of action. The law is well stated in Clark on Contracts (2d Ed.) 435: "In such a case the position of the parties is that the payer, having certain rights against the other party, under a contract, has agreed to take the instrument from him instead of immediate payment of what is due him, or immediate enforcement of his right of action, and the other party, in giving the instrument, has thus far satisfied the payer's claim, but, if the instrument is not paid at maturity, the consideration of the payer's promise fails, and his original rights are restored to him. The effect of receiving a negotiable instrument conditionally is merely to suspend the right to sue on the original contract until the instrument matures, and, when it matures, and is not paid, to give the right to sue either on it or on the original contract." Norton, Bills & Notes (3d Ed.) 20; *Gordon v. Price*, 32 N. C. 385. The complaint sets out the entire transaction, and defendant makes no point of the fact that his promissory notes are not tendered. He simply denies that he received the buggies upon the contract—the jury have found the issue against him.

In summing up the arguments of counsel for plaintiff, the court told the jury that plaintiff insisted that defendant's statement that he had another and different contract from the one introduced by plaintiff was unreasonable, for the reason that he had come to trial without such contract and without serving notice on plaintiff to produce it, etc. After the jury retired, plaintiff's counsel called the attention of the court to the fact that in his answer defendant had said that the new contract was in parol. The court caused the jury to be brought back and told them that he withdrew so much of the charge as related to the failure of defendant to produce the new written contract or to serve notice on plaintiff to produce it, and that the same should have no influence whatever on

their verdict. No exception was taken to this at the time, or until the case on appeal was made out. Waiving the objection that no exception was made at the time, we are unable to perceive how the defendant could have been prejudiced by his honor's action. He had been misled as to the form of defendant's alleged contract and simply removed any impression made on the mind of the jury by reason of such misapprehension. There is no merit in the exception.

The judgment must be affirmed.

(140 N. C. 209)

COOPER v. NORTH CAROLINA R. CO.
(Supreme Court of North Carolina. Dec. 12, 1905.)

1. RAILROADS—ACCIDENTS AT CROSSING.

Both the railroad when approaching a public crossing and the traveler on the highway are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty.

2. SAME—INSTRUCTIONS—DUTY OF TRAVELER.

In an action for damages for the alleged negligent killing of plaintiff's intestate, an instruction that relieved the traveler of all obligation to look and listen when there had been a failure on the part of the defendant to give the ordinary signals, where there was evidence tending to show that there was an unobstructed view, is erroneous, and the fact that the court in other portions of the charge imposed on the plaintiff the obligation to look and listen whenever the view was unobstructed does not help the matter.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Evidence tending to show that the intestate was in a covered wagon and that he drove on the crossing without any stop whatever and with the wagon cover down on the side from which the train approached, and at a point just on the edge of the wagon road and 13 feet from the center of the railroad track one could see down the track from 500 to 1,200 feet, in the direction from which the trains approached, was sufficient for the consideration of the jury on the issue of contributory negligence.

4. SAME—SIGNALS—DUTY TO LOOK AND LISTEN.

A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.

5. SAME—CONTRIBUTORY NEGLIGENCE.

Where the view is unobstructed, a traveler who attempts to cross a railroad track under ordinary and usual conditions without first looking, when by doing so he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence.

6. SAME—OBSTRUCTED VIEW.

Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen, and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence.

7. SAME.

There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for

the jury, even though there has been a failure to look or listen, and a traveler may in exceptional instances be relieved of these duties altogether, as when gates are open or signals given by a watchman and the traveler enters on the crossing reasonably relying upon the assurance of safety.

8. DAMAGES—PERSONAL INJURIES.

In an action to recover damages for the alleged negligent killing of plaintiff's intestate, plaintiff's inventory of the personal property of her intestate and her annual account as administratrix are inadmissible for the purpose of showing intestate's capacity to earn and accumulate money.

Clark, C. J., and Connor, J., dissenting.
(Syllabus by the Court.)

Appeal from Superior Court, Caswell County; E. B. Jones, Judge.

Action by Mary W. Cooper, as administratrix, etc., against the North Carolina Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Action to recover damages for alleged negligent killing of plaintiff's intestate. The ordinary issues in such actions were submitted. There was evidence of plaintiff tending to show that intestate was killed in attempting to drive his wagon over defendant's road at a public crossing, and by reason of the negligent failure on the part of defendant in giving the ordinary and usual signals at crossings, and that such negligence was the proximate cause of the injury. There was evidence of defendant tending to show that the ordinary and usual signals were given, and that the intestate was guilty of contributory negligence in driving on the crossing without having looked and listened for an approaching train, and when, if he had looked, the approach of the train might have been seen in time to have avoided the collision and prevented the death of the intestate. In response to prayer for instructions by plaintiff, the court on the issue as to contributory negligence charged the jury as follows: "Fourth. It is the duty of a railroad company to give the public due notice of the approach of its trains to a public crossing so that travelers may stop their teams, if necessary, and stay off the crossing until the train has passed. The train, if it gives the proper warning of its approach, and the railroad company is not otherwise at fault, is entitled to the right of way in preference to a traveler on the highway. The traveler has the right to expect such warning to be given to him, and he must look and listen when approaching a crossing, and his failure to look and listen when such warning is given is negligence, and, if such failure should cause his death, no recovery could be had for it. But, when the train does not give timely warning and reasonable warning of its coming, it is not contributory negligence in a traveler to go upon the track without looking and listening for the approach of a train, if he exercises that prudence and care which a prudent man would exercise under the circumstances, and, if the injury resulting is attributable to the negligence of the rail-

road company in failing to give the signals, for such failure would be deemed the proximate cause of the injury, if the jury should find from the evidence that with proper warning the traveler would not have attempted to cross. Therefore, if from the evidence you find that the railroad company failed to give timely warning of its approach to the crossing, by sounding the whistle or ringing the bell, and also find that the plaintiff's intestate went upon the crossing without looking and listening, his failure to look and listen under such circumstances would not be the proximate cause of his death, if, with the proper warning, he would not have gone upon the track, and if from the evidence you find such to be the facts, you will answer the second issue 'No'; that is, that the plaintiff's intestate was not guilty of contributory negligence." To this charge the defendant duly noted an exception. The court in substance repeated this statement in its direct charge to the jury. Verdict and judgment for the plaintiff. Defendant excepted and appealed.

Manly & Hendren, for appellant. Kitchin & Carlton, for appellee.

HOKE, J. (after stating the case). The first portion of the instruction above quoted, which states the obligation on the railroad to give adequate warning when approaching a public crossing and the obligation on the traveler to look and listen in like case, is correct. As stated in *Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403: "Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty." The remaining portion of the instruction, however, addressed more particularly to the feature of contributory negligence, by fair and reasonable intendment can only mean that, though a traveler in approaching a railroad track is required to look and listen, yet this obligation is not upon him, nor will the consequence be imputed to him, if he failed to look and listen when such failure was caused by the negligent failure of the railroad train to give the necessary signals; and this where there was evidence tending to show that, if he had looked, he could have seen the approaching train in time to have avoided the collision, or at least to have saved himself by the exercise of reasonable effort. In this we think there was error which entitles the defendant to a new trial. It relieves the traveler of all obligation to look and listen when there is a failure on the part of the defendant to give the usual and ordinary signals, and places the entire responsibility for such a collision on the railroad company. It would, in effect, practically eliminate the defense of contributory negligence when there had been a negligent failure to give the warning; for ordinarily it is only by

looking and listening that a traveler can inform himself of dangerous conditions. This is not a just principle by which the rights of parties in cases like the present should be determined, nor is it supported by any well-considered authority. The general rule is well stated in *Beach on Contributory Negligence*, as follows: "In attempting to cross, the traveler must look and listen for signals, notice signs put up as warnings, and look attentively up and down the track, and a failure to do so is contributory negligence, which will bar a recovery. A multitude of decisions of all the courts enforce this reasonable rule. It is also consonant with right reason and the dictates of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily routine of life that it would seem to be scarcely dependent upon the authority of decided cases in the law courts. As a general rule, the omission of the traveler to look and listen is so clearly a want of ordinary care that it constitutes contributory negligence as a matter of law, but it cannot be said that such failure will always defeat a recovery, for circumstances may and sometimes do exist which excuse the omission." And the rule so stated is in accord with the decisions in this and other jurisdictions. *Randall v. Railroad*, 104 N. C. 410, 10 S. E. 691; *Mayes v. Railroad*, 119 N. C. 758, 26 S. E. 148; *Mesic v. Railroad*, 120 N. C. 490, 26 S. E. 633; *Laverenz v. Railroad*, 56 Iowa, 689, 10 N. W. 268; *Nixon v. Railroad*, 84 Iowa, 331, 51 N. W. 157; *Davis v. Railroad*, 47 N. Y. 400; *Rodrian v. Railroad*, 125 N. Y. 526, 26 N. E. 741; *Bonnell v. Railroad*, 39 N. J. Law, 189.

The rule is so just in itself, and so generally enforced as controlling, that citation of authority is hardly required. But, as the matter has been very earnestly debated, it is considered well to quote from some of the decisions illustrative of the obligation on the traveler to look and listen, and some of the exceptions where its violation was not held contributory negligence as a matter of law. In *Randall's Case*, supra, it is held to be the duty of a person approaching a railroad track to take every prudent precaution to avoid a collision, and it is the duty of the engineer to sound the whistle or ring the bell at a reasonable distance from the crossing in order to enable travelers to avoid danger. In *Mayes' Case* (*Clark, J.*, delivering the opinion) it is held to be the duty of one approaching a railroad crossing to use ordinary and reasonable care to avoid accident, and to exercise his senses of hearing and sight to keep a lookout for an approaching train; and, if he does not do so, but drives inattentively upon the track without keeping a lookout or listening for approaching trains, and injury results, he is ordinarily, but not in all cases, guilty of contributory negligence. In *Mesic's Case*, *Mr. Justice Montgomery*, speaking for the

court, said: "The rule is general and usual that, whenever an approach to a public crossing over a railroad is made by any one in charge of a wagon and team, such person is bound to look and listen for approaching trains and take every proper precaution to avoid a collision; and this is so, even though the approach be made at a time when no regular train is expected to pass; and in case the driver fails to look and listen and to take proper precaution to avoid a collision, and one does occur, the plaintiff cannot recover, even though the defendant was negligent in the first instance." In *Laverenz's Case*, supra, it is held to be the rule that a person who voluntarily goes on a railroad track at a point where there is an unobstructed view of the track, and fails to look or listen for danger, cannot recover for an injury which might have been avoided by so looking and listening; but, when the view is obstructed or other facts exist which tend to complicate the question of contributory negligence, it becomes one for the jury. In *Nixon's Case*, supra, it is held that one who, in full possession of his senses and without having his attention diverted from any cause, passes over a railroad crossing without looking in both directions to see if there is an approaching train, is guilty of contributory negligence, and will not be entitled to recover for injuries received from a passing train, though no whistle was sounded nor bell rung from the engine, as required by law. *Rothrock, J.*, delivering the opinion, said: "It is true there are exceptions to this rule. There may be such circumstances surrounding the traveler as that his failing to look and listen may exonerate him from the charge of contributory negligence. The traveler, for instance, may be placed without his fault in some dilemma, or some place of danger, where the exigencies of the situation and an emergency may excuse him from going on the track without looking and listening. These circumstances are so varied that they cannot be cited or commented upon in an opinion without unduly extending the subject. They involve obstructions on the track, which prevent an approaching train from being seen by the traveler, and where there are several tracks and trains running on them in different directions, and one train is obscured by another the fact that the railroad track is in a deep cut and trains cannot be seen by a traveler approaching the crossing, or trains following each other in close proximity which may serve to confuse the traveler, and numberless other circumstances from which the jury may be authorized in finding that the traveler exercised the precaution which an ordinarily prudent person would exercise under the same circumstances." In *Rodrian's Case*, supra, it is held that a pedestrian who crosses a railroad track must, in the absence of circumstances excusing it, look in each direction

and ascertain whether a train is approaching. He may not omit this in reliance upon the performance by the railroad of its duty to give reasonable notice of the approach of the train; and, if he does omit it, the neglect of the company to discharge its duty will not relieve him from the imputation of negligence; Andrews, J., further saying: "If in case of an accident at a crossing it appears that the person injured did look for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time when and where looking would have been of some aid. Many circumstances might be shown which could properly be considered by the jury in determining whether he exercised due and reasonable care in making his observation, the presence of other imminent dangers, the raising of gates erected by the company to guard the highway, giving assurance that the crossing was safe, these and similar circumstances appearing, they may be considered in determining whether the person injured, who did in fact look and listen before attempting to cross the track, fairly discharge the duty imposed upon him, although it should appear that if he had looked at another instant of time, or had looked last in the direction from which the train was approaching, he would have seen it."

It will be observed that the circumstances which may at times excuse the failure of the traveler, who has entered on a railroad crossing, to note the approach of a train, usually arise where the view is obstructed, or in the presence of some imminent danger or emergency sufficient to divert the attention of a person of reasonable fortitude and self-possession, or where one has entered on the crossing under an express or implied invitation of the company's employees giving reasonable assurance of safety. The last instance more usually occurs at stations where a way has been left open by the company across other tracks for an approach to the station or train, or at much frequented crossings where there are gates raised, or an employe charged with the duty has satisfied the traveler that he may cross in safety, and has no application here. The general rule is that the traveler is required to look and listen for danger, and, where there is an unobstructed view, he is not relieved of the obligation by the fact that the train has failed to give the ordinary signals of its approach. The error in the above charge consists in relieving the plaintiff's intestate from all obligation to look and listen, if his not doing so was caused by the negligent failure of the defendant to give proper warnings, where there was evidence tending to show that there was an unobstructed view which would have enabled the intestate to see the train in time to have saved himself by the exercise of reasonable effort. It is submitted in support of this charge that the

objectionable feature is qualified or eliminated by the use of the words "if he exercised that prudence and care which a prudent man would use under the circumstances"; and, further, "that the failure to look would not be the proximate cause of the injury, if the jury should find from the evidence that with the proper warning the traveler would not have attempted to cross," and it is argued that by reason of these qualifying words the charge may be referred to certain testimony to the effect that the view was obstructed. Unfortunately for this position, and for the intention here imputed to the judge below, he puts his own, and as we interpret it, an entirely different, construction upon these words, for in his conclusion, and just after using them, he says: "Therefore, if from the evidence you find that the railroad company failed to give timely warning of its approach to the crossing by sounding the whistle or ringing the bell, and also find that the intestate went upon the crossing without looking or listening, his failure to look and listen would not be the proximate cause of his death, if with the proper warning he would not have gone upon the track." It is true the court in several other portions of the charge imposes on the plaintiff the obligation to look and listen whenever the view was unobstructed, but this does not help the matter. Standing apart, the positions are in absolute conflict, and the only way to reconcile them and give each any significance would be to annex the erroneous proposition to the more correct one wherever the same occurs.

Again, it is contended that the burden was on the defendant to establish contributory negligence, and that there was no evidence tending to show contributory negligence sufficient for the consideration of a jury, and for this reason any error in the charge on that issue should be considered as harmless and immaterial. But this position cannot be sustained. Both the evidence on the conduct of the intestate and as to the physical conditions and placing of the occurrence are against it. There was evidence of the defendant tending to show that the intestate was in a covered wagon and that he drove on the crossing without any stop whatever, and with the wagon cover down on the side from which the train approached. Henry Flintop (on pages 38 and 39 of the record) testified that he "was in the wagon, going towards Scarlet crossing; while near a branch Cooper's wagon passed the witness and continued up the hill to the crossing; noticed the wagon of intestate nearing the railroad and wondered why they did not stop the team; Cooper was driving; the wagon sheet was down on the right side; the wagon did not slacken its speed or stop, but went right on the crossing; was looking at the wagon all the time." There was also evidence to the effect that at a point just on the edge of the wagon road and 13 feet from the center of the railroad track one could see

down the railroad from 500 to 1,200 feet in the direction from which the train approached, and photographs were in evidence giving a picture of the view from that point. This was on the edge of the county road, and it may have been taken from that point in order to give the photographer an opportunity to present a picture of the county road where it approached the crossing, as well as the crossing itself. If the camera had been placed in the center or right of the county road, the view down the railroad would have been shortened some, but would still be sufficient to require that the question should be submitted to the jury as to whether the intestate could by looking have noted the train's approach in time to have saved himself by reasonable effort, and with the obligation to look upon him. There was both contradictory and impeaching testimony for the plaintiff on this question, but the defendant was entitled to have this view presented under a proper and correct charge.

We are referred, further, to several decisions in this state which it is argued are contrary to our present opinion, but none of them we think sustain the position for which they are cited. While the headnotes of the different cases may be at times too general, both these and the language of the judge delivering the opinion must be taken in connection with the facts admitted or established, or at least in evidence and assumed to be true, upon which they are predicated; and they are only to be regarded as authoritative decisions when so construed and applied. Thus, in *Hinkle's Case*, 109 N. C. 478, 13 S. E. 884, 28 Am. St. Rep. 581, the plaintiff testified that the plaintiff and his father were on the county road in a covered wagon, and as they traveled along the road he looked out of the wagon two or three times to see if the train was coming; and when they had gone down the hill, within about 20 yards of the crossing, he stopped the wagon and listened. The plaintiff then got on the cross-pieces of the shaft and held to the wagon with one hand while he rested the other on the horse's rump, and, as his father drove on, he looked and listened, but neither saw nor heard an approaching train. In *Alexander's Case*, 112 N. C. 720, 16 S. E. 896, the view of the track was shut off by cars, etc., and the ordinary noise of a moving train was deadened by the operation of an adjacent cotton factory, etc. The plaintiff testified that before attempting to cross the track he pulled up his horse and listened to hear if there was any approaching train, and, hearing no bell, he ventured on the track and was hurt; that he had heard the bell there, prior to that time, as a warning, etc. There was also an ordinance requiring trains to sound bells at crossings. In *Russell's Case*, 118 N. C. 1098, 24 S. E. 512, the evidence was not set out, but the writer has examined the record and finds that the plaintiff testified that he both looked and listened, and failed to see or hear any

train, and drove on the track only after having done this. There was also testimony in this case to the effect that the plaintiff, who was in a buggy, had crossed one railroad track, and was between that and another which she was approaching, when the horse took fright, and her husband, who was driving, lost control over him; and, further, there were some cross-ties between the roads which may have partially obstructed the view. Here was testimony that the plaintiff both looked and listened, that the occupants of the buggy were in the presence of an emergency, and further there was evidence tending to show that the view was partially obstructed. In *Norton's Case*, 122 N. C. 910, 20 S. E. 886, the plaintiff stopped, looked, and listened at a distance of 90 feet from the track, the nearest point where the view was open to him, and not seeing or hearing any train, and relying on the signals he had a right to expect and which the defendant negligently failed to give, he drove on the track, and was injured by a train running at an unlawful rate of speed. Here the plaintiff had looked at the only place where looking would have availed him. In *Mesic's Case*, supra, the distinction here dwelt upon is adverted to by Mr. Justice Montgomery. After laying down the obligation on the traveler to look and listen, even though the railroad may have been negligent, he proceeds: "The rule, however, does not prevail where to look would be useless on account of obstructions, natural in themselves or such as had been placed by accident or design by the company's employes on their tracks, * * * and when at the same time the engineer had failed to sound the whistle or ring the bell for the crossing, and in consequence of which failure the plaintiff had been induced to go upon the track and take the risk."

In none of these cases cited and relied upon is the person injured or killed relieved of the obligation to look and listen when the proper and prudent exercise of sight or hearing would have enabled him to save himself by avoiding a collision, and a correct deduction from these and the other cases seems to be: (1) That a traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty. (2) That, where the view is unobstructed, a traveler, who attempts to cross a railroad track under ordinary and usual conditions without first looking, when, by doing so, he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence. (3) That, where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and, if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals,

this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence. (4) There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether as when gates are open or signals given by a watchman and the traveler enters on the crossing reasonably relying upon the assurance of safety. None of these positions, however, justify the charge given in the case, which, as stated, withdraws all obligation either to look or listen when there has been a negligent failure to give the ordinary warnings, even though there was evidence tending to show there was an unobstructed view.

There was also pressed upon our attention a ruling of the court on a question of evidence; and, as the cause goes back for a new trial, we deem it well to determine the matter. Defendant offered Exhibit A, being the plaintiff's inventory of the personal property of the deceased, and Exhibit B, being the annual account of plaintiff, as administratrix of the intestate, for the purpose of showing the intestate's capacity to earn and accumulate money. The proposed evidence was excluded by the court, and defendant excepted. If these papers should show a large estate, there are so many ways by which it could be explained otherwise than by the capacity of the deceased to accumulate money, and, if it is small, there are so many and various ways it could be accounted for, consistent with the highest capacity to earn and acquire, that these admissions, we think, would tend rather to confuse than aid the investigation and would open up a field of inquiry entirely too extensive and often foreign to the issue. We hold the papers to be irrelevant, and affirm the ruling of the trial judge on that question.

For the error in the charge above pointed out, there will be a new trial on all the issues, and it is so ordered.

New trial.

CLARK, C. J. (dissenting). In the first part of the fourth instruction, given for the plaintiff, the court charged, upon the issue of contributory negligence, that the traveler "must look and listen when approaching a crossing, and his failure to look and listen when such warning [by the railroad] is given is negligence, and, if such failure should cause his death, no recovery could be had for it." The court then added: "But when the train does not give timely and reasonable warning of its coming, it is not contributory negligence in a traveler to go upon the track without looking and listening for the approach of a train, if he exercises that

prudence and care which a prudent man would under the circumstances, and, if the injury resulting is attributable to the negligence of the railroad company in failing to give the signals, such failure would be deemed the proximate cause of the injury, if the jury should find from the evidence that with the proper warning the traveler would not have attempted to cross." This does not withdraw from the jury the duty of the traveler to look and listen, but simply leaves it to the jury to find, upon the facts of this case, whether the proximate cause of the injury was the failure of the deceased to look and listen, or was it attributable to the failure of the engineer to give a warning signal. Every instruction must be taken in connection with the context and the evidence in the case. Here, in this fourth instruction, the judge expressly told the jury that one "must look and listen when approaching a crossing"; and further he charged them, in response to the fourth request of the defendant, that, if the defendant failed to give a signal on approaching the crossing, this did not relieve the plaintiff's intestate of his duty to exercise the senses of sight and hearing and to take reasonable precautions to avoid accidents, and that, if he did so fail to use his senses, the jury should find the issue of contributory negligence "Yes," notwithstanding the negligence of the defendant in failing to give the signal. This is elaborated and more fully given in response to the defendant's prayers 5, 6, 7, 8, 9, 10, and 14, which are as clear and as strong as the defendant's counsel asked or could ask, and in substance he gave that instruction to the jury no less than 10 times in the charge or in the prayers given at the request of the defendant. It is clear, not only that the judge did not eliminate the duty of the intestate to look and listen, but that there being occasions when the failure to look and listen could not contribute to the injury, as when if he had looked he could not have seen, and if he had listened he could not have heard, the judge in the above-selected paragraph of the plaintiff's fourth prayer was simply submitting to the jury (as he should have done) the question of proximate cause, whether on the facts of this case, if the deceased did not look and listen it contributed to the injury, or was such injury caused by the defendant's failure to sound the whistle or ring the bell.

The evidence was that the county road crossed the railroad where the cut was 18 to 20 feet deep. Necessarily there was a bluff which would cut off the view of the approaching train from a wagon in the road. The engineer testified that he was running 40 to 50 miles an hour. He further said, "When I was 100 yards away, I could not see the mules or the county road," and that he was only 40 or 50 yards away when he did see them. Of course, if the engineer, sitting several feet above the track, could

not see the mules when 100 yards away and did not see them till 40 or 50 yards away, the deceased, who was in the wagon, down in the road and several feet behind the mules, could not see the engine that far off by reason of the same bluff. The court, therefore, properly told the jury that, if the train did not give timely warning, "it is not contributory negligence in a traveler to go upon the track without looking and listening, if he exercises that prudence and care which a prudent man would exercise under the circumstances." He had told them that prudence required the traveler ordinarily to look and listen, but in this case upon the engineer's evidence, if the intestate had looked, he could not have seen, and upon the weight of the evidence, if he had listened, he could not have heard, for 11 witnesses who were in position to hear it testified that no signal was given, and the court was favorable to the defendant in requiring that the intestate should in all cases "exercise that prudence and care which a prudent man would exercise under the circumstances." It is true a photograph is sent up in the record by the defendant, and the photographer, witness for defendant, testified that at the point where it was taken the train could be seen 1,000 feet away. But on cross-examination he says: "I did not take a picture * * * from a point where a man would be crossing the track of the road. I was 13 feet from the center of the railroad track in the outer edge of the public road." Why was it taken there, and not in the public road where the intestate must have been sitting in his wagon when the heads of his mules were at the track? The engineer's testimony and a glance at the photograph will show the reason. In the road, where the intestate was, the bluff hid him so that even his mules could not be seen by the engineer 100 yards away, and hence he could not see the engineer; whereas, on the outer edge of the public road, the angle of vision, not being cut off by the bluff, would perhaps permit a view down the railroad track for 1,000 feet. The evidence shows that the public road was 18 feet wide. The deceased sitting on the right-hand side of the wagon could not see through the bluff, but the photographer on the left-hand outer edge of that road could see down the track.

The charge was as favorable as possible to the defendant. In *Mayes v. Railroad*, 119 N. C. 770, 26 S. E. 149, it is said: "It is not negligence in a traveler to cross a track unless he disregards a warning in crossing which he might have seen or heard with proper care." In *Russell v. Railroad*, 118 N. C. 1109, 24 S. E. 513, it is said: "The plaintiff had a right to expect that the company would not omit to give the usual alarm, and was not culpable for acting upon that supposition." "It is the duty of a railroad company to give reasonable and proper warning for the protection of travelers on the highway, when its trains are approaching a

highway crossing, and a traveler has a right to presume that this duty will be performed and reasonable warning given." 8 Am. & Eng. Enc. (2d. Ed.) 408, citing *Railroad v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132, and numerous other cases. Where the view is obstructed, "the duty of the company to give notice is more imperative than at other places along its route." *Id.*, and cases there cited in note 4. The omission to do so "is negligence per se" (*Id.* 416); and "the question whether the failure to ring a bell or sound a whistle was the cause of the injury sustained is a question of fact, for the determination of the jury" (*Id.* 417, and numerous cases cited in note 1). This was the identical question which the judge submitted to the jury in the part of the fourth instruction given for the plaintiff, which is here objected to. "Failure to stop, look, and listen is not contributory negligence per se," and is not negligence at all when the traveler could not have seen or heard. 7 Am. & Eng. Enc. (2d Ed.) 432, 433, with citation of numerous authorities. The judge in substance told the jury that it was the duty of the defendant to ring the bell or sound the whistle for the crossing, but that, if the engineer failed to do so, this would not absolve the traveler from the duty of looking and listening, and, if the intestate failed to do so, it would be contributory negligence, unless they found that in fact the failure to look and listen could not contribute to the injury. That was correct, certainly, in this case, where, if the intestate had looked, the bluff would have prevented his seeing, and, if he had listened, he could not have heard a signal which it was testified by many was not given. The court further charged that in all cases one crossing a railroad track is required to use "that prudence and care which a prudent man would exercise under the circumstances," and there was evidence that the intestate did stop his wagon, and presumably he looked and listened. Only one witness, a colored man, testified that he did not stop, and five respectable men testified that such witness was not there on that occasion, and neither he (nor any other) testified that the deceased did not look and listen. The judge left the question of proximate cause fairly to the jury, and I see no error of which the defendant has any cause to complain. *Hinkle v. Railroad*, 109 N. C. 473, 13 S. E. 884, 26 Am. St. Rep. 581; *Alexander v. Railroad*, 112 N. C. 720, 16 S. E. 896; *Russell v. Railroad*, 118 N. C. 1108, 24 S. E. 512; *Mayes v. Railroad*, 119 N. C. 758, 26 S. E. 148; *Mesic v. Railroad*, 120 N. C. 491, 26 S. E. 633; *Norton v. Railroad*, 122 N. C. 935, 29 S. E. 886. *Hinkle's*, *Russell's*, and *Mayes'* Cases all say that the traveler is not guilty of contributory negligence if his going upon the track is induced by the negligence of the defendant. But, suppose the jury believed Flintoff, he does not undertake to say that the intestate did not

look and listen, but says that the wagon did not slacken its speed or stop. If true, was the failure to stop sufficient for the jury to reasonably infer that the intestate did not use due care, and that such failure to stop contributed as the proximate cause of his death, when no warning was given? His honor could safely have instructed the jury that there was no evidence to justify an affirmative answer to the issue of contributory negligence.

But the defendant assumes that the intestate failed to look when at a distance of 13 feet from the track, and insists that such failure was the proximate cause of the injury. This contention of the defendant was clearly stated by his honor in giving the defendant's instructions, and was found against the defendant. The evidence does not show that the intestate, when 13 feet from the track, could have seen the train. The evidence does not show that, when the intestate was 13 feet from the track, the train was 1,000 feet from the crossing. The evidence does not show that the intestate failed to look, and the evidence does not show that after the intestate could have seen the train the accident could have been avoided. On the contrary, the evidence shows that, when the intestate could have seen up the track, his mules must have been partly on the track, and that at that time the train was in 50 yards of the crossing, running nearly a mile a minute. The evidence does not show what the mules did, but they escaped, while the wagon was demolished; the engine striking its front wheels. An occupant of a wagon is about 10 feet behind the heads of his team, so that when he is within 10 feet, or even within 13 feet, of the center of the track, his mules are in the act of crossing it. It would seem unreasonable to hold that as matter of law a traveler, whose team is in the act of crossing with a fast train coming within 50 yards of him, when he could first see it, even if no excitement seized him or his mules in this sudden danger, had the opportunity thereafter and could be reasonably expected to avoid a collision.

In view of the great increase of the country in population and wealth, with the consequent vast increase of traffic, both upon the public roads, which are the inheritance of the people, and also upon the railroads operated by corporations, which are under very slight regulation by the public, the number of people killed or maimed at the crossings of public roads on the same grade by railroads running at a speed formerly unknown now amounts up into many thousands annually in this country. Throughout Europe, except, perhaps, in Russia, no railroad is permitted to cross a public road on the same grade, but must either pass under or over the public road. This avoids the vast and deplorable loss of life which occurs in this country at such crossings, and similar statutes will doubtless be enacted at no distant

day in this country, when such cases as the present will cease to come before the courts. In New York, years ago, such statute was enacted, applying, however, only to crossings to be laid out thereafter. In Massachusetts and Connecticut statutes have been enacted forbidding any grade crossing whatever, and requiring all railroads within a specified time to change all crossings, so that their tracks should pass under or over the public roads. This act was held constitutional by the United States Supreme Court, affirming the Supreme Court of Connecticut, even as to existing crossings (*Railroads v. Bristol*, 151 U. S. 558, 14 Sup. Ct. 437, 38 L. Ed. 269) on the ground that grade crossings were a menace to public safety, and it was further held that the imposition of the entire expense of such change of grade upon the railroad company was not in violation of the Constitution of the United States. This has been cited and followed. *Railroad v. Woodruff*, 153 U. S. 691, 14 Sup. Ct. 976, 38 L. Ed. 869; *Railroad v. Kentucky*, 161 U. S. 696, 16 Sup. Ct. 714, 40 L. Ed. 849; *Railroad v. Defiance*, 167 U. S. 99, 17 Sup. Ct. 748, 42 L. Ed. 87; *Wheeler v. Railroad*, 178 U. S. 324, 20 Sup. Ct. 949, 44 L. Ed. 1085; *Railroad v. McKeon*, 189 U. S. 509, 23 Sup. Ct. 853, 47 L. Ed. 922; *Railroad v. Wheeler*, 72 Conn. 488, 45 Atl. 14; *Norwood v. Railroad*, 161 Mass. 265, 37 N. E. 199; *Chicago v. Jackson*, 196 Ill. 502, 63 N. E. 1013, 1135. A due regard for the safety of life and limb of our citizens who may have occasion to use the public roads will doubtless cause the statutes in this respect, enacted in New York, Massachusetts, and Connecticut, to be followed and enacted in other states, or, at least, will cause enactments conferring power upon the Corporation Commission to compel railroad companies to abolish grade crossings, or erect gates provided with keepers, wherever the public safety and the volume of travel on the public roads may require it. In Germany the wheel of the engine at a prescribed distance completes an electric circuit and automatically rings a gong communicator in the station. The same device applied to grade crossings would save thousands of lives annually in this country. If it were not cheaper for the railroads to pay the damages assessed for the lives and limbs destroyed at such crossings, their own pecuniary interests would require them to make such changes of grade at all public crossings, especially at those most used, without awaiting the legislation that shall require them to do so.

CONNOR, J. (dissenting). Conceding the force of the view presented in the opinion of Mr. Justice HOKE, I think that, considered as a whole, every question of law applicable to the evidence was presented to the jury in the charge. His honor said to the jury that "the traveler has the right to expect such warning to be given to him, and he must look and listen when approaching a crossing, and his failure to look and listen

when such warning is given is negligence, and, if such failure should cause his death, no recovery could be had for it." He then stated the proposition in a negative form: "But, when the train does not give timely and reasonable warning of its approach, it is not contributory negligence in a traveler to go upon the track without looking and listening for the approach of the train, if he exercises that prudence and care which a prudent man would exercise under the circumstances," etc. I think that with this language, construed in the light of other portions of the charge favorable to and given in the words of the defendant's prayer, the jury could not have been misled in regard to the relative duty of the plaintiff's intestate and the defendant. Upon this view, and for the reasons and authorities cited in the opinion of the Chief Justice, I concur in the dissenting opinion that there is no reversible error. I do not care to express any opinion in regard to the weight of the testimony; nor do I think that the other questions discussed are presented by the record. They are not "matters of law or legal inference," and I do not care to express any opinion in regard to them.

(140 N. C. 252)

SHERRILL v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 12, 1905.)

MASTER AND SERVANT—INJURIES TO SERVANT CONTRIBUTORY NEGLIGENCE.

Plaintiff was employed by contract to construct a union depot for defendant and another railroad at a junction; his duty requiring him to work almost on the track, and frequently requiring him to be on and across it. While so engaged, he was run over by defendant's engine, which came upon him without giving the warning required by custom and rules of the company. Plaintiff had just looked both ways and listened without seeing any train on defendant's track, when he started to walk a short distance across the same, and within five or six seconds from the time he looked was struck and injured. *Held*, that plaintiff was not guilty of contributory negligence as a matter of law in failing to look a second time just prior to his stepping onto the track.

Appeal from Superior Court, Catawba County; Council, Judge.

Action by A. H. Sherrill against the Southern Railway Company. At the close of plaintiff's case, the court directed a nonsuit, and plaintiff appeals. Reversed.

Civil action for personal injuries, caused by alleged negligence of defendant. The ordinary issues were raised by the pleadings. There was evidence tending to show that the plaintiff was at the time of the injury engaged in superintending the construction of a union depot at Helena, Ga., for the defendant and the Seaboard Air Line Railway Company. The tracks of the two railroads crossed each other at right angles, and the depot was being constructed in one of the angles and within a few feet of the tracks, and within the yard limits of the defendant

at that point. The plaintiff's duties required him to cross and recross the defendant's track at frequent intervals in order to properly superintend the construction of the work. The depot which was being built had two fronts, one facing the track of the defendant, and the other the track of the Seaboard. The defendant's employes were accustomed to give warning of the approach of the trains at this point by sounding the whistle and ringing the bell, and the rules of the company required that adequate warning should be given. On the occasion when the plaintiff was injured, no warning of any kind was given, and the plaintiff, in endeavoring to cross the track, was struck by one of the defendant's trains and severely injured. The plaintiff, who was the only witness examined, speaking to the main features of the charge, testified as follows: "I was setting door and window frames. After I got them set, I stepped across the Southern, and walked up and down to see if the frames were level. There was a belt over the doors and windows, running around the whole building, and the frames had to be on line at the top. I stepped across and walked up and down the platform to see if these frames were on a line. I had to get off to do this, and could not have done it properly any other way. The Seaboard train was standing across the Southern, and I walked to the side of the depot on the Seaboard line, and cautioned the men about letting blocks of timber fall from the building. I pulled out a piece of scantling 4x6 that had fallen from the building and walked back across the Southern on to the platform, and gave a few steps, and the Seaboard train was then pulling out. I made straight back to my men. I don't think I walked over 15 feet. I walked straight to the men across the road, and the engine of the Southern caught me. I had no notice or knowledge of the presence of the engine until I was struck. I did not hear the ringing of the bell, nor a signal of any kind. It was not more than half a minute. I looked and saw the Seaboard train, just started, and was about stepping across the road. I don't think I walked more than 15 feet when the engine struck me. I cannot tell at what speed the engine was running. It was all done so quick I could not see. I was walking right fast. When I started down the Southern the last time, returning to my men, I looked back and the Seaboard was on the crossing, moving off. I looked both ways and there was nothing there. I looked both ways and did not hear anything. I heard nothing. I heard the rumbling of no car and no whistle. I was using every precaution I could." On cross-examination he stated that, when he started down the Southern track the last time, he was 10 or 12 feet from the Seaboard track, and looked both ways. He then walked nearly 30 feet before he undertook to cross, or something like 20 feet, and did not look back again. He walked down the track and

stepped over, and that, if he had looked just as he stepped on the track, he could have seen the train which struck him, and that he was not struck just as he stepped on the track, but just as he was making the last step off the track. At the close of the testimony, on motion, the court directed a nonsuit, and the plaintiff excepted and appealed.

W. C. Feimster and M. H. Yount, for appellant. S. J. Ervin, for appellee.

HOKE, J. (after stating the case). We have held in *Cooper v. Railroad* (at this term) 52 S. E. 932, that one who enters on a public railroad crossing is required to look and listen, and when he fails in this duty and is injured in consequence, the view being unobstructed, under all ordinary conditions, such person is guilty of contributory negligence. It is further held that, negligence having been first established, facts and attendant circumstances may so qualify this obligation to look and listen as to require the question of contributory negligence to be submitted to the jury, and in some instances the obligation to look and listen may be altogether removed. The principle, with its limitations, applies, we think, with peculiar force to those persons whose duties, by contract relation with the railroad company, call them to work on or upon the railroad tracks, or frequently to cross the same, and is sustained by abundant authority. *Cooper's Case*, supra; *Erickson v. Railroad*, 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786; *Shearman & Redf. on Neg.* § 476; *Laverenz v. Railroad*, 56 Iowa, 689, 10 N. W. 268; *Nixon v. Railroad*, 84 Iowa, 331, 51 N. W. 157; *Rodrian v. Railroad*, 125 N. Y. 526, 26 N. E. 741; *Jennings v. Railroad*, 112 Mo. 268, 20 S. W. 490. In *Shearman & Redfield*, supra, it is said: "A traveler must look in every direction, * * * but circumstances may excuse him from looking more than once. There is no arbitrary rule requiring him to look constantly." In *Rodrian's Case*, supra, *Agnew, J.* said (quoted, also, in *Cooper's Case*, supra): "But, where one has looked for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time, when and where looking would have been of the most advantage." The facts in *Jennings' Case* are very similar to the one before us, so far as the obligation to look and listen is concerned. As pertinent to the question, they are stated thus: "Plaintiff before passing these cars looked west along the street he was travelling, and saw it was open. He could not see south, on the second side track, because of cars on the first. He looked in that direction, however, saw no one on top of any car, and heard no engine bell ringing, though he saw the smoke from an engine. He crossed over the first track upon which the cars were standing, and, while looking north at the approaching train on the main track, stepped upon the side

track without again looking south, and was immediately struck, knocked down, and run over by some freight cars, five in number, which had been kicked by an engine from a point 300 or 400 feet south of Lesperance street." On these facts there was verdict and judgment for the plaintiff, and in affirming the judgment the court held that "the rule that a person who goes on a railroad track, or purposes crossing it, must use his eyes and ears to avoid injury, and, if he neglects to do so, he cannot recover, notwithstanding the negligence of the company, is not of universal application, but has exceptions under exceptional circumstances, and the facts of this case make an exception to the rule."

Applying these decisions to the facts testified to by the plaintiff, we hold there was error in directing a nonsuit. The plaintiff's duties by contract with the company (whether through himself or under his employer, who was a contractor with the company, makes no difference) caused him to work almost on the track, and frequently required him then and there to be upon and across it. While so engaged, he was run over by an engine of the defendant company, which had come upon him without any warning, and which warning was required both by the custom and rules of the company. More than that, he had just looked and listened both ways, not at the precise time when he started to cross the track, but only several seconds before, and the way then appeared clear. He says half a minute, but, as a matter of fact, you could walk the distance he says he went, and at the rate he says he was moving, in five or six seconds. To hold him to a constant looking would disqualify him from doing his work, and as a matter of law it is not required of him. If the negligence of the defendant is properly established, we are of opinion that on the evidence set forth in this case the question of contributory negligence must be left to the jury to determine under proper instructions, and on the facts as they shall find them. The case, we think, comes within the principles so clearly stated in *Smith v. Railroad*, 132 N. C. 825, 44 S. E. 663.

There is error and a new trial is awarded.
New trial.

(140 N. C. 239)

NORTH CAROLINA CORP. COMMISSION
v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina. Dec. 12, 1905.)

1. RAILROADS—REGULATION—ESTABLISHMENT OF SIDE TRACK.

Where the action of the corporation commission in requiring a railroad company to install a private switch has been affirmed by the circuit court on a jury finding that the requirement was reasonable, the fact that the switch would increase the danger of operating the road is no cause for reversing the judgment of the circuit court.

2. SAME — REASONABLENESS OF ORDER — EVIDENCE.

On an issue as to the reasonableness of an order of the corporation commission requiring a railroad to establish a private switch, evidence that the railroad had previously maintained a switch at the same place without inconvenience or accident was admissible.

Brown J., dissenting.

Appeal from Superior Court, Wake County; Justice, Judge.

Proceeding by the state, on relation of the North Carolina Corporation Commission, on petition of the Round Pine Lumber Company, against the Seaboard Air Line Railway Company. From a judgment affirming the action of the commission, the railway company appeals. Affirmed.

T. B. Womack and Pou & Fuller, for appellant. H. E. Norris and Seawell & McIver, for appellee.

CLARK, C. J. The corporation commission act (Laws 1899, p. 292, c. 164, § 2,) enumerates in 26 subheads the powers conferred upon the corporation commission. Among these, subsection 15 authorizes the commission "to require the construction of side tracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such side track is sufficient within five years to pay the expenses of its construction"—and further restricting the power by forbidding the commission to require the construction of any side track more than 500 feet. The power of the General Assembly to establish a commission to supervise and regulate the rates and operations of quasi public corporations exercising public franchises has been too often decided in the state and federal Supreme Courts to be again discussed. The matter has been discussed, with the citation of authorities. *R. R. Connection Case*, 137 N. C. 14, 49 S. E. 191 et seq.; *Corporation Commission v. Railroad (Rate Case)* 127 N. C. 283, 37 S. E. 266; *Express Co. v. Railroad*, 111 N. C. 463, 16 S. E. 393; and in many others, among them, *Corporation Commission v. Railroad ("Track Scales Case")* 51 S. E. 793, at this term.

As to this special matter, which arises under subhead 15, authorizing the commission to require the establishment of side tracks for the use of industrial plants, there is, in view of the great industrial development of the state, scarcely any power granted to the commission that is of greater importance. Owing to the exigencies of their business, as well as the greater cost of land immediately at railroad stations and in towns, many factories, and especially most lumber plants, are situated at some distance from any passenger and freight station, though usually on the line of some railroad. To require their products, which are usually shipped in car load lots, to be hauled to a distant station, often over bad roads, when the trains

perhaps pass in a few yards of the plant, would entail a great and useless expense, to the great discouragement of such enterprises in our midst. To avoid this the railroads, whenever the receipts in their judgment would justify it, have for years been putting in such sidings, upon which empty cars would be placed when called for, and, when loaded, would be taken away by some passing train. Such sidings are not passenger or freight stations named in subsections 12, 13, 13a, and 14, and have not (except possibly in rare instances) any agent. Prior to the enactment of this provision of the statute the establishment of such sidings rested in the arbitrary will of the common carrier, who could also discontinue such sidings at will. Such powers, it will be seen at once, placed the industrial development of the state at the mercy of the railroad management, which could mar the prosperity of any plant along its line by refusing a siding, or arbitrarily discontinuing it if established. This power could be used for both political and pecuniary advantage. Whether it was ever so used or not the General Assembly, while not prohibiting the carrier from continuing to establish such sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings out of the arbitrary will of the common carrier by authorizing the corporation commission to require the establishment of such sidings in proper cases. It did not, however, substitute the arbitrary power of the commission for the arbitrary power of the carrier, but it gave the former authority to require such sidings only when the "revenue accruing from such side track is sufficient within five years to pay the expense of its construction," and subject also to a review of the reasonableness of such order on appeal to the superior court, and by further review as to the rulings on the law to this court. By a subsequent act (Laws 1903, p. 788, c. 444, amended by chapter 693, p. 1073, of the same year) a penalty is imposed for refusing to receive loaded cars at such side tracks as well as at regular depots or stations, showing that the Legislature was advertent to the distinction and difference between such sidings and "regular stations."

In the present case, the corporation commission, upon petition of the Round Pine Lumber Company, ordered the establishment of such siding, sufficient to hold four cars, on the line of defendant road, at the twenty-fourth milepost from Raleigh, and about 1¼ miles north of Merry Oaks Station. The lumber company agreed to prepare the grade for said siding, and to furnish the cross-ties for the same, and to have the switch lamp for said siding lighted every night while it should be in existence. The corporation commission found that approximately 30,000,000 feet of lumber would be shipped by the lumber company from said siding in two years, yielding a revenue of not less than \$8,000 to the defendant, and that the cost to the de-

fendant of constructing the siding, the grading being done and cross-ties furnished by the lumber company (as offered), would be about \$200, and ordered that, upon the petitioner doing the grading and furnishing the cross-ties, the defendant construct, on or before 23d August, 1905, a spur siding, as prayed, to hold four cars. An appeal to the superior court was taken upon the ground that the order was unjust and unreasonable; that it would entail considerable and unnecessary cost upon the defendant, which would be taking its property for private purposes without compensation; that the commission had no right to make the order; that the petitioner's mill was 800 yards from the defendant's track, and hence the petitioner could not use the siding without hauling that distance or constructing a tramroad; and, lastly, that putting in the siding would increase the hazard in operating the defendant's road. Upon appeal in the superior court three issues only were submitted, and without exception: (1) Was it reasonable that the defendant be required to construct the spur siding for the convenience of the petitioner as prayed for? (2) Is the spur siding a necessary convenience for the use of the petitioner in the shipment of freight from its sawmill? (3) Will the revenue accruing to the defendant from such spur or side track from the shipment of freight, within five years, be sufficient to pay the expenses of its construction? The jury responded, "Yes" to each of these issues, and judgment was entered reaffirming the order made by the corporation commission, but extending the time for its execution till 3d November, 1905.

Upon appeal to this court the defendant frankly admits in its brief that "the order appealed from does not lessen the revenues of the road, but distinctly tends to increase the same," and rests its case almost entirely upon the allegation that putting in the side track would increase the hazard of operating its road by reason of the additional switch required. But this point, if it could be made one of law, is not raised by the tender and refusal of an issue as to such alleged fact, nor was it presented, as might probably have been done, by an appropriate prayer upon the first issue. It was presented as an issue of fact by the argument and evidence, on the first issue, to the jury on the trial, and the finding upon the issue was adverse to the contention of the defendant. There was neither any prayer for instruction refused, nor any exception to the charge. If it is competent for us to take judicial notice of such matters, we should say that, while there is some danger that this switch may be misplaced, there is also risk as to any other switch on the line of the defendant's road, just as there is danger that any rail, if not renewed, may become worn, or any cross-tie, if not removed in time, may become rotten, and cause derailments; but these are risks necessarily incident to the defendant's busi-

ness, and to be guarded against by its diligence, and certainly the supposed danger from adding one switch to the great number now on the defendant's line is not a sufficient cause, as a matter of law, to reverse the judge's order made upon the responses to the issues submitted to the jury, without exception from the defendant, and without a prayer for instruction upon this aspect of the case. There was, as already stated, no exception to the charge, and the only exception to the evidence is that the plaintiff was permitted to show that a few years ago the defendant's road maintained a spur or side track at this same spot for two years without inconvenience or accident. This was competent, certainly, to show the practicability of a side track being established at that point, and requires no serious consideration. Indeed, the argument in this court was chiefly upon the evidence whether it showed the order of the commission to be a reasonable one, which was properly a matter for consideration by the jury, and which has been passed upon by them under instruction from the court with which the defendant was satisfied, as it filed no exceptions thereto. There was evidence, too, that the facilities offered the petitioner at Merry Oaks were entirely inadequate for the accommodation of its shipments, aside from the evidence that it would add \$5 to \$8 to the cost per car load, if the petitioner were required to ship from that point, and that it would be impossible to haul from the sawmill to Merry Oaks in the winter at all.

We affirm the judgment of the superior court, and, as the date of its execution (3d November, 1905) has now passed, final judgment will be entered here, directing the execution of the work in the same terms as prescribed by the judgment of the superior court, on or before 15th February, 1906. This course was pursued in the Railroad Connection Case, 137 N. C., and in other cases therein quoted on page 21, 49 S. E. 199.

Affirmed.

BROWN, J., dissents.

CONNOR, J. (concurring.) For the reasons set out in the opinion and upon the authority of the cases cited, I concur in the opinion of the court that the statute confers upon the commission the power to require the construction of side tracks upon the terms and conditions prescribed. Whether the order is a reasonable one was submitted to the jury, and answered by them as set out in the record. To this there was no exception. In view of the fact that the cause was tried in that way, I do not care to discuss the question whether what is a reasonable regulation is a question of law for the court or a fact to be submitted to the jury. The usual rule undoubtedly is that what is a reasonable time, or a reasonable notice, or reasonable regulation upon the facts admitted, or found

by the jury if disputed, is a question of law. The practice in regard to the validity of orders made by the corporation commission not being well settled, and not having been discussed in this case, I do not wish to be understood as expressing any opinion in regard to it. I do not think the exception to his honor's ruling upon the question of evidence is reversible error. There are expressions in the opinion as to which I cannot give my assent, not being, in my opinion, pertinent to the questions presented for our decision. I simply concur in the disposition made of this case.

WALKER, J., concurs in the concurring opinion of CONNOR, J.

(140 N. C. 293)

MOORE v. FIRST NAT. BANK OF STATESVILLE et al.

(Supreme Court of North Carolina. Dec. 15, 1905.)

1. MALICIOUS PROSECUTION—MALICE—PROBABLE CAUSE.

In an action for malicious attachment, it is necessary for plaintiff to show an absence of probable cause before he can call in question the motives of defendant.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 18.]

2. SAME—DEFINITION OF PROBABLE CAUSE.

That probable cause which constitutes a defense to an action for malicious attachment is a belief by the attaching creditor in the existence of the facts essential to the prosecution of his attachment, founded upon such circumstances as, supposing him to be a man of ordinary caution, would be sufficient to induce the belief.

3. SAME—QUESTION FOR JURY.

In an action for malicious attachment, the facts being admitted, the question as to the existence of probable cause is one for the court.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 161.]

4. SAME—EVIDENCE—SUFFICIENCY.

A bank, which for several years had been making advances to a customer without security, received a letter from him stating that, owing to an action which was pending against him, he feared the impairment of his capital, and suggested that he convey his property in trust for the benefit of creditors. Subsequently he withdrew his account from the bank and disposed of some of his property, and the cashier, on going to a mill conducted by the customer, was informed by his son, who was in charge, that the customer had left the state and would be absent for a week or so, and that all the running capital had been drawn out from the mill owing to the litigation. *Held*, that the facts did not show a want of probable cause for the issuance of an attachment by the bank.

Appeal from Superior Court, Alexander County; Webb, Judge.

Action by J. H. Moore against the First National Bank of Statesville and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Action for damages alleged to have been sustained by reason of suing out an attachment by defendant bank and George H.

Brown, its cashier, against plaintiff's property, wrongfully, maliciously, and without probable cause. A demurrer to the plaintiff's evidence was sustained by the court, and the action dismissed. Plaintiff appealed.

The facts developed upon plaintiff's evidence, in so far as they are material to the decision of the appeal, are: The defendant bank is a banking association duly organized pursuant to the national banking laws and was, at and before the date of the transactions set out in the complaint, engaged in the banking business in the city of Statesville. The defendant Brown was, at said dates, cashier of said bank, charged with the duties incident to his office. Plaintiff was, on the 5th day of June, 1903, and had been for some time prior thereto, indebted to defendant bank in the sum of \$5,100. Said indebtedness was evidenced by several notes executed at different dates during the year 1901, and two notes during 1902, some of said notes running 30 days and some 90 days. Interest had been paid from time to time. Several of them were overdue on June 5, 1903. The defendant bank had no security to the said indebtedness. The bank had, during the year 1903, frequently urged the payment of the notes, but no payment had been made on them. Plaintiff was, in June, 1903, a resident of Lilledown, Alexander county. He was a physician, but was, at the date of the transactions referred to, engaged in operating a cotton mill, flour-mill and farming, etc., conducting a store in connection with his mills. He owned June 5, 1903, a roller flourmill and cornmill at Hickory in Catawba county, known as the "Allspaugh Mills," also the Allspaugh farm of 287 acres, worth in all \$8,000. He owned at Lilledown a cotton mill and other real estate, estimated to be worth \$45,000. There was a mortgage on the Alexander property of about \$2,500. He owned the Watts farm of 350 acres, upon which there was a mortgage of \$2,500 for the purchase money. According to plaintiff's estimate, his property was worth at a forced sale, \$53,000, and his indebtedness was \$20,000. He was involved in a divorce suit with his wife, in which she was claiming alimony, and had filed a notice of lis pendens in the county of Alexander. There was evidence tending to show that plaintiff owned property in Kentucky of considerable value. He had in his mill at Lilledown \$10,000 or \$12,000 worth of "duck goods," the product of his mill, which he had sold, and for which he had received New York exchange. Prior to June, 1903, plaintiff had kept an account depositing large sum of money in defendant bank, but had ceased to do so during the month of April, 1903, after which time the deposits did not amount to much. He was on June 5, 1903, solvent.

Plaintiff's litigation with his wife was giving him anxiety and annoyance. Motion was pending for further alimony pendente

lite, \$4,000 having been allowed and paid. The reason assigned by plaintiff for ceasing to keep his account with defendant bank was the fact that the attorney for the bank had been employed by his wife in her suit with him, and that he did not deem it safe to have his business known to them. On May 21, 1903, plaintiff sent to defendant Brown, cashier, a letter in which he stated that he felt he owed a duty to his creditors, he being one of them, to make a plain statement concerning his business, and to afford him the means of realizing the amount of his debt in full; that he (Brown) had trusted him, and he did not propose that he should lose a cent by reason of his confidence; that if he would take the prompt action, as he (plaintiff) suggested, he would sustain no loss; that prior to two years before this his business was on a firm basis, and he was making money; that his obligations were met promptly, and he looked forward with hope to a successful business future; that at that time his wife, from whom he had separated several years before, had returned from California and instituted suit against him on groundless charges; that he had been harassed by motions for alimony pendente lite, had paid her \$4,000, besides costs and attorney's fees; that he had been unable to procure a trial of the case, and had exhausted every effort to obtain a reasonable settlement; that he had no assurance when the cause would be tried; that meanwhile she was clamoring for more alimony, and that costs and expenses were accumulating; that after July 1st another motion for alimony could be made, and he had no doubt that it would be; that it might result in another heavy financial loss to him; that he had lost heavily in sums actually paid out; that he had not been able to give to his business the proper attention; that he was indebted to the amount of \$20,000, and had property enough to make every obligation good, saying: "But with the continuance of this suit, its heavy demands upon my time and resources, its disturbing and harassing influence upon my mind, I fear that such will not be the case long." He stated that he wished to protect his creditors while he had the means with which to do so; that he did not wish to enter bankruptcy, because he was not a bankrupt; that if he left his creditors to sue, obtain judgment, and levy execution, and resort to other process, the assets would be consumed in court, etc. He proceeded to make a proposition to convey his property to two trustees—one selected by himself and one by his creditors—both to give bond, etc., to sell and pay his creditors. He requests the defendant to act promptly in the matter, signifying acceptance and taking the steps necessary to carry into effect his proposition. This letter was sent by plaintiff to his other creditors who were willing to accept his proposition. Some time during the months

of February and March, 1903, plaintiff sold some horses, mules, and cattle, he sold other stock in May, and on the 18th day of said month sold his stock of goods for \$3,300 for which he received \$2,000 cash, and note for balance, leased his storehouse for two years, sold his growing crop cotton on hand, and shut down his mill. On or about May 26, 1903, plaintiff left his home, and went to the city of Cincinnati for the purpose of attending the sale of some property belonging to his children. He stated in Sunday school that he was going, and would be away some two or three weeks. He caused to be sent to his nephew, Mr. Payne, in Cincinnati, from the proceeds of his property sold, about \$8,000, which was deposited in bank to his (Payne's) credit. This was not known to Brown on June 5, 1903. There was much testimony in regard to plaintiff's property and his movements subsequent to the issuing of the attachment.

Plaintiff introduced his son, Ernest V. Moore, who testified that he saw defendant Brown at Taylorsville two days prior to the date of the attachment. He testified as follows in regard to conversation with defendant: "I came up on the train from Statesville; had been to Hickory. I got into a buggy; was about to drive away, when I saw Mr. Brown. I had the buggy stopped. Mr. Brown spoke to me, and shook hands with me, and made some remark; asked where my father was. Told him that my father was out of town, and he made the remark that he wished to see me. I got out of the buggy, and went back to the Campbell boarding house. Mr. Brown asked me again, I think, where my father was, and I told him he was in Cincinnati. He told me that a report had come to him of the sale of certain property. I told him that Mr. Deal could give him all the information regarding that property, and that he could see him at the mill. We secured a buggy, and at his request drove to the mill, about three miles. On our way out we talked about the situation. He explained that the money had been loaned by the bank, and that he was very anxious about it. I told him that I realized that, and also that he need have no anxiety concerning it; that we were immediately expecting a trial of the divorce proceedings then pending; that a special term of court had been ordered by the Governor in Catawba county for the purpose of trying this case, and it would come up in July—1st of July; and that the case would then unquestionably be settled. Explained to him that he had practically exhausted his credit on the property on account of these divorce proceedings, and that at the present time it was impossible for us to make payment of the notes then due or about to be due. He seemed to be very well satisfied with what I had said, and when he reached the mill he made inquiry concerning the insurance on the property. I told him my impression was it was insured for \$40,000. We

made search for the policies and found several; but all the policies which we were able to locate were old policies and had been canceled. Mr. Brown seemed very anxious about it, and wished to know definitely about it, and I told him that the only way I could find out was to write my father, which I promised to do and let him know immediately I heard. He then requested me to take him through the cotton mill. He examined the machinery thoroughly, and made notes of some sort, and questioned me as to the price of it. I informed him that the mill originally cost between \$40,000 and \$50,000, including the machinery. We went entirely through the mill; examined the water power and the engine, and just as we stepped out the mill Mr. Brown said, 'There is no question about this being a good mill.' I took him through the roller mill. It cost between \$3,500 and \$4,000. I offered to take him up about one-half mile above the place to show him the shoal, and he said he did not care to go. We went back into the store. He went and questioned Mr. Deal. I don't know what he said to Mr. Deal. Very shortly afterwards we drove back to town. Driving back to Taylorsville, he said to me, 'Why did your father sell the property at Lilledoun?' I went into this detailed statement, which might have been made some parts at other times. This was the substance of the statement I made to him at different times on that trip. I stated that for the past two or three years we have been harassed by divorce proceedings. Motions for alimony have been made at eight or nine different times. At one time there was a judgment and an order from the superior court of this state for \$4,000 to be paid in 90 days. An appeal was taken on that order; and there were other matters in the court. At least my father was threatened with contempt proceedings and threatened with jail for failing to pay it, but the amount was paid. I stated the business here has been dull, and all the running capital practically has been withdrawn from the mill to meet the expense of the litigation. In addition to this, he has bought and paid for, to a great extent, the roller mill in Hickory, which also took a great part of his capital. That capital which I speak of was the running capital of the mill at Lilledoun. I explained to him that the litigation had been protracted, but a special term of the court had been ordered, and we were expecting a trial in July, and beyond all reasonable doubt a trial would be had. In addition to a trial, we were expecting a further motion for alimony, and that the sale of the property had been for the exclusive purpose of obtaining money to meet the expenses of the litigation, and to pay any possible judgment for alimony, and to run his business which was then standing still for lack of funds. Mr. Brown seemed to be satisfied. He had previously stated that he had always been a good friend to this concern. I said that was true.

He said that he was my father's friend; and, when he said he was, he was; and he had no desire in the world to injure him. I told him I believed that. He told me that he knew the attorneys and the plaintiff in the divorce proceedings were doing everything in their power to ruin him, and, if possible, would ruin him; and in all the trouble that had preceded, he had advanced the money with which to run the business, and had done it willingly. He said now he was anxious, and wanted the money back; wanted the debt paid off. I told him that the most earnest desire we had was to pay every obligation we had. Every move we made was to protect our creditors. That the sale of such personal property as had been sold was for the purpose of meeting all the requirements of the court in the matter then pending. After we reached Taylorsville, I left him at the bank in conversation with Mr. McIntosh and Mr. Matheson. Mr. Brown was very much concerned because he could see no insurance on the property at Lilledoun. I told him, however, that I would look into the matter at once, and let him know as soon as I could. He said that he thought Dr. Moore should, for his own protection, and the protection of his creditors, keep his property insured. \$50,000 of property with not a cent of insurance on it! I may have stated again, I would write to my father about it. While we were at Lilledoun, Mr. Brown again asked me where my father was. I told him he had gone to Cincinnati, and was going to Columbus for a day or so. I said, 'I would be very glad for you to write him about the matter.' I took a piece of paper, and wrote his address in Cincinnati and in Columbus, telling him I was not certain as to just which place he would be when his letter should arrive. I said, 'If you write duplicate letters to him at these addresses, they will be delivered in due course of mail,' and gave him the addresses. I told him further, 'I will write to him, and will let you know immediately I hear from him concerning the insurance.' He said, 'When will he be back?' I said, 'If he is not on his way back, he will be here the first of the week.' He said, 'What is he gone for?' I said, 'To look after some property belonging to us children in Cincinnati. He has an order of court authorizing a sale of this property, and has gone for the purpose of trying to effect a sale.' He urged me on the matter as to his return, and I repeatedly restated these facts. I questioned him as to what course he was about to pursue. He made a statement here in Taylorsville just outside the Bank of Alexander, in the middle of the street, just before he went to the train that he had no course in view; nothing to act upon. I said, 'Whatever course you have in view, don't take any action until Monday.' I said, 'My father will certainly be here Monday.' He said, 'He will certainly return Monday?' I said, 'He will undoubtedly return Monday.' Mr. Brown smiled, and said, 'All right.'

He returned Monday. I don't recall anything further."

On June 5, 1903, defendant bank instituted an action against plaintiff for the recovery of said indebtedness. For the purpose of obtaining a warrant of attachment, the defendant Brown made an affidavit setting forth the cause of action, and averring that plaintiff had sold and disposed of the property described, and was then offering for sale other valuable property "all of which said defendant has done with intent, as affiant is informed and believes to defraud his creditors." That plaintiff had departed from the state with, as affiant is informed and believes, intent to defraud his creditors. A warrant of attachment was issued upon said affidavit, and duly levied by the sheriff of said county upon plaintiff's property on June 6, 1903. Plaintiff, through his counsel, gave notice on July 25, 1903, that he would move the court at a time and place named to dissolve the attachment. At the August term, 1903, an order was made reciting the said motion, and that, "the defendant having averred in his answer his willingness and ability to pay off the indebtedness due plaintiff upon dissolution of the attachment, and having exhibited a certified check to the court payable to the plaintiff as evidence of his good faith, it is ordered that the said attachment be dissolved and thereupon said check delivered to the plaintiff." Thereafter an order was made taking defendant bank with the cost. There was evidence that plaintiff had advertised his property for sale. It is not clear whether defendant Brown had knowledge of this at the time he sued out the attachment. At the close of plaintiff's evidence, defendant moved for judgment as upon nonsuit. Motion allowed. Plaintiff excepted, and appealed.

Armfield & Turner, R. Z. Linney, and Huffman & Williams, for appellant. Furches, Coble & Nicholson and W. P. Bynum, Jr., for appellees.

CONNOR, J. (after stating the case). We are relieved of any extended discussion of the principles of law applicable to this appeal. The learned counsel for plaintiff and defendants agree in that respect. Plaintiff's counsel cite a line of cases decided by this court which clearly and without any variation settle the law as to the material questions in the case. We are not called upon to express any opinion in regard to the conduct or motives of plaintiff except in so far as they bear upon the state of defendant's mind and the reasonableness of his belief. It may well be, and we do not wish to be understood as intimating any opinion to the contrary, that he was acting in all that he did in perfect good faith and with honest intentions. It is evident from his testimony that the long and harassing litigation with his wife had, as it was well calculated to do, seriously disturbed his mind, and embarrassed his business. The question

is whether the defendant Brown had probable cause to believe that plaintiff was moved by any other than an honest purpose in his conduct. The essential averment to be established before the plaintiff can proceed with this suit is the absence of probable cause for defendant's action. Until he has done this, he can not call the defendant's motives in question. This is conceded by his counsel. What constitutes probable cause? The answer is given by Daniel, J., in *Cabiness v. Martin*, 14 N. C. 454, quoting Judge Washington: "I understand it to be the existence of circumstances and facts, sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty was guilty; it is a case of apparent guilt, as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced; but the guilt should be so apparent at that time as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution." *Smith v. Deaver*, 49 N. C. 513; *Jaggard on Torts*, 616. "A reasonable or well-grounded suspicion of the guilt of the accused, based on circumstances sufficient to justify a reasonable belief thereof in the mind of a cautious and prudent man is sufficient defence to the action." 19 Am. & Eng. Enc. 659; *Stacey v. Emery*, 97 U. S. 642, 24 L. Ed. 1035; *Ferguson v. Arnou*, 142 N. Y. 580, 37 N. E. 626. In *Spengler v. Davy*, 56 Va. 381, the action was for malicious prosecution in suing out an attachment. Daniel, J., referring to Judge Washington's definition in *Munns v. Dupont*, Fed. Cas. No. 9,928 (cited in *Cabiness v. Martin*, supra) says: "Modifying the definition so as to adapt it to such a case as the one before us, we may, I think, properly define justifiable probable cause in cases of the kind to be, a belief, by the attaching creditor, in the existence of the facts essential to the prosecution of his attachment founded upon such circumstances as, supposing him to be a man of ordinary caution, prudence and judgment, were sufficient to induce such belief."

It is conceded that when the facts are admitted it is the duty of the court to declare, as a question of law, whether there is probable cause. Daniel, J., in *Swalm v. Stafford*, 25 N. C. 289, says: "What is probable cause when the facts are admitted is a pure question of law." The law has been uniformly so held in this state. In *Beale v. Roberson*, 29 N. C. 280, *Ruffin, C. J.*, after reviewing the English authorities, in connection with our own, says: "It would seem then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here." He also says that however difficult it may be it is a question which a judge can deal with better than a jury; as he does with reasonable time, due diligence and legal provocation and the like.

Vickers v. Logan, 44 N. C. 394; *Jones v. R. Rd.*, 125 N. C. 227, 34 S. E. 398. In *Kirkham v. Coe*, 46 N. C. 423, the judge upon the entire evidence instructed the jury that there was not probable cause. In *Honeycut v. Freeman*, 35 N. C. 820, the court held, as matter of law, that there was not probable cause. In this case, his honor, in effect, instructed the jury that there was probable cause. There was nothing to be submitted to the jury; the defendant admitted every portion of plaintiff's testimony, material to the inquiry, to be true. In ascertaining whether the defendant had probable cause, we are to consider only those facts which were known to him at the time he sued out the attachment. Those facts and circumstances alone, which were known to defendant at the time the affidavit upon which the warrant of attachment were based are to be considered in determining the question whether he had probable cause. *Swalm v. Stafford*, supra; *Beale v. Roberson*, supra.

The defendant Brown knew that plaintiff was indebted to the bank in a large amount; that the debt was unsecured, and had been running a long time, interest being paid; that, although urged to do so, plaintiff had made no payment whatever on the notes; that he had withdrawn his account from the bank. In this connection the reason given for doing so is not material, the withdrawal deprived the bank of any opportunity of keeping up with his cash transactions, knowing the sources from which he was drawing cash, and the disposition made of it. He had a right to withdraw his account, if he saw fit; but when he did so, he was bound to know that the bank would not longer extend him credit. The defendant knew of the litigation with his wife, and its effect upon his business and property. In the light of these facts, the letter of May 21, 1903, informed the defendant of his condition and his apprehensions in regard to the future of his business. The bank was under no obligation to accept his proposition, no matter how sincere and honest he was in making it. The defendant Brown must have known that a conveyance of the property incumbered with two mortgages of \$5,000—a pending claim for alimony pendente lite reasonably anticipated to be not less than \$4,000—secured on the property by a notice of its pendens, with the right to renew the demand, the property further incumbered with an inchoate dower right. Certainly all of these incumbrances rendered the security offered for \$20,000 precarious. No prudent person would have loaned so much upon the property with the chances, the almost certainty, of litigation. In this condition of affairs, the defendant Brown goes to Taylorsville, and thence to the mill; he finds that plaintiff has sold very nearly, if not quite, all of his personal property, has dismantled and shut down the mill, leased out the store for two years, left the entire

property uninsured and gone, as his son tells him, to a distant state. It is true that plaintiff's son gives defendant an account of conditions, as he understands them, and we take it does so honestly. There is no suggestion of the disposition made of the money for which the property had been sold—his son says, because he did not ask. The defendant was not bound to accept the son's explanations of the father's conduct, he could well have concluded that the son himself did not understand the purposes of his father. In this condition of affairs, it was certainly the duty of the officers of the bank to take some action looking to the collection of the debt; to have failed in that respect would have subjected them to censure, if not personal liability. No other course than an attachment was open to them. The plaintiff was out of the state, no personal service could be made, nor could any injunction have been served on him. The defendant must either have quietly awaited developments and taken the risk of further sales by plaintiff while out of the state, or of his return or of other creditors attaching.

The plaintiff's counsel strongly contend in a well-considered brief that the facts which were known to defendant Brown should have assured him that the bank was in no danger of losing the debt; that plaintiff was amply able to pay his debts in full; that he knew why plaintiff had gone to Cincinnati, and that he would return on Monday; that, while the conditions existing at the time of suing out the warrant might have constituted probable cause for action by some other person, the same facts did not constitute such cause to justify defendant Brown's action. This is equivalent to saying that Brown swore falsely in his affidavit; that he did not, in fact, believe that plaintiff was guilty of fraudulent conduct. We are of the opinion that when all of the facts and circumstances known to defendant Brown are taken into consideration, he had probable cause to sue out the warrant. Was there any evidence that in truth he did not honestly believe that to which he swore? But, says the plaintiff, did not plaintiff's son explain his father's absence, and when he would return, and did not Brown say that he had the utmost confidence in Dr. Moore—had been his friend and had no ground to take any action? Brown was under no obligation to accept the son's version of his father's conduct, and his action shows that he did not do so. He may not, at the time, have determined upon the course he would pursue to secure the bank's debt. If he had done so, he would hardly have notified the son that he was going to return to Statesville and sue out an attachment. That would not have been the conduct of a prudent man trying to secure a debt of \$5,000. It is asked: Were not the circumstances now relied on as suspicious, explained to the defendants, and explained to their

satisfaction? The answer is found in defendant's action. Again, it is asked: "Didn't they say, after hearing the explanations, that they had the utmost confidence in Dr. Moore?" The testimony upon this point is as follows: Mr. Moore says that he told defendant Brown that the property had been sold; that he did not ask him where the money was; told him that the running capital had been practically run out of the business on account of the suit; that they had to increase the capital some way or the mill had to shut down. "Mr. Brown told you he had always been your father's friend in his business? Yes, sir. Let him have this money to be used in conducting his business? Yes, sir; had the utmost confidence in him. And, when he told him he was his friend, he was? Yes, sir; said he had the utmost confidence in him."

We do not construe this language as plaintiff does. To our minds it is rather the language of a man more disappointed in the conduct of one to whom he had extended credit because of his confidence and friendship. This language must be interpreted in the light of time, place, and circumstances. Here was the cashier of a bank, and had for two years been renewing and increasing a loan to his friend without security to enable him to carry on his business. When he goes to see him for the purpose of securing his debt, the debtor has sold off property of large value, as it afterwards turns out \$8,000, shut down the mill, permitted the insurance to expire, and gone to a distant state, leaving his son, a young student just from college, in charge. Certainly his statement that he had trusted and had reposed confidence in plaintiff does not show a state of mind inconsistent with his action taken shortly thereafter. That Brown was anxious about the debt is evident from his actions, as well as his words. Plaintiff was put upon notice that the bank desired payment, and was urgently pressing for payment; that it had rejected his proposition. To take the most favorable view of his conduct, was it not folly on his part to leave the state under the circumstances known to him, and was not his entire conduct well calculated to cause his creditors to reasonably apprehend that their debts were in jeopardy. The plaintiff says that the dissolution of the attachment shows an absence of probable cause. Whatever effect such order would have had if made upon the merits, it is not necessary to discuss, because the order was made upon plaintiff's payment of the debt. No other cause was open to the court or the defendant bank. The fact that plaintiff returned on Monday following the attachment, and paid the debt cannot be considered on the question of probable cause, nor can the fact that plaintiff caused the proceeds of the personal property, including the manufactured goods in the mill which he had sold,

amounting to \$8,000 to be deposited in the bank in Cincinnati to the credit of his nephew, Dr. Payne. "If by his folly or his fraud the plaintiff exposed himself to a well-grounded suspicion that he was guilty of the crime of which he was charged, he cannot claim that there was not probable cause for the prosecution." 19 Am. & Eng. Enc. 659. An examination of the cases in our own and other Reports shows that the courts have, with practical uniformity, held that when the facts are admitted, as by a demurrer to the evidence, the question of probable cause has been decided as a matter of law. When the testimony is conflicting, the court instructs the jury as to the law, leaving to them to find the truth of the matter by applying the law to the facts as they find them to be. Mr. Justice Hunt, in *Stacy v. Emery*, supra, says: "The question of malice or good faith is not an element in the case. It is not a question of motive. If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient. Whether the officer seized the occasion, to do an act which would injure another, or whether he moved reluctantly, is quite immaterial." In *Willard v. Holmes*, 142 N. Y. 492, 37 N. E. 480, Gray, J., in discussing the law in regard to suing out an attachment says: "It was a process which the statute authorized and which is usual in such cases, and its use subjects this defendant to no unfavorable criticism, if it accompanied the institution of an honest suit." He further says: "The circumstances to sustain this right of action must appear to have been such that no reasonable man could have been influenced thereby to the belief that the plaintiff had unauthorizedly committed the company, whose officer he had been, to a liability which it had not incurred, and which was foreign to its chartered purposes. It is our judgment that the facts did not justify the trial court in submitting the case to the jury, and that, upon all the evidence, it was error to deny the defendant's motion to dismiss the complaint. The material facts were not in dispute, and whether there was probable cause for the prosecution of the former action became a question of law solely for the court." The law is discussed in the case of *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116. The authorities are reviewed in an able opinion by Mr. Justice Strong.

The plaintiff strongly urges upon our attention the fact that he owned a large quantity of real estate of large value. In this action we do not perceive that this fact is material upon the question of probable cause. If the defendant had such cause to believe that plaintiff was disposing of his property to defraud his creditors, or had left the state for that purpose, the value of his property was of no moment. He could as

easily dispose of a large quantity by conveyance as a small quantity. A very wealthy man, whose conduct is such as to give to his creditors probable cause to sue out an attachment, is in no better position in that respect than a man with small means. That defendant was seriously apprehensive in regard to its debt is shown by the testimony of plaintiff's son. If this were an action for abuse of process by levying the attachment upon property of value largely in excess of the debt or otherwise using the process oppressively, the testimony in respect to the value of the property would be material. *Railroad Co. v. Hardware Co.*, 138 N. C. 174, 50 S. E. 570.

Upon a careful examination of the entire record, we find no error in his honor's judgment.

No error.

(140 N. C. 323)

FORTUNE v. BUNCOMBE COUNTY COM'RS.

(Supreme Court of North Carolina. Dec. 15, 1905.)

1. STATUTES—INTENT OF LEGISLATURE.

A statute should be construed with reference to its general scope and the intent of the Legislature in enacting it, and in order to ascertain its purpose the court must give effect to all its clauses and provisions and must construe ambiguous language in such a sense as will conform to the scope of the act and effectuate its object.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 259-265, 269, 283.]

2. SAME—VERBAL INACCURACIES.

The use of inapt, inaccurate, or improper terms or phrases, clerical errors, or misprisions, inadvertences, or omissions, or misdescriptions or misnomers, will not invalidate a statute, providing the real meaning of the Legislature can be gathered from the context or from the general purposes and tenor of the enactment; and such errors and inaccuracies will be corrected and the inadvertences and omissions supplied by reference to the context or to other statutes, if practicable.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 278, 279.]

3. SAME—EXTRINSIC EVIDENCE.

The court, in endeavoring to correct misdescriptions or misnomers in a statute, may consider the description as it reads, in the light of extrinsic evidence and of anything in the act itself which points a way to the true meaning of the statute.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 290-299.]

4. SAME—SUPPLYING OMISSIONS.

Laws 1905, p. 856, c. 703, creating the office of auditor of a certain county, provides, in section 12 (page 859), that the auditor shall perform all duties required by "section 74 of the Public Laws of 1905" to be performed by the register of deeds. The only act of 1905 which contains as many as 74 sections is chapter 590, relative to the collection of taxes, and section 74 (page 688) of that act refers to duties to be performed by the register of deeds. While chapter 590 was ratified two days later than chapter 703, yet under Const. art. 2, § 14, requiring a bill for a law imposing taxation to be read on three several days, chapter 590 was presumably pending and nearing completion when chapter 703 became a law. *Held*,

that section 12 of chapter 703 would be construed to refer to section 74 of chapter 590, and would be enforced accordingly, notwithstanding its failure to mention such chapter.

5. SAME—TIME OF TAKING EFFECT.

Laws 1905, p. 856, c. 703, fixing salaries for the officers of a certain county and creating the office of auditor of that county, provides, in section 12 (page 859), that the auditor shall perform the duties required of the register of deeds by Laws 1905, p. 688, c. 590, § 74. The section referred to requires the register of deeds to make out tax lists and to perform certain duties in relation thereto. Section 22 of chapter 703 (page 860) provides that the act shall be in "full" force and effect after the expiration of the term of office of the officers elected at the election of 1904. The general purpose of the statute is to substitute salaried officers for fee officers, and for that reason its full operation is postponed until the expiration of the terms of the officers then in office. Section 11 of the act specifically appoints a certain person to serve as auditor, to hold until the next election, and fixes his salary. Section 21 provides that the term of office of the auditor so appointed shall begin on July 1, 1905. *Held*, that chapter 703, in so far as it requires the auditor to perform the duties imposed on the register of deeds by section 74 of chapter 590, and to perform other duties capable of immediate performance, takes effect July 1, 1905, although his performance of such duties will lessen the fees of the register of deeds.

6. OFFICERS—RIGHTS AND DUTIES—REDUCTION OF COMPENSATION.

Although an office is a constitutional one, the Legislature may, within reasonable limits, change the statutory duties and diminish the emoluments of such office, if the public welfare requires it.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, § 152.]

Appeal from Superior Court, Buncombe County; Moore, Judge.

Mandamus proceedings by A. B. Fortune against M. L. Reed and others, commissioners of Buncombe county. From a judgment awarding a peremptory writ, defendants appeal. Reversed.

Civil action for mandamus, heard at chambers in August, 1905. The case was heard upon a case agreed, which was as follows: (1) That A. B. Fortune is the register of deeds for the county of Buncombe, duly qualified and elected, and as such has been performing the duties incident to said office since the first Monday of December, 1904, and that his term of office will not expire until the first day of December, 1906. (2) That M. L. Reed, C. P. Weaver, R. B. Clayton, Frank Wells, and Marion Glenn were duly elected and qualified as commissioners for the county of Buncombe on the first Monday of December, 1904, and as such have been filling the offices of county commissioners since said date and constitute the board of county commissioners of the county, and their term of office will not expire until the first Monday of December, 1906. (3) That the General Assembly of North Carolina, at its session in 1905, passed an act entitled "An act to amend an act to provide for the assessment of property and the collection of taxes," which said act was

ratified on March 6, 1905 and went into force from and after its ratification, the same being chapter 590, p. 647, Laws 1905, and is made a part of this case. (4) That the said General Assembly, at its session of 1905, passed an act (chapter 703, p. 856, Laws 1905) entitled "An act to fix salaries for the officers of Buncombe county, and to increase the road fund and to create the office of auditor of Buncombe county," which said act was ratified on March 4, 1905, and is made a part of this case. (5) That on July 10, 1905, the plaintiff requested and demanded of the board of commissioners that the tax lists of the county be delivered to him for the purpose of performing the duties required of him by chapter 590, p. 647, Laws 1905. (6) That the board of commissioners declined and refused to permit the plaintiff to have the tax lists, and declined and refused to make an order for the payment of the said register of deeds for the work of computing the taxes and making out the tax lists, and declined and refused to permit the said register of deeds to perform any of the duties in relation to said tax lists required of him by said chapter 590. (7) That the State Auditor furnished the plaintiff books and blanks for the purpose of preparing the tax lists, and the same were demanded of him by the board of commissioners and R. J. Stokeley, and were delivered to said Stokeley under protest; the plaintiff denying the right of Stokeley or the board of commissioners to deprive him of the right to perform the duties mentioned and described in said chapter 590. (8) That the plaintiff is, by virtue of section 2 of article 7 of the Constitution, ex officio clerk of the board of county commissioners. (9) That said Stokeley, on July 1, 1905, qualified as auditor for Buncombe county, and is now performing the duties required by section 12 of said chapter 703, p. 859, Laws 1905, and is now, under authority of said act and by order of said commissioners, computing the taxes and preparing the tax lists of the county for the year 1905.

It is insisted by the plaintiff that he is entitled to perform the duties required of him by said chapter 590, and he asks the court for a writ of mandamus to compel the commissioners of the county to comply with the conditions of the provisions of chapter 590, p. 647, Laws 1905, and to turn over to him the tax lists for the county, which said tax lists they have undertaken to place in the hands of said Stokeley. It is insisted by the defendants that said Stokeley, by virtue of chapter 703, p. 859, Laws 1905, from and after July 1, 1905, became the auditor for the county and entitled to perform all the duties and functions of said office as prescribed in said chapter 703, and as such auditor he was the proper person to compute and make out the tax lists for the year 1905 for the county of Buncombe; the said auditor's office beginning on the 1st day of July, 1905. Upon the foregoing facts, judgment

was rendered that the plaintiff is entitled to the tax lists and to perform the duties in regard thereto, which are specified in Acts 1905, p. 688, c. 590, § 74, and to receive the compensation for his services in that behalf. It was then adjudged that a peremptory writ of mandamus issue, requiring the defendants to deliver the lists to the plaintiff for the purposes aforesaid, and to pay such compensation as they may deem proper for his services in computing the taxes, completing the lists and making copies as required by law. The court further adjudged that said Stokeley is the duly elected auditor of Buncombe county, and that his term of office, as such, began on the 1st day of July, 1905. The defendants were adjudged to pay the costs. From the judgment of the court, they appealed.

Chas. A. Webb, for appellants. Merrimon & Merrimon, for appellee.

WALKER, J. (after stating the facts). The correctness of the principles by which statutes should be construed, as stated with much clearness in the brief of the plaintiff's counsel, may be readily conceded, and yet we are of opinion, if the statute in question is examined in the light of those principles, the plaintiff has not shown himself entitled to the relief which he seeks. Some of the cardinal rules for the interpretation of a statute are that it should be construed with reference to its general scope and the intent of the Legislature in enacting it, and, in order to ascertain what was the purpose we must give effect to all of its clauses and provisions. Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its object. The use of inapt, inaccurate, or improper terms or phrases will not invalidate the statute, provided the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment. Clerical errors or misprisions, which, if not corrected, would render the statute unmeaning or incapable of reasonable construction or would defeat or impair its intended operation, will not necessarily vitiate the act, for they will be corrected, if practicable. Nor will mere inadvertences or omissions have that effect, provided they can be supplied by reference to the context or to other statutes, and the true reading of the statute made obvious and its real meaning apparent. These principles are fully set forth and aptly illustrated, by reference to decided cases, in Black on Interpretation of Laws, §§ 30-39. Guided by them, we should be able to ascertain and declare what was the intention of the Legislature with reference to the matter involved in this case, and whether it has been sufficiently expressed in the act under consideration. It seems that the leading purpose was

to reduce expenses and to provide for the management of the affairs of the county in the future upon a more economical basis. At the same time, it was thought fair and just that a radical change from the fee system to the salary system should not take effect until the terms of those now in office should expire. In construing the act, we should give proper heed to this controlling idea and bring the different provisions of the statute into harmony with it, if this can reasonably be done. The office of auditor of the county was created, and at the same time filled by the appointment of Stokeley, and it is expressly provided that his term shall begin on the 1st day of July, 1905. So far, there can be no misunderstanding. Section 12 prescribes the duties of the auditor, and among others therein enumerated is the duty of making out a copy of the tax list of each county for the tax collector therein. He is further required to perform "all the duties required by section 74 of the Public Laws of 1905 to be performed by the register of deeds and to prepare for publication the annual statements required by law."

One difficulty in construing the act, and an insuperable obstacle, as the plaintiffs counsel contend, in the way of enforcing the provision which we have quoted, is that there is no reference therein to any particular chapter of the acts of 1905. It is argued that this is a patent ambiguity which defeats the operation of that clause. "A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended apart from the erroneous description, are clear, certain and convincing." Black, Int. of Laws, § 58. Under this rule, we may call to our aid anything in the act itself or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning, but it may be used in connection with anything outside of the statute to which it refers, and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. Black, Int. of Laws, § 38. But ours is not so much an erroneous as an inaccurate description, and the question is whether its words are adequate to express with sufficient certainty the intention of the Legislature. It has been held that, if a later act expressly refers to a designated section of an earlier one, to which it can have no application, but there is another section of the prior act to which, and to which alone, in view of the subject-matter, the later act can properly refer, it will be read according

to the manifest purpose of the Legislature, and the misdescription will not prevent the reasonable construction that the Legislature intended to refer to the latter section. *School Directors v. School Directors*, 73 Ill. 249; *Plank Road Co. v. Reynolds*, 3 Wis. 287; Black, Int. Laws, § 38. When we turn to chapter 590, p. 647, of the Acts of 1905, commonly known as the "Machinery Act," we find that section 74 prescribes the duties of the register of deeds with reference to computing the taxes and preparing the tax lists of the county, and this is the only chapter of those acts that contains as many as 74 sections, and it is the only one referring to such duties. It is true that chapter 590 was ratified two days later than chapter 703, but this should not have the effect of defeating the will of the Legislature otherwise sufficiently declared. Taking judicial notice of the course of legislation as affected by the requirements of the Constitution (article 2, § 14) that a law imposing taxes cannot pass unless a bill for the purpose has been read on three several days, we must assume that the bill which finally became chapter 590 was pending in one of the Houses of the General Assembly at the time that chapter 703 became a law and was nearing its completion, being in the last of the formative stages of legislation. It was not possible then to indicate by number the chapter of the laws to which reference was made, as the arrangement of the acts into chapters had not then been effected, but it was possible to indicate the section. We have no doubt as to the intention, and conclude that the mere designation of the section was sufficient, under the circumstances, for us to identify with certainty the chapter and section to which the reference was made.

This brings us to the consideration of the other question, whether it was intended that the act should have operation from July 1, 1905, as to the duties mentioned in that section. By section 12, c. 703, p. 859, of the Acts of 1905, the auditor is required to perform various duties, the most, if not all, of which were the duties of other officers at that time. In the view we take of the case, it is not necessary that we should stop to inquire whether all of said duties appertained to other offices then existing, or whether some of them were newly created. It is sufficient for us to say that one of the duties, namely, the examination of all books and papers of the county officers, for the purpose of keeping a record of fees and commissions received by them, cannot be performed under the terms of the act until after the next election, as the liability of the said officers to account for fees and commissions received by them cannot arise during their present terms of office; it being manifest that the change from the fee to the salary system was not intended to take effect until after the present terms expire. But there is no reason why the act should not be allowed to have full opera-

tion as to all duties not within that category. The language is explicit that the auditor shall prepare the tax lists and perform all other duties prescribed by section 74 of the Laws of 1905, and this provision must have effect from July 1, 1905, when the auditor's term of office commenced, unless by a subsequent section its operation is postponed. Section 22 provides as follows: "This act shall be in full force and effect from and after the expiration of the term of office of the officers elected for said county at the election in November, 1904." The use of the adjective "full" implies that the act shall have some force and effect at once, and its clear meaning is that it shall have such force and effect as to all official duties, except those which cannot be performed until after the expiration of the present terms of the county officers. This must be true, if we give to the word "full" its natural and ordinary meaning and then construe the act with due regard to the manifest intention of the Legislature. When an act creates an office to commence at a certain time, and directs its incumbent to perform certain duties, which, though formerly belonging to another office, are required by law to be performed annually at a specified time, the officer must perform them, if at all, at the time specified. There is nothing in this act to restrict the plain, direct, and positive requirement of the statute that he shall prepare the tax lists, to a particular period of time, and there is no good reason why the operation of the act in this respect should be deferred. The mere fact that the duty thus required of him had theretofore been annexed to another office, and that the present incumbent of that office will be deprived of the compensation allowed for the service, is not sufficient to override the plain intent of the statute. Again, the act refers to the duties of the register of deeds as prescribed in section 74 of the Laws of 1905. That section requires those duties to be performed in the years 1905 and 1906, and it must be the clear intentment that those duties shall be performed by the auditor in the same years. This is in accord with the spirit and intent of chapter 703 to reduce expenses as speedily as is consistent with a proper regard for existing rights. The abolition of the fee system was postponed until the expiration of the present official terms, for reasons which appeared to the Legislature to be sound and just, but they do not apply to the mere transfer of some of the duties of one officer to another then created by the statute. Nor is there any constitutional objection to such transfer. The office is constitutional, it is true, but the duties are statutory. The Legislature may within reasonable limits change the duties and diminish the emoluments of the office, if the public welfare requires it to be done, and to this the incumbent must submit. *Bunting v. Gales*, 77 N. C. 283; *Mial v. Ellington*, 134 N. C. 181, 48 S. E. 961, 65 L.

R. A. 697; *Hoke v. Henderson*, 15 N. C., at page 20, 25 Am. Dec. 677.

We have not adverted to the fact that the Legislature has not only created the office of auditor, but has filled it by direct appointment, instead of waiting for its incumbent to be chosen at the next election, which shows that there was considered to be a pressing necessity for immediate change from the old system to the new, in respect to the duties assigned to the auditor by the act. His salary is fixed at \$1,200, and, unless our construction be the correct one, he will have very little to give, in the way of public service, in return for what he will receive. His salary would seem to be out of all proportion to the work which would be left for him to do. This result is not consistent with the main purpose and the evident policy of the enactment. The expression used in section 22, namely, "This act shall be in full force and effect," cannot be found in any other statute, and they must have been intended, by implication, to give the act immediate operation as to those matters which pertained to the office of auditor, created by it, for the regulation of which there seemed to be urgent need. If this is not the meaning, we are unable to understand what it is. The provision in regard to the duty of preparing the tax lists, if put into immediate effect, will not conflict with the other provisions concerning the substitution of salaries for fees. This is not true as to some of the other duties imposed upon the auditor, and, as to the latter, the act will take effect only after the existing terms of the officers expire. The statute must have some effect, for it was clearly so intended, and we can give it none unless we hold that the auditor is to perform the duties of the register of deeds in respect to the tax lists, this year and the next, and, of course, thereafter, unless the Legislature should otherwise provide.

There was error in the ruling of the court upon the facts agreed. The judgment will be reversed, and judgment entered for the defendants.

Reversed.

(140 N. C. 286)

PLEMMONS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 15, 1905.)

1. EXECUTORS AND ADMINISTRATORS—LETTERS—ISSUANCE—COLLATERAL ATTACK.

The action of the clerk of the superior court in issuing letters of administration without requiring a proper bond cannot be attacked collaterally in an action brought by such administrator.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 178-182.]

2. RAILROADS—PERSONS ON TRACK—DEATH—LAST CLEAR CHANCE.

In an action for death of plaintiff's intestate by being run over by defendant's train while intestate was lying unconscious on the track, evidence held to justify the court in sub-

mitting to the jury the issue whether defendant could have avoided striking deceased, notwithstanding the latter's negligence.

Appeal from Superior Court, Buncombe County; T. A. McNeill, Judge.

Action by Maggie Plemmons, as administratrix of B. M. Plemmons, deceased, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action to recover damages for alleged negligent killing of plaintiff's intestate. The court submitted the following issues: (1) Is the plaintiff the duly qualified administratrix of B. M. Plemmons, deceased? Answer: Yes. (2) Was the plaintiff's intestate killed by the negligence of the defendant as alleged in the complaint? Answer: Yes. (3) Did said intestate by his own negligence contribute to his own death? Answer: Yes. (4) If so, could the defendant, notwithstanding the negligence of the deceased, have avoided his death by the exercise of proper care and caution? Answer: Yes. (5) What damages, if any, is the plaintiff entitled to recover? Answer: Fifteen hundred dollars." From the judgment rendered defendant appealed.

Moore & Rollins, for appellant. Julius O. Martin, for appellee.

BROWN, J. 1. The defendant requested the court to dismiss the action because the administrator had not given an administration bond at the time the letters of administration were issued. The issuing of the letters cannot be collaterally attacked in this action. If the clerk of the superior court issued the letters in violation of the statute without requiring the proper bond, he should revoke them at once of his own motion, or upon the application of any one interested in the intestate's estate. Until he does so, and for any devastavit in the interim, the clerk's official bond is undoubtedly liable. For the purposes of this action his honor's ruling on the first issue is correct. 2. The defendant asked the court in apt time to nonsuit the plaintiff upon the ground that there was no sufficient evidence tending to prove that the intestate was killed by the negligence of the defendant. There is evidence tending to prove that the intestate was run over by the defendant's train in the yards of the defendant in Asheville on the night of November 25, 1900; that the intestate was lying across the track unconscious; that the track was straight for a distance of some 300 feet or more; that the headlight of the locomotive was burning; that the train was running slowly, and was actually stopped within about 80 feet after striking the man. There was evidence tending to prove that the engineer or fireman either saw the object lying across the track, or could easily have done so, to the distance of 100 yards or more. We have examined the evidence carefully, and under the decisions

of this court in similar cases the judge below properly submitted the issues to the jury. Clegg's Case, 133 N. C. 304, 45 S. E. 657; Upton's Case, 128 N. C. 173, 176, 38 S. E. 738; Lloyd's Case, 118 N. C. 1010, 1014, 24 S. E. 805, 54 Am. St. Rep. 764; Pickett's Case, 117 N. C. 618, 639, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611.

We find no error in the record.

Affirmed.

(140 N. C. 333)

BROWN v. W. T. WEAVER POWER CO.

(Supreme Court of North Carolina. Dec. 15, 1905.)

1. WITNESSES — BIAS — COMPETENCY OF IMPEACHING EVIDENCE.

In an action against a water power company for damages to plaintiff alleged to have been caused by the erection of a dam in a stream on which her property abutted, a witness for plaintiff testified in regard to the value of the land. On cross-examination he stated that he had sold some worn-out upland in the neighborhood of plaintiff's land for \$30 and \$50 an acre, giving the location of the land; that the sales were made before the installation of defendant's water power. It appeared that witness had given his opinion that plaintiff's land was worth \$100 per acre, and that defendant was permitted to show that he had sold lands in that vicinity at a smaller price, and that such sales were made since this installation of defendant's plant. *Held*, that a question on cross-examination as to whether the erection of defendant's plant had not increased the value of land "down there" was not competent as an impeaching question to lessen the weight of his testimony in regard to the value of the lands.

2. TRIAL — INSTRUCTIONS — REQUESTS.

An instruction requested is properly refused, when its substance is included in the instructions given.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

3. EMINENT DOMAIN — DAMAGES.

Where land is damaged by the exercise of the power of eminent domain in the erection of a dam, the true measure of damages is the difference in the value of the land arising from the erection of the dam in its condition just prior to the erection of the dam and its value in its condition just after the erection of the dam.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 372-374.]

4. SAME — ELEMENTS OF DAMAGE.

Where the power of eminent domain is exercised in the erection of a dam for the purpose of generating water power, the jury, in assessing damages, may consider as an element of damages the manner in which the water flowed through and over the plaintiff's land as it related to and was connected with the flow over the defendant's lands, as constituting water power capable of use and development.

5. SAME.

Where the power of eminent domain is exercised in the erection of a dam for the purpose of generating water power, the jury should, in estimating the damages, consider the fact that a railroad owned an easement of right of way over the lands in question.

6. APPEAL — VERDICT — SUFFICIENCY OF EVIDENCE.

Though the Supreme Court on appeal has the power, and though it is the court's duty, to set aside a verdict when there is no evidence to support it, the court will not disturb the verdict,

when there is any evidence in support of it proper to be submitted to the jury.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 3928-3943.]

7. SAME.

Whether there is any evidence in support of the verdict proper to be submitted to the jury is a question "of law or legal inference," which the Supreme Court on appeal must pass on and decide, under Const. art. 4, § 8, giving the court jurisdiction to review on appeal any matter of law or legal inference.

8. SAME—DAMAGES—EXCESSIVENESS.

The Supreme Court will not on appeal set a verdict aside on the ground of excessiveness in assessment of damages.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 3944, 4546.]

Appeal from Superior Court, Buncombe County; McNeill, Judge.

Action by Mary Brown against the W. T. Weaver Power Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff alleged: That she was the owner in fee of a tract of land lying on the French Broad river in Buncombe county, a particular description of which is set forth. That she resided with her family on said land, cultivating a portion thereof. That the defendant company had erected and maintained a dam across said river in the vicinity of and below said land, by which the water was thrown back and ponded said land near to her residence. That by reason of said dam her land is flooded and damaged, and that, so long as the said dam is maintained, such injury and damage will continue; that by reason of said ponding, etc., the value of her land is diminished, and that she will continue to suffer in comfort and convenience, and in the destruction of her water power and of a valuable spring on her premises. That by ponding the water above said dam the defendant has taken possession of a part of said land and wrongfully withholds the same from her. She demands judgment for the same from her. She demands judgment for the possession of the portion of land so withheld. She also demands judgment for permanent and annual damage. The defendant by way of answer admits that it has erected and maintains the dam as alleged; denies the plaintiff's ownership of the land and the damages alleged to have been sustained, etc. For a defense it avers that it is a corporation duly chartered pursuant to the laws of the state, the charter being properly pleaded; that it has constructed, and has now in operation, a large and expensive dam across the French Broad river and a large plant with expensive machinery, and is engaged in furnishing electric power to the public lights in Bltmore, and operating the street railway system and lights in the city of Asheville, certain cotton mills, and other manufacturing plants; that in order to carry on this business it was and is necessary to erect and maintain across the French Broad river a

dam to collect water and to operate such plant and machinery; that the portion of the lands described in the complaint situated between the roadbed of the Southern Railway and the western banks or margin of the said river is necessary, and is required, by the defendant for the purpose of constructing and operating its works; that it has made several efforts to agree with plaintiff upon a price for the said lands, etc. Defendant insists that by its charter the right to condemn said land to its use is conferred, and that plaintiff's remedy is confined to the procedure provided in the charter, etc. The following issues were submitted to the jury: "(1) Is the plaintiff the owner and entitled to the possession of the lands and premises described in the complaint? Answer: Yes. (2) Was the land of plaintiff injured by the erection of the dam, as alleged in the complaint? Answer: Yes. (3) What permanent damage, if any, has the plaintiff sustained by reason of the erection of said dam and the ponding and backing of said river, as alleged in the complaint? Answer: \$750. (4) What annual damage, if any, has the plaintiff sustained by reason of the erection of said dam and the ponding and backing of said river, as alleged in the complaint? Answer: \$150." The court reduced the amount assessed for permanent damage to \$625. Defendant moved the court to set aside the verdict. Motion denied. Judgment was signed, and defendant excepted and appealed.

Davidson, Bourne & Parker and Tucker & Murphey, for appellant. Mark W. Brown and Zeb F. Curtis, for appellee.

CONNOR, J. (after stating the facts). There was evidence tending to show the location of plaintiff's land, the location of the dam, and the effect upon the land by water ponding thereon, etc., in regard to its productive capacity, the crops raised upon it before and after the erection of the dam. There was also evidence tending to show that the quantity of land upon which water was ponded was about three acres, the rental value of the land, the effect of the water ponded on the land by the dam upon the health of plaintiff's family, etc. The testimony in all of these aspects was conflicting. The estimate of the value of the land and its rental value indicated great divergence of opinion. Only such portions as relate to the exceptions need be noticed. Several of the exceptions to the ruling of his honor upon the admission of testimony were not pressed in this court.

Mr. Ingle, a witness for the plaintiff, testified in regard to the value of real estate, etc. Upon cross-examination he stated that he had sold some worn-out upland in the neighborhood of plaintiff's land for \$30 and \$50 an acre, giving the location of the land; that

the sales were made before the installation of the water power. Defendant thereupon proposed, upon cross-examination, to ask him if the erection of defendant's plant had not increased the value of the land "down there." The question was, upon objection, excluded, and defendant excepted. Defendant's counsel concede that this testimony was not competent for the purpose of offsetting against plaintiff's damage any benefit that may have accrued to her land by the erection of the plant, but states that his purpose was to impeach the witness and lessen the weight of his testimony in regard to value of lands. We are not quite sure how the testimony in regard to the sale of other lands in the vicinity of the plaintiff's, unless it was shown that in respect to the conditions, etc., they were similar, was relevant. The question in issue was the market value of the plaintiff's land. It seems that witness had given his opinion that it was worth \$100 per acre. The defendant was permitted, without objection, to show that he had sold lands in that vicinity—worn-out and bottom land—at a smaller price; that such sales were made since the installation of the plant. We do not perceive how it would tend to impeach him to show that the erection of the plant had increased the value of lands "down there." The time of the sale, in respect to the erection of the plant, was shown. This enabled the jury to draw such reasonable inferences from the facts as were proper in estimating the weight to be given to his evidence in regard to the value of plaintiff's land. The exception cannot be sustained.

Plaintiff testified that her land between the river and the railroad is submerged all the year; that there is but a small portion over which a person can walk; that this was caused by the dam; that no part of the three acres was fit for agricultural purposes or pasturage now; that the erection of the dam had ruined her spring, which formerly afforded good water; that she has no other water. She testified that noxious odors came from the river, caused by ponding the water; that sickness, fevers, etc., had prevailed. She said that "before the dam was made this place was her home, and she was happy at it, and could have made her support out of the bottom, and now she has no good water and no support, and it rendered her unhappy, and she did not have her health this summer, and before she had always had her health; that through the wet weather one of the houses on the place had its walls moulded, and that her things got so damp and bad that they moulded in her trunk; that they had filled the yard up trying to prevent it; that it was not that way before the dam was built; and that there was no unpleasant odor before the dam was built." There was evidence tending to show that plaintiff had an orchard on the land from which she gath-

ered and sold fruit, and that since the erection of the dam the trees had died; that she raised vegetables for market on the three acres, etc. The testimony in regard to the value of the orchard, fruit, etc., was conflicting. Mr. Hawkins testified that the three acres between the railroad and the river, if used for gardening purposes, would be worth about \$100 per acre, and that included the orchard; that he had run a mill all of his life, and, if plaintiff had a water power in front of her place before the erection of the dam, it would be worth about \$500 an acre at least, and it would be worth that much on the French Broad anywhere that you could put up water power nearly. He also testified, in regard to the effect of the water ponded upon the land on the orchard, that the trees were dead, and that it was not now worth anything for gardening or agricultural purposes; that he never measured the fall of the river from plaintiff's south line to her north line before the erection of the dam, but he guessed it was about 3½ feet; that he looked over it, but never measured it. He was examined at much length in respect to the flow of the water, etc. He testified that in forming his estimate of the value of the land he did not know that it was all subject to the right of way of the Southern Railway; that the fact that this land was subject to an easement of the railway company would affect its value after they took possession of it, because you could not farm there, but it would not affect its present damage; that it would not affect it unless the company built a house there, or took permanent possession of it.

Defendant introduced Mr. Stepp, who said that he was familiar with the land, passed it frequently, thought it worth for agricultural purposes \$50 per acre; that the people asked a good deal more than that for it, but that was as much as it was worth for purpose of general farming. Mr. Weaver, president of defendant company, testified in regard to water power on the French Broad: That the fall from plaintiff's southern to her northern line was exactly 8¼ inches; that above this property for 1,900 feet there is an eddy or pool in the river, that is, there is a swag there, etc.; that from his knowledge of water powers and what it takes to make them commercially valuable, if the defendant's dam had not been built, the whole fall on plaintiff's property would have been of no value and could not have been utilized; that 8¼ inches from a slight rise in the river would be wiped out, and a wheel to give speed under such a fall would have to be an enormous affair. He testified at much length in regard to the power, concluding with the statement that it would be commercially impossible to develop 8¼ inches fall on the French Broad river, giving his reasons for the opinion, etc. He also testified in regard to the damage sustained by plaintiff in other respects. Defendant in-

roduced several other witnesses, whose testimony in regard to the river, the fall, etc., tended to sustain its view and contention. Plaintiff introduced witnesses in reply.

At the close of the evidence defendant submitted certain prayers asking special instructions. Those which were pressed in this court are: "The court charges the jury that they cannot be influenced in this action by any sentimental considerations which might arise from the fact that this was plaintiff's home, that she was satisfied with it and did not care to sell the three acres of her land lying between the railroad and the river; nor will the jury be influenced by what plaintiff would charge for her land or was willing to take for her land, except in so far as this consideration throws some light on the true value of the said land and the extent of the injury thereto resulting from the erection of defendant's dam." His honor declined to give this instruction. Defendant excepted. He instructed the jury, upon the issue in regard to permanent damage, that the burden was on the plaintiff to show what permanent damage she had sustained, and that in passing upon the evidence they would take into consideration all the evidence tending to show the ponding or obstruction of the water of the stream, the extent to which the plaintiff's land was overflowed and damaged by the water ponded by the erection of the dam, if caused by its erection. "You will take into consideration the testimony tending to show that the land was rendered unfit for agricultural or gardening purposes, the quantity of it so injured, the injury or destruction of the apple orchard, injury to the spring, if any; you will take also into consideration the evidence tending to show that plaintiff had water power on the river, and that of the defendant tending to show that her water power, if there, was of no commercial value, and, if there, upon the whole circumstances and all the testimony, you will determine its value, if you are of the opinion that it has value; taking into your estimate also in fixing the damages on this issue the evidence tending to show that the land of the plaintiff was subject to the right of way or easement for railroad purposes, or that a portion of it was; and you will also take into consideration, if you find from the testimony and by the greater weight of the evidence that the plaintiff's land was injured, and that the injury and damage was caused by the erection of the dam, and you further find that this injury and damage continues, then you will ascertain what the injury and damage from the erection and maintenance was, and the amount you reach will be your answer to the issue." In conclusion his honor said to the jury: "You are not to be influenced by sympathy on the one side or by prejudice or bias on the other side, if any such exist. The true measure of damages in this case is the difference in the value of the land of the plaintiff that is affected by

the flowage or ponding back of the water, arising from the erection of defendant's dam in its condition just prior to the erection of said dam and its value in its condition just after the erection of said dam. That the burden of proof is on the plaintiff in this case, and she must establish by a preponderance of the evidence not only the fact that her lands have been damaged, but also that such injury was due to the erection of defendant's dam; and she must also establish by like preponderance of the evidence in what amount said lands have been damaged before she can recover in this action."

While we find no proposition of law in the instruction asked which is not correct, we think that his honor's instruction in respect to the manner in which the jury should consider the evidence pertaining to the permanent damage and the measure of such damage covers the principle involved in the instruction. It is too well settled to require or justify the citation of authority that the court is not required to give the instruction in the language of the prayer. It is well settled that when, for the purpose of meeting and providing for a public necessity, the citizen is compelled to sell his property or permit it to be subjected to a temporary or permanent burden, he is entitled, by way of compensation, to its actual market value. *Lewis on Em. Domain*, § 478. The difficulty arises, not so much in fixing the standard of the right, as in ascertaining what elements or factors may be shown in applying the standard. Certainly where by compulsory process and for the public good the state invades and takes the property of its citizen, in the exercise of its highest prerogative in respect to property, it should pay to him full compensation. The highest authorities are to that effect. "The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted may be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner." *Lewis, Em. Dom., supra*. Mr. Justice Field, in *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, says: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or be regarded as valueless because he is unable to put it to any use. Others may be able

to use it. Its capability of being made thus available gives it a market value which can be readily estimated." In *L. R. Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51, it is said: "Since, then, the market value is the true criterion of damages, we are led to inquire, what is the market value? The word 'market' conveys the idea of selling, and the 'market value,' it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay." Referring to the range which the testimony may take in ascertaining the market value, the court says: "As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the landowner should be allowed to state, and have his witnesses state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury and the opposing counsel, for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make." "If a tract, of which the whole or a part is taken for a public use, possesses a special value to the owner which can be measured by money, he is entitled to have that value considered in the estimate of compensation and damages." 15 Cyc. 724; *Cooley, Const. Lien*, §§ 567, 568. Plaintiff testified without objection that she could have rented the bottom land for \$100, and had been offered that sum; that she depended upon it for her sole support, and would not have taken less than \$100 a year for it. This last testimony, considered with what preceded it, was certainly competent to be considered by the jury in ascertaining its value. She also said that it was her home, and she was happy there with her spring of good water, and that she could make her support out of the bottom; that she did not have her health and was unhappy by reason of it. We do not understand that, under the instruction of his honor, the jury gave her compensation for the disturbance of her happy condition before the march of progress and the demands of a large city for water and lights deprived her of her bottom land and her spring. As said in *Boom Co. v. Patterson*, supra: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern it in all cases." The instruction given the jury for their guidance conforms to the rule approved by the authorities.

The defendant requested his honor to charge the jury: "If the jury should find as a fact that the plaintiff had not used or developed, and had not intended to use or to

develop, any water power which she might have had on her river front, then they cannot consider the alleged destruction of such power as an element of damages in this case. That the jury cannot consider the value of plaintiff's property as a part of the water power system of the W. T. Weaver Power Company in estimating the damages occasioned by erection of defendant's dam, but only in its former condition and the difference in value between the land in its former condition and its value in its condition immediately after the erection of the dam." To the refusal to give this instruction defendant excepted. In this connection it appears in the case on appeal that, at the conclusion of the charge, counsel for defendant requested the court to caution the jury that they should not consider the 8½ inches of water power of plaintiff as a part of a great system, as argued to them by plaintiff's counsel. His honor in response said to the jury that they would take into consideration the water power on the one side and the easement on the other, and say upon the whole evidence what it is worth. To this defendant excepted. It is said in defendant's brief that testimony in regard to the value of the water power as a part of the Weaver power, as a system or whole, was excluded. The testimony sent up does not disclose the ruling upon this point, and we are not quite sure that we comprehend the extent of it. It is further stated in the brief that plaintiff's counsel, in the course of his argument, read to the jury a case bearing upon the question and attempted to apply the law as therein decided to this case; that the attention of the court was called to the argument, and he said that he could not prevent counsel from arguing the law to the jury. The judge was requested to caution the jury when he came to charge them. The action of his honor in that respect was as set out in the record. The question raised by the request for special instruction, although not very clearly presented by the testimony, is whether the jury should, in arriving at the plaintiff's compensation, consider the manner in which the water flowed through and over her land as it related to and connected with the flow over the defendant's lands, as constituting water power capable of use and development.

The defendant's contention, stated in the brief, is: "If plaintiff did not have a water power along her river front which could be independently developed, and had not set about acquiring rights which would enable her to combine her water power with that of other riparian proprietors along the river, at the time of the erection of the dam, she was not entitled to damages for any alleged destruction of her water power." This contention presents an interesting and, as applied to the condemnation of property, an important question. The rule is thus stated by Mr. Lewis: "The market value of property includes its value for any use to which

it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown and the fact of such adaptation may be taken into consideration in estimating the compensation. Some of the authorities hold that its value for a particular use may be proved, but the proper inquiry is, what is its market value in view of any use to which it may be applied and of all the uses to which it is adapted?" The question was presented in *San Diego Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83, in which it was sought to condemn land for the purpose of a reservoir. It was insisted that the value of the land as a reservoir site should not be considered because there was no practicable site for a dam on the land; the only way in which it could be so used being in connection with plaintiff's land. The court disposed of the objection by saying: "While it is true that defendant's land had no value for reservoir purposes except in connection with the land of the plaintiff, it is equally true that the plaintiff's land had comparatively little value for such purposes except in connection with the land of the defendant. * * * Suppose, for illustration, that the two sides of a cañon suitable for reservoir purposes were owned respectively by two persons who are joined as defendants in a proceeding to condemn the land by a water company which did not own any of the property. It would not be pretended that such company could take the property at its value for grazing or agricultural purposes merely because it was owned by different persons. * * * Now there is no difference in principle between such a case and the one where the company itself owns half the cañon and is seeking to acquire the other half. Nor is there any difference in principle where the company owns somewhat more than half, or the more valuable portion. The logical result of the argument for the appellant is that, if the company owned but a small portion of the cañon, it could acquire all the rest, without regard to the value for the only purpose for which it might have much value, merely because the other party did not own the whole and had not been able or did not choose to go into the business themselves." This case was followed in *Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123. In *Boom Co. v. Patterson*, supra, the question was whether the adaptability of certain islands in the Mississippi river for boom purposes should be considered in estimating their value. The court held that it was a "circumstance which the owner had a right to insist upon as an element in estimating the value of his lands." The same contention was made, as in this case, that the charter conferred upon the company the privilege of erecting

its boom at the place of its location, and this prevented the defendant from utilizing his lands for that purpose. In reply to the argument the court said: "The contention on the part of the plaintiff in error is that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons by reasons of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property." *Goodin v. C. & W. Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95; *Young v. Harrison*, 17 Ga. 30.

The president of the defendant company testified that the plaintiff's land between the railroad and the western bank of the river was necessary to the operations of the company. While there is no direct evidence of its value as a part of the water power, the defendant had the benefit of the testimony of experts that in no point of view was it of any commercial value. His honor simply submitted the question to the jury to be considered as an element of value. We find no error in his ruling in this respect. In regard to the effect of the easement owned by the Southern Railway over the land, the court expressly told the jury to consider it in estimating the damages. This was proper. *Forbes v. Com.*, 172 Mass. 289, 52 N. E. 511. The condemnation for the purpose of building and operating a railroad did not deprive the plaintiff of the use of her land except to the extent that it was necessary for the operation of the road. For any additional burden she was entitled to compensation to be measured with reference to the limited easement of the railroad. *Blue v. Railroad*, 117 N. C. 644, 23 S. E. 275; *Phillips v. Telegraph Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; *Hodges v. Tel. Co.*, 133 N. C. 225, 45 S. E. 572.

The defendant strongly urges upon us the exception to his honor's refusal to set the verdict aside. There can be no controversy in respect to the power and duty of this court to set a verdict aside when there is no evidence to support it. *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141. It is equally well settled that, when there is any evidence proper to be submitted to the jury, this court has no power to interfere. Whether there is such evidence is a question "of law or legal inference." This question, we must, in the discharge of our constitutional duty, pass upon and decide. Const. art. 4, § 8. The defendant's exception assumes that the jury, in estimating the value of the land and the damages, were confined to the rental value

for agricultural purposes. As we have seen, other elements of value entered into the estimate and were submitted to the jury. There was competent and legal evidence fit for their consideration in regard to these matters. If the defendant desired more specific instructions in respect to the evidence, it should have asked for them. We are impressed with the language of the court in *Railroad v. Woodruff*, supra, in disposing of a similar motion: "This is a delicate duty in any case, and especially so in a case when the sole issue is one as to value. This is so peculiarly within the province of the jury, it is a matter in which we can act with so little intelligence or satisfaction, and there is so little finally about any judgment we could render on this point, that nothing but an extreme case would justify our interference. If there was no evidence to support the verdict, we would not hesitate to exert our authority to set it aside. It must be very seldom, however, that the verdict is entirely unsupported by evidence in a case where there is but a single and simple issue submitted to the jury, as in this class of cases."

* * * As long as witnesses differ so widely in their opinion as to values, and as long as litigants measure values so entirely by the standard of self-interest, we cannot hope for verdicts that shall be satisfactory to both parties. The utmost to which we can hope to attain is to sometimes reach a verdict that is unsatisfactory to both parties." In that case the estimates vibrated between \$1,500 and \$50,000; the jury fixed the value at \$20,000. The attention of the writer was called some years ago to a case in which the commissioners, appointed to assess the value of land condemned for a street in a progressive town, fixed the amount at \$1,250. The town authorities not being content with the assessment sent another jury to assess the value. They fixed it at \$250. They were all intelligent, honest men and, with no change in conditions, reached conclusions so divergent. It sometimes occurs that appeals disclose, upon the record, verdicts which seem to be excessive, but this court has not, so far as we are informed, assumed the power to set them aside. When an erroneous rule for assessing damages is given the jury, it is our duty to direct a new trial, as in *Carter v. Railroad* (at this term) 52 S. E. 642. We do not find any error in this respect. The plaintiff must part with her land submerged by water thrown over it by the dam, and whatever value resided in the flow of the water affected by the conformation of the bottom and banks of the river must be destroyed to meet a public necessity. Counsel informed us upon the argument that a very large, valuable, and, to the public use, important motive power has been developed by defendant company generating electricity which is utilized for lighting the streets and operating the street railways of populous towns and cities and the machinery of sever-

al cotton and other manufacturing plants. The state has conferred upon the company, to enable it to accomplish these beneficent results, one of the highest and most dangerous of its sovereign powers—that of eminent domain. An essential and elementary condition precedent annexed to the exercise of this power is that the owner of property who is compelled to surrender it shall have full compensation. His honor in the exercise of his discretion reduced the amount assessed for permanent damages to \$625. We can see no ground, as matter of law, authorizing us to disturb the verdict.

We have disposed of the case upon the theory that by suing for permanent damages the plaintiff concedes the right of defendant to acquire a permanent easement in her land. The judgment confers such easement upon defendant. She recovers, by way of permanent damages, compensation in full therefor. It was agreed by counsel that the annual damage accruing prior to the beginning of the action should be assessed for two years, and the judgment is drawn accordingly. When the judgment is discharged, the defendant acquires an easement to overflow plaintiff's land to the extent set out in the judgment. *Ridley v. Railroad*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; *Candler v. Electric Co.*, 135 N. C. 12, 47 S. E. 114.

Affirmed.

(73 S. C. 194)

STATE ex rel. SCHRODER, County Treasurer, v. BURNS, Court Clerk.

(Supreme Court of South Carolina. Jan. 22, 1906.)

1. STATUTES — LOCAL LAWS — COUNTY OFFICERS.

Act Feb. 22, 1905, § 33 (24 St. at Large, p. 927), providing that the salary of the clerk of the court of Oconee county shall be \$1,350 per year, payable monthly, and that he shall collect all fees and costs and pay the same over to the county treasurer, is unconstitutional, as violating Const. art. 3, § 34, providing that the General Assembly shall not enact local laws fixing the amount of compensation to any county officer.

2. SAME—PARTIAL INVALIDITY—EFFECT.

Act Feb. 22, 1905 (24 St. at Large, p. 918), fixing the amount of compensation to be paid county officers, is not unconstitutional because of the invalidity of section 33 (page 927), providing for the salaries of officers of Oconee county.

Appeal from Common Pleas Circuit Court of Oconee County; Dantzler, Judge.

Application by the state, on the relation of W. J. Schroder, county treasurer of Oconee county, for writ of mandamus against O. R. D. Burns, clerk of court. From an order refusing the writ, relator appeals. Affirmed.

Jaynes & Shelor, for appellant. Stribling & Herndon, for respondent.

JONES, J. This is an appeal from an order of Judge Dantzler denying relator's application for a writ of mandamus to require respondent to pay over to relator certain

amounts collected by him as fees, costs, and commissions, and to make and file certain monthly reports, as required by an act of the General Assembly, approved February 22, 1905 (24 St. at Large, p. 918). Judge Dantzer held that so much of section 33 (page 927), of said act as undertakes to provide for the compensation of the clerk of the court for Oconee county is void, because violative of article 3, § 34, and for this reason denied the writ. From such decision the relator appeals.

The act in question is entitled "An act to fix the amount of compensation to be paid to the county officers of the various counties of the state," 24 St. at Large, p. 918. Section 33 of said act, providing for the salaries of the officers for Oconee county, contains this provision with reference to the compensation of the clerk of the court: "Clerk of the court, thirteen hundred and fifty dollars, payable monthly: Provided, that he shall collect all fees, costs and commissions due to him by virtue of his office and pay same over to the county treasurer on monthly statements verified by him, which shall be a part of the ordinary county funds."

The question is whether this claim in said act violates section 34 of article 3 of the Constitution, which declares: "The General Assembly of this state shall not enact local or special laws concerning any of the following subjects, or for any of the following purposes, to wit * * * X. To fix the amount or manner of compensation to be paid to any county officer, except that the laws may be so made as to grade the compensation in proportion to the population and necessary services required. XI. In all other cases where a general law can be made applicable, no special law shall be enacted. XII. The General Assembly shall forthwith enact general laws concerning said subjects for said purposes, which shall be uniform in their operations: Provided, that nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws." The manifest purpose of this provision of the Constitution is to uproot the great evil of local and special legislation. Ten subjects are therein enumerated (which include the matter of compensation to be paid county officers, involved in this case), as to which there is express inhibition of local or special legislation, and, in order to further extend the inhibition, it is declared that there shall be no special law on any other subject where a general law can be made applicable. As to the 10 expressly inhibited subjects of local or special legislation, the General Assembly is directed to enact general laws, subject, however, to the provision that such general laws shall be uniform. We understand that such uniformity must exist throughout the state as distinguished from a uniformity of operation within a county or other subdivision of the state, since the whole scheme of

this article of the Constitution is to bring about as far as possible general laws operating with substantial uniformity throughout the state. Then follows the somewhat perplexing proviso "that nothing contained in the section shall prohibit the General Assembly from enacting special provisions in general laws." The difficulty is to harmonize the express inhibition of local or special legislation as to the enumerated subjects with the provision allowing special provisions in general laws, and at the same time preserve uniformity of legislation with respect to the enumerated subjects. To reconcile these apparently conflicting ideas, we must construe "special provisions in general laws" so as not to practically nullify the purpose to uproot local or special legislation as to certain subjects and to secure general laws thereon having uniform operation throughout the state. We understand the language, "special provisions in general laws," to mean provisions in general laws, which, while having a limited application, must not be so inconsistent with the general scheme or purpose of the statute as to prevent substantial uniformity of operation throughout the state. Such was the view of the court as declared in *State v. Queen*, 62 S. C. 247, 251, 40 S. E. 553, 554, wherein Mr. Justice Gary, speaking for the court, used this language in reference to this section of the Constitution: "The main object was to secure uniformity as to the subjects therein mentioned, and any legislation relating to those subjects which substantially militates against uniformity must necessarily be declared unconstitutional." In the case of *Grocery Company v. Burnet*, 61 S. C. 205, 211, 39 S. E. 381, 384, 58 L. R. A. 687, this court declared: "It may be regarded as settled that local or special statutes upon any of the 10 enumerated subjects above will be declared void, and that the express prohibition of special legislation on said subjects shall not be practically annulled or evaded under any form or guise of legislation. *State v. Higgins*, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561; *Dean v. Spartanburg County*, 59 S. C. 110, 37 S. E. 226; *Nance v. Anderson County*, 60 S. C. 501, 39 S. E. 5." In the case of *Grocery Co. v. Burnet*, supra, and in the case of *Severance v. Murphy*, 67 S. C. 410, 46 S. E. 35, the court considered the matter of special provisions in general laws in reference to subjects not among the 10 inhibited, and as to such other subjects there must necessarily be a wider range for legislative discretion. In *State v. Queen*, supra, there was an apparent attempt to make a general law with respect to 1 of the 10 inhibited subjects of local or special legislation, and is therefore more analogous to this case; but in *State v. Queen* the statute exempted the county of Aiken wholly from its operation, and so failed to be a general law; but the court held that, even if the provisions of the statute objected to could be regarded as

special provisions in a general law, they violated the principle of uniformity.

The act in question, considered as a whole, may be regarded as a general statute, as it operates throughout the state in providing compensation for the various county officers. The salaries or compensation provided are in the act declared to be graded in proportion to the population and necessary service required. With reference to clerks of the court, the general scheme or purpose of the statute was to give said clerks salaries in lieu of fees, etc., chargeable against the respective counties as distinguished from fees, etc., which are payable by parties in civil cases, for recording, etc. In Abbeville county, for example, the salary of the clerk from the court is fixed at \$300, and in the county of Anderson at \$500; but in Oconee county the salary is \$1,320, in lieu of all fees, costs, and commissions due him by virtue of his office, which he is required to collect and pay over to the county treasurer as ordinary county funds. No other clerk of court is required to pay over to the county treasurer all his fees, etc., from whatever source derived. This provision as to Oconee county is wholly different from the general plan and purpose of the act, and violates the requirement as to uniformity. We therefore agree with the circuit court that so much of section 33 of said act as herein referred to is unconstitutional. But as it is the duty of the court to sustain the validity of an act of the General Assembly in so far as it is possible to do so, we do not regard the vice in the particular clause under consideration as sufficient to destroy the whole statute, since it is separable from the other provisions of the statute relating to Oconee county and the other counties of the state.

The judgment of the circuit court is affirmed.

(73 S. C. 173)

ABLE v. SOUTHERN RY. et al.
(Supreme Court of South Carolina. Jan. 5, 1906.)

1. MASTER AND SERVANT—JOINT TORTS.

A master and servant are jointly liable for the willful tort of the servant committed in the scope of his employment.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1238.]

2. REMOVAL OF CAUSES—SHAM DEFENDANT.

In an action against a master for willful tort committed by his servant in his employment, the servant is a proper party, and the case is not removable to the United States court on the theory that he is a sham defendant.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 79.]

3. TRIAL—CALENDARS—HEARING OF DEMURRER.

Though Code Civ. Proc. 1902, § 279, par. 2, provides for three calendars, and distinguishes the causes which shall be placed on each, and a demurrer should be heard on a different calendar from that on which issues of fact to be tried by a jury are placed, where a demurrer to a pleading in a cause properly on calendar No. 1 because of issues of fact to be tried by a jury is heard without a transfer to calendar No. 2, it is a mere irregularity,

not affecting the jurisdiction and affording no sufficient ground for reversal.

Appeal from Common Pleas Circuit Court of Lexington County; Purdy, Judge.

Action by Mary E. Able, administratrix of Oliver C. Able, against the Southern Railway and James Alexander. From an order refusing to remove cause to the United States court, defendants appeal. Affirmed.

B. L. Abney, E. M. Thomson, and R. H. Welch, for appellant. G. T. Graham and J. Wm. Thurmond, for respondent.

WOODS, J. This action was brought by the administratrix of Oliver C. Able for \$21,000 damages for his death by the alleged wrongful acts of the defendant railway company and its codefendant Alexander. The complaint alleges that the defendant railway company is a corporation duly created and existing under the laws of the state of Virginia, and owned and operated a railroad running through the town of Leesville, in the county of Lexington, in this state; that the defendant Alexander was a servant in its employ as engineer of its passenger locomotive engine which struck and killed plaintiff's intestate and operated the same. The allegation of the complaint which alleges the joint tort and which is material to this appeal is as follows: "That on or about the 13th day of December, 1903, the said Oliver C. Able, deceased, plaintiff's intestate herein, was struck and killed at a public crossing, and traveled place within the corporate limits of the town of Leesville, in the county of Lexington and state of South Carolina, by a locomotive engine with a train of passenger cars attached thereto, operated, controlled and managed by the defendants. And the plaintiff alleges that the death of her intestate, the said Oliver C. Able, was caused by the joint and concurrent, negligent, reckless, and wanton conduct and management of the said locomotive engine by the defendants, in that said defendants ran said locomotive and train of cars on and over said railroad track and in the corporate limits of the said town of Leesville at a negligent and reckless rate of speed, and caused said locomotive engine and train of cars to approach the public crossing in Green street, in the town of Leesville aforesaid, the place at which plaintiff's intestate was walking, at a negligent and reckless rate of speed, and then and there negligently, recklessly, wantonly, and willfully caused said locomotive engine to strike and kill plaintiff's intestate, that while plaintiff's intestate was in plain view of the defendants and was actually seen by them in ample time for them to have avoided injuring him, and while plaintiff's intestate's back was toward the said locomotive and train of cars which was approaching the plaintiff's said intestate at said public crossing, and while the defendants saw and knew the perilous position of her said intestate and could easily have avoided injuring him, but regardless of their duty

in that respect, and regardless of the rights of the plaintiff's intestate, and in utter disregard of human life, and without ringing the bell or sounding the whistle of said locomotive, and without observing any care or caution whatsoever, the said defendant ran said locomotive engine and train of cars over said railroad track within the corporate limits of the town of Leesville aforesaid at a negligent and reckless rate of speed, and then and there negligently, recklessly, and wantonly caused said locomotive engine to strike and kill plaintiff's said intestate at said public crossing on said railroad track as he was in the act of stepping off of said railroad track at said public crossing."

Within due time, on April 27, 1904, the defendant Southern Railway Company filed its petition and bond for the removal of the cause to the Circuit Court of the United States for the District of South Carolina. The railway company on April 28th answered the complaint, denying its allegations and pleading contributory negligence. On the same day the defendant Alexander demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action against him. On the call of the cause on calendar No. 1, Hon. R. O. Purdy, the presiding judge, refused the petition for removal, and the appeal involves chiefly the correctness of this ruling.

As stated in appellants' argument, the petition of the railway company for removal alleges (1) that the complaint averred no fact to charge the defendant railway company with participation in alleged willful and wanton acts of its codefendant Alexander and showed a separable controversy; and (2) upon information and belief that its codefendant Alexander was made defendant to the suit, under the allegation that he is a resident and citizen of the state of South Carolina, solely for the purpose of preventing the removal of the cause to the United States court, and that he is merely a nominal or sham defendant and not a necessary or indispensable party to the action, that the said codefendant cannot be made to respond to any judgment that may be had against him in the cause, and that the petitioner does not believe it is intended eventually to obtain a judgment against him. The first ground was not urged in the argument for the reason, no doubt, that the conclusive opinion of the circuit judge is fully sustained by the cases of *Schumpert v. Ry. Co.*, 65 S. C. 332, 43 S. E. 818, 95 Am. St. Rep. 802; *Carson v. Ry. Co.*, 68 S. C. 55, 46 S. E. 525; *Id.*, 194 U. S. 186, 24 Sup. Ct. 609, 48 L. Ed. 907. Under these authorities the master and servants are jointly liable for the willful tort of the servant committed in the scope of his employment while in the master's service. The application of this principle also disposes of the second ground.

If a tort was committed, and the defendant Alexander is responsible therefor jointly with the railway company, he is a proper party to

the action, and is in no legal sense a sham defendant because a judgment could not be collected from him for lack of property. No one can be a sham defendant who is legally liable in the action. It is not averred in the petition that the facts alleged in the complaint constituting the cause of action against Alexander and giving the state court jurisdiction are not stated in good faith, but pretensively, as, for example, that Alexander is known to the plaintiff not to be a resident of the state, or not to have been the engineer in charge of the locomotive, and was fraudulently made a party to defeat the right of the railway company to have the cause removed.

The view of the defendant railway company that, though Alexander may be jointly liable as a matter of fact and law, yet he was a sham defendant, because the plaintiff, as defendant believes, does not expect to collect her money from him, but from the railway company, is erroneous. If all this were proved, it could not confer upon Alexander or any one else the right to have the action against him dismissed. The following clear statement of the principle under consideration made by Chief Justice Fuller in the beginning of the opinion in *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 135, 21 Sup. Ct. 67, 45 L. Ed. 123, is conclusive: "The question to be determined is whether the Court of Appeals of Kentucky erred in affirming the action of the Boyd circuit court in denying the application to remove. And that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of the defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkey and Sidles was immaterial. The petition for removal did not charge fraud in that regard, or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry." *Carson v. Railway Co.*, supra; *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673.

From the foregoing discussion it is also obvious that the complaint states a cause of action against the engineer Alexander, and his demurrer was properly overruled. He insists, however, that, as the cause had not been docketed on calendar No. 2, the circuit judge was without jurisdiction to hear the demurrer against his objection upon the call of the case on calendar No. 1. The second paragraph of section 279 of the Code of Civil Procedure of 1902, provides specifically for three calendars, and distinguishes the causes to be placed on each.

Though the different calendars and the character of the causes properly on each are recognized in the same section of the Code of 1902, the second paragraph, providing for the three calendars, is entirely omitted. Enough of the section remains, however, taken in connection with other sections of the statute,

to make it clear that a demurrer should, in the regular conduct of the business of the court, be heard on a different calendar from that on which issues of fact to be tried by a jury are placed. When there has been a demurrer to a pleading in a cause properly docketed on calendar No. 1, because the issues of fact are for trial by a jury, if the cause has not been also docketed on calendar No. 2 for the hearing of the demurrer, either party may move to have it docketed on calendar No. 2 for the hearing of the demurrer. *Threatt v. Brewer Co.*, 42 S. C. 92, 19 S. E. 1009. In this case the defendant merely objected to hearing the demurrer on calendar No. 1, but made no motion to docket on calendar No. 2. There was no showing that the defendant was taken by surprise or was deprived of a full hearing, and hence hearing the demurrer on calendar No. 1 was at most an irregularity in no wise affecting the jurisdiction and affording no sufficient ground for reversal. *Ward v. Telegraph Company*, 62 S. C. 274, 40 S. E. 670.

The judgment of this court is that the orders appealed from be affirmed.

(73 S. C. 140)

FRASIER v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. Dec. 20, 1905.)

1. CARRIERS—INJURY TO FREIGHT—LIMITING LIABILITY—ACTION BY CONSIGNEE.

In an action against a carrier for injury to a horse shipped, where the carrier sets up a special contract limiting its liability, the consignee may show the contract was not binding on him because not signed by the shipper until after the injury, and on agreement that it should not affect the rights of the consignee.

2. SAME—SPECIAL CONTRACT.

Where, in an action to recover for injury to freight shipped from a foreign state, the carrier sets up a special contract, the consignee may show that the contract was void under the laws of the foreign state without pleading such laws.

3. TRIAL—STATUTES—FOREIGN LAWS—CONSTRUCTION.

The construction of the laws of a foreign state is for the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 327.]

4. CARRIERS—CONTRACT—CONSTRUCTION.

In an action by a consignee for damages arising from injuries to freight shipped from a foreign state, the contract must be construed according to the laws of the state in which it was executed.

5. SAME—LIMITATION OF LIABILITY.

Under the laws of Georgia a carrier cannot bind the shipper by a contract limiting the liability of the carrier, unless it is signed by the shipper at the time of the shipment.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 678, 691-694.]

6. CONSTITUTIONAL LAW—CONTRACT OF CARRIER—EQUAL PROTECTION OF LAWS.

Act Feb. 23, 1903 (24 St. at Large, p. 81), providing a penalty against a common carrier for failing to adjust and pay within a specified time the claim of a shipper for loss or damage to goods, is not unconstitutional as denying to common carriers the equal protection of the laws.

7. CARRIERS—INJURY TO LIVE STOCK—INSTRUCTIONS.

In an action against a carrier for injury to a horse shipped, an instruction that if defendant furnished a safe means of unloading the horse in question, and the injury did not occur on account of the unsafe condition of the same, plaintiff could not recover, was erroneous, in eliminating the question whether defendant was negligent in furnishing a suitable place for unloading and in the use of the appliances at hand.

8. TRIAL—INSTRUCTIONS.

An instruction assuming the existence of a contract in dispute was properly refused.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 420-423.]

9. CARRIERS—UNLOADING LIVE STOCK—LIABILITY OF CARRIER.

Under a special contract making it the duty of a shipper to unload a horse, if the agent of the carrier is present and assisting in unloading the horse in an unsafe way, and the horse is injured, the carrier is liable.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 924.]

10. TRIAL—INSTRUCTIONS—ASSUMING DISPUTED FACTS.

Where a special contract was denied, an instruction that the shipper ratified the special contract limiting its liability by accepting reduced rates of freight was properly refused.

Appeal from Common Pleas Circuit Court of Abbeville County; J. A. McDonald, Special Judge.

Action by T. B. Frasier against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. J. Simpson and Parker & Greene, for appellant. Wm. N. Graydon, for respondent.

JONES, J. The plaintiff brought this action for damages for loss of a horse, which died from injuries received in transportation from Augusta, Ga., to Mt. Carmel, S. C., and for the penalty of \$50, as provided by statute, for failing to adjust and pay said claim within ninety days. The jury rendered a verdict for the whole amount claimed, including the penalty, and defendant now seeks to reverse the judgment thereon.

1. The first exception alleges error in refusing to strike out of the deposition of plaintiff's witness James S. Carswell so much of the testimony therein as sought to show when the contract of shipment was signed by him and why the same was signed. It is contended that plaintiff, having introduced said contract in evidence as the basis of his action, should not have been allowed to vary its terms, or impeach it, or relieve himself of its obligation. This exception is founded on a misconception of the circumstances. The plaintiff did not make said contract the basis of his action. The defendant by its answer set up a special contract limiting its liability, and evidence of such contract was sought to be brought out by defendant on cross-examination. The plaintiff was properly allowed to offer testimony that the said alleged contract was not binding on plaintiff, and that it was not

signed by the shipper until 10 days after the shipment and after the injury to the horse, and with the understanding that it would not be prejudicial to plaintiff's claim for damages.

2. The second exception assigns error in allowing the plaintiff to offer in evidence the Code of Georgia, when he had not pleaded the matters therein sought to be proved. The general rule is, "where a party seeks either to recover or defend under a foreign law, such law must be pleaded and proved like any other fact, since the court cannot ex officio take notice of the laws of a foreign state." 9 Ency. Pl. & Pr. 542. The plaintiff's cause of action did not arise in Georgia, nor does the complaint seek to establish a right founded on the laws of Georgia. He sues in tort to recover damages arising from a breach of the carrier's general duty under the law to safely deliver the freight consigned to him, a breach which occurred in this state. The law of Georgia not being essential to plaintiff's cause of action, it was not necessary to plead the same. The plaintiff merely sought to avail himself of the law of Georgia in reply to defendant's answer setting up a special contract made in Georgia, in which case it was clearly admissible for plaintiff, without having pleaded the same, to prove the law of Georgia in order to show the invalidity of the legal effect of the special contract alleged by defendant. In the case of *Rosemand v. Southern Ry.*, 66 S. C. 92, 44 S. E. 574, the cause of action arose in Georgia, and it was necessary to allege the laws of Georgia as one of the facts constituting plaintiff's cause of action. In the case of *Association v. Rice*, 68 S. C. 239, 47 S. E. 63, while it was not necessary for the plaintiff to anticipate a defense by way of counterclaim and allege in his complaint the law of Virginia, yet, inasmuch as the Code requires a reply to a counterclaim, if it is to be contested, it was necessary to plead in reply to the counterclaim the law of Virginia relied on to defeat said counterclaim. These cases cited by appellant illustrate the general rule stated, but do not apply to this case, which is governed by the rule stated in *Price v. Railroad*, 38 S. C. 210, 17 S. E. 732, which allowed plaintiff to offer evidence to invalidate a release set up in the answer without having pleaded in reply, because under section 189 of the Code of Civil Procedure 1902 plaintiff was not required to reply to such defense, since the allegation of new matter in the answer, not relating to a counterclaim, is to be deemed controverted by the adverse party.

The third exception charges error in refusing defendant's motion for nonsuit on the ground that the evidence showed conclusively that the horse injured was not the property of the plaintiff at the time of the injury. There is no ground for this exception. The witness Carswell, who shipped the

horse to plaintiff, testified that he sold the horse to plaintiff for \$125, and plaintiff testified he gave that sum for the horse.

The fourth exception imputes error in charging the jury as follows: "The statute law of Georgia has been introduced in evidence, which provides that a common carrier cannot limit its common-law liability, but they can make express contracts and be bound thereby. I charge you under that statute, and it construes the law of Georgia, that, when a bill of lading is issued and is signed only by the common carrier, the shipper is bound by all of the general provisions in that bill of lading, whether signed by the shipper or not. But any special contract limiting its liability, there must be a signing of the contract by the shipper, or he must expressly assent to the terms of the contract. The mere acceptance of a bill of lading by the shipper, and his acting upon it, will bind him so far as a general contract is concerned, but it will not bind him as to limiting the liability of the common carrier, but he must sign it at the time of shipping or expressly assent thereto. I charge you that is the law of Georgia. If you find from the testimony that at the time of this shipment this bill of lading was delivered to Mr. Carswell or some one acting as his agent, and he shipped it under the bill of lading, he is bound by the general provisions of that bill of lading, and so is the plaintiff in this case." The specifications of error are: (1) That plaintiff could not avail himself of the law of Georgia without having pleaded the same; (2) that the charge was upon the facts, in violation of article 5, § 26, of the Constitution; (3) that it was competent to show a ratification of the contract after shipment, such as would bind the plaintiff. The first specification above cannot be sustained for reasons given in considering the second exception.

3. The second specification cannot be sustained because the testimony as to the law of Georgia was documentary, and it was the duty of the court to construe it. "While it is true that what is the law of another state is a fact to be proven (*Horne v. McRae*, 53 S. C. 51, 30 S. E. 701), yet it is not a charge upon the facts for the court to construe the language of documentary evidence such as the statute of another state." *State v. Whittle*, 59 S. C. 304, 37 S. E. 923.

4. There was no evidence of any act on the part of the plaintiff or his alleged agent which tended to show a ratification of the alleged special contract, unless such ratification could be inferred from the mere acceptance of the bill of lading containing the special contract signed only by the carrier. The evidence was undisputed that the shipper did not sign the contract until 10 days after the shipment, when the shipper and the agent of defendant knew of the injury to the horse, and after representation by defendant's agent that such signing by the

shipper would not hurt plaintiff's case. "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract and will then be governed thereby." In order, therefore, to make a valid contract in Georgia so as to bind the shipper to stipulations limiting the carrier's common-law liability for injury not the result of the carrier's negligence, the shipper must expressly assent to such stipulations. "Mere acceptance of the bill of lading does not establish the shipper's assent to stipulations of this kind." *Central Railroad v. Hasselkus* (Ga.) 17 S. E. 838, 44 Am. St. Rep. 37. The special contract sought to be established by defendant contained, among other things, a provision limiting liability for damages for loss or injury to the horse to \$60. Such a contract when fairly made upon consideration is binding on the shipper. *Johnstone v. Railway Co.*, 39 S. C. 56, 17 S. E. 512. The circuit court, however, charged in effect that the existence and validity of the special contract set up in this case must be governed by the law of Georgia, where it was made, and that the shipper would not be bound by such stipulation in the bill of lading unless he expressly assented thereto. We think the circuit court was correct in this, and that all exceptions by appellant based upon a contrary view must be overruled. The general rule on this subject is that clearly stated in *Scudder v. Union Nat. Bank*, 91 U. S. 406, 412, 23 L. Ed. 245. "Matters bearing upon the execution, the interpretation, or validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought." In *Lery v. Boas*, 2 Bailey, 219, 23 Am. Dec. 134, approved in *Ayres v. Audubon*, 2 Hill, 604, it is declared that: "The *lex loci contractus* is to be observed in deciding on the nature, validity, and construction of the contract; but the form of the action, the course of judicial proceeding, and the time when the action must be commenced, must be directed exclusively to the laws of the state in which the action is brought." This general rule is well settled and understood, but the real contention in this case is whether the requirement by the Georgia law that the shipper shall expressly assent to the special contract, touches the validity of the contract or only the remedy upon it or the evidence of it. Upon a similar contract the Supreme Court of Massachusetts, in *Hoadley v. Northern Trans. Co.*, 115 Mass. 304, 15 Am. Rep. 106, held that the question was one of evidence, and was to be determined by the law of the place where the suit is brought; while

in Missouri, in the case of *Hartmann v. Louisville, etc., Ry. Co.*, 39 Mo. App. 88, it was held that the question related to the validity of the contract, and was governed by the law of the place of contract. We think this latter rule is the correct one. The contract was alleged to have been made in Georgia concerning a shipment from that state into South Carolina. It was therefore not to be fully performed in South Carolina, but was to be at least partly performed in Georgia, where made. It therefore falls within the general rule stated in 4 Elliott on Railroads, § 1506: "The law of the place where it is made and is to be performed, either in whole or in part, governs as to its nature, validity, and interpretation." To treat the question as relating to the remedy, or the evidence of the contract, is to assume that a contract has been made to be evidenced and enforced, whereas the real question is whether any such contract exists. By the law of Georgia, there is no contract limiting common-law liability, unless the shipper expressly assents thereto.

5. The seventh, ninth, and thirteenth exceptions raise the question that the act of February 23, 1903 (24 St. at Large, p. 81), providing a penalty against a common carrier for failing to adjust and pay within a specified time the claim of a shipper for loss or damage to goods while in the possession of the carrier, is unconstitutional, in that it denies to common carriers the equal protection of the laws. This question has been recently discussed in the case of *Seegers v. Seaboard Air Line Ry.* (decision filed November 13, 1905) 52 S. E. 797, and the constitutionality of the act was sustained, and we are satisfied that such conclusion is correct.

6. The appellant's fourteenth exception alleges error in refusing to instruct the jury as follows: "That under the contract offered in evidence in the case, it is provided that the owner or shipper, shall unload the horse shipped, and if in so doing, through any act or omission on his part solely the horse was injured, the plaintiff cannot recover." This request is faulty in assuming the existence of a special contract, a matter in controversy. Furthermore, the provision in the alleged contract was "that the owner and shipper is to load, transfer, and unload said stock, with the assistance of the company's agent or agents, at his own risk." It is a primary duty of the carrier to load and unload freight, and it cannot transfer to the shipper or owner the consequences of its own negligence in these particulars. *Crawford v. Railway Co.*, 56 S. C. 149, 34 S. E. 80. The complaint was based upon the charge that plaintiff's horse was injured through the negligence of the defendant in failing to provide a safe and suitable place at which to unload said horse, and in failing to provide a safe and suitable passageway or gang-plank on which to unload said horse, and in

carelessly leading said horse over a slick piece of iron. The evidence tended to show that the horse slipped and fell and was injured while being led from the car by plaintiff and defendant's agent over a slick piece of sheet iron used to connect the car with the platform. It may be true that, if the injury to the horse was caused solely by the negligence of the plaintiff while unloading, there should not be a recovery; but the request to charge was not so framed as to submit such question.

7. The fifteenth exception charges error in refusing to instruct the jury in these words: "If the jury find that the defendant furnished a safe and suitable means of unloading the horse in question, and that the injury did not occur on account of the unsafe condition of the same, the plaintiff cannot recover." This request was incorrect in eliminating the question whether the defendant was negligent in furnishing a safe and suitable place for unloading and in the use of the appliances at hand. The court charged in lieu of such request: "If they furnished safe and suitable means to unload the horse, and an injury did occur, and did not occur from unsafe and unsuitable appliances, or from the negligence of the defendant, the plaintiff cannot recover." This modification of defendant's erroneous request to charge is not to be construed as leaving it open to the jury to consider acts of negligence on the part of the defendant not alleged in the complaint, but is to be construed with reference to the negligence alleged in the complaint.

8. The sixteenth exception assigns error in declining to charge the jury as follows: "If the defendant had suitable facilities for unloading stock, and the plaintiff failed to use the same, he cannot complain of the company on that account, but is himself responsible for any damage caused by a failure to use the same." The request was properly refused, as it is the duty of the carrier not only to furnish suitable facilities for unloading stock, but to use such facilities with due care. The request to charge was doubtless framed under appellant's view that plaintiff had made a valid contract exempting defendant from all duty with respect to unloading, except to place at the shipper's disposal appliances which, if used by him, would have resulted in a safe unloading. There was some testimony that there were some timber or skids at hand, which, if they had been placed as guards on the sides of the piece of sheet iron used as a gangway, would have prevented the horse from slipping and falling between the car and the platform, as happened; but, if the use of the slick sheet iron for that purpose without such guards was negligent, it was the negligence of the defendant, present and with the assistance of the plaintiff attempting to perform its duty as a carrier.

9. The seventeenth exception raises the

question that, if Carswell, the shipper of the horse for plaintiff, signed the alleged special contract 10 days after the shipment and injury to the horse, that would bind plaintiff as a ratification of the contract. We have already alluded to the testimony as to the circumstances under which Carswell signed the contract, viz., that it was after the injury and upon representation by defendant's agent that plaintiff's case would not be prejudiced thereby. It would have been error to have instructed the jury in accordance with appellant's contention.

10. The eighteenth exception is as follows: "Because his honor erred in refusing the defendant's eleventh request to charge, as follows: 'If plaintiff, after receiving knowledge that the horse was shipped under a special contract limiting the liability to \$60, and with knowledge that such horse was so shipped, accepted the reduced rate of freight and thereby obtained for himself an advantage, he cannot repudiate the contract without paying or offering to pay the full rate of freight. In other words, he cannot accept the advantages under said special contract, with a knowledge of its terms, and repudiate the liabilities of such contract.' It is submitted that, if the plaintiff with such knowledge accepted the reduced rate of freight, he thereby ratified the contract of shipment upon which it was based, and it would be unjust, unreasonable, and illegal to allow him to recover more than the amount specified in said contract." The request was properly refused, as it assumed the vital question in issue as to whether there was any such special contract.

Such exceptions as may not have been specifically mentioned herein have been duly considered, and are controlled by the principles herein announced.

All exceptions are overruled, and the judgment of the circuit court is affirmed.

(73 S. C. 102)

POOLER et al. v. SMITH.

(Supreme Court of South Carolina. Nov. 27, 1905.)

1. APPEAL—OBJECTIONS TO EVIDENCE.

An objection to evidence, not stating the ground, will not be considered.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1141; vol. 46, Cent. Dig. Trial, §§ 194-210.]

2. WITNESS—IMPEACHMENT.

Though a party has been taken by surprise by testimony of his witness, he cannot contradict him by asking him if he had made a contradictory statement.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1268-1270.]

3. APPEAL—OBJECTIONS TO INSTRUCTIONS.

Where a judge fails to state the issues correctly to the jury, it is the duty of the attorney of the party objecting to call his attention to the fact.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1141, 1309-1314.]

4. PARTITION—EVIDENCE OF TITLE.

In partition, defendant can show that title to the land was in a third person not a party to the record.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 69.]

5. TRIAL—INSTRUCTIONS.

Where plaintiff desires fuller instructions, it is his duty to present requests to the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 628.]

6. APPEAL—EXCEPTIONS.

Where an exception alleges no error, it will not be considered.

7. MARRIAGE—EVIDENCE—WEIGHT AND SUFFICIENCY.

An allegation of marriage must be proved by the preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, § 79.]

8. TRIAL—INSTRUCTIONS.

If a request is substantially given, it is sufficient.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 665.]

9. SAME—CHARGE ON FACTS.

An instruction that, if S. was the widow of E., she would not be in unlawful possession of certain property, was not a charge on the facts, as assuming that she was a widow in lawful possession.

10. NEW TRIAL—SUFFICIENCY OF EVIDENCE.

Where there is evidence to sustain a verdict, the refusal of a new trial is not error.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 142-148.]

Appeal from Common Pleas Circuit Court of Darlington County; Aldrich, Judge.

Action by James Pooler and others against Phyllis Smith. Judgment for defendant, and plaintiffs appeal. Affirmed.

Plaintiffs appeal on following exceptions:

"(1) His honor erred in admitting, over plaintiffs' objection, upon cross-examination of the witness Pooler, evidence of cohabitation and general repute of the defendant and the intestate Edwin Ervin: (a) Because it was collateral testimony, and not responsive to anything drawn out in chief examination. (b) Because it was irrelevant and incompetent as proof of marriage between Edwin Ervin and Phyllis Smith.

"(2) His honor erred in admitting, over plaintiffs' objection, upon cross-examination of the witness Pooler, testimony to the effect that the intestate acknowledged Henry and Ed. Ervin, Jr., as his sons: (a) Because it was incompetent as proving their legitimacy, so as to inherit his estate. (b) Because they are not parties to this action, and are claiming no interest. (c) Because it is not responsive to anything stated by the witness in chief, nor is responsive to any of the issues raised by the pleadings.

"(3) It being clearly shown that the witness William Harvey was sacrificing the plaintiffs and was hostile, his honor erred in not allowing plaintiffs to show that the witness had made contrary statements just before the trial, to wit, by not allowing him to answer the following question: 'Didn't you at that time say that your recollection was clear that

these children were born prior to their marriage?'—the error being this: He denied the plaintiffs the right of protection before the jury, showing that the witness had recently been brought under the influence of the defendant, and was testifying contrary to what the plaintiffs expected. (b) Because it led the jury to believe that the witness' version was substantial, regardless of any contradictory statements he had made.

"(4) His honor erred in admitting, over plaintiffs' objection, upon cross-examination of the witness Pooler, evidence of cohabitation and general repute of the intestate Edwin Ervin and Phyllis Smith, as proof of marriage between them: (a) Because the principal fact of such marriage had not been established by any testimony before the jury. (b) Because it led the jury to believe that cohabitation and general repute was sufficient to show the existence of marriage in a case of this kind. (c) Because it led the jury to believe that, even though an actual marriage may have never occurred, yet the jury may infer it from such testimony. (d) Because it was merely hearsay, and not admissible.

"(5) Because his honor erred in charging the jury the following: 'Phyllis Smith, according to the allegations of the complaint, was not the widow of Edwin Ervin, the intestate. Phyllis Smith alleges that she was, or denies the allegations of the complaint. She denies the charge that she was not his wife and his widow.' (a) Because, it is respectfully submitted, there is no such allegation in the complaint and no such denial in the answer. (b) Because it is a charge upon an assumed fact.

"(6) Because his honor erred in charging the jury the following language: 'There is an allegation, you recollect, that he left no children. The answer of the defendant denies that. Now, that is a question that you must pass upon.' (a) Because there is no such allegation in the complaint or answer. (b) Because if there were such children, they were not claiming and are not parties to the action. (c) Because there was no competent testimony to base such charge upon.

"(7) His honor erred in charging the jury in the following language: 'As to the legitimacy of a child, if you bring up that question, it is simply a question of fact; but the law in this state is, for the peace and repose of families, and for the good of society, that a child, the issue of a man and woman lawfully married to each other, are presumed to be legitimate children. And that presumption prevails.' (a) Because it ignored the necessity of considering whether such children were born prior or subsequent to the marriage. (b) Because it led the jury to believe that although the children were born prior to marriage and illegitimately, yet, by a subsequent marriage of the parties, such children became legitimate. (c) Because the whole and undisputed testimony in this case show-

ed that the children were born long before marriage, if there were ever any marriage. (d) Because it was, at least, in effect, a charge upon the facts, and in violation of Const. 1895, art. 5, § 26.

"(8) His honor erred in refusing to charge the plaintiffs' first request to charge: Because it embodies a sound proposition of law and was applicable to the case. The request was as follows: '(1) That, where facts are shown which are sufficient to throw doubt upon the reality of a transaction, the burden of proof is shifted to those who know the truth, and where they fail to furnish information within their knowledge the presumptions of law are against them.'

"(9) He committed error of law in stating to the jury the following isolated words: 'That, in some instances, may be a correct statement of the law, but an allegation of marriage or an allegation of title is one of those allegations that when plaintiffs put them in their pleadings, they must prove them by a preponderance of evidence.' Because all statements in the complaint relating to marriage could at most amount to a negative averment of a fact wholly within the knowledge of the defendant, of which slight proof only would be sufficient.

"(10) He erred in reading to the jury, then refusing to charge them, plaintiff's fourth request to charge. Because it embodied a sound proposition of law, and was applicable to the case. The request was as follows: '(4) That if the jury conclude from the testimony that the defendant, Phyllis Smith, is in the unlawful possession of this land, took all the rents and profits exclusively to herself, the jury should find such rents and profits for the plaintiffs from the time she went into such possession till the present time. But if the jury should conclude that she was married to the intestate Edwin Ervin, but bore no children to him under the marriage, then the jury should find one-half of such rents and profits for the plaintiffs in the proportions set out in the complaint, and the remaining one-half to the defendant.'

"(11) He erred in charging the following isolated statement: 'If Phyllis Smith was the widow of Edwin Ervin, she would not be in unlawful possession.' Because such language assumed and led the jury to believe that she was the widow, in lawful possession, and is, therefore, a charge upon the facts, and in violation of Const. 1895, art. 5, § 26. The assumed fact is denied, and there is no competent testimony to the contrary.

"(12) His honor erred in not granting a new trial on motion of plaintiffs, for the reason that the jury had found nothing for the plaintiffs: (a) Because the whole and undisputed testimony shows that the two children, Henry and Ed., were born long before the marriage of the intestate, Edwin Ervin, and Phyllis Smith, if such marriage ever occurred. (b) His honor, recognizing that the testimony was undisputed on that point,

erred in refusing the motion, simply because the jury passed upon it. (c) Because the verdict was against his honor's charge. (d) There being no evidence, judge had no discretion to refuse new trial.

"(13) His honor erred in refusing to set aside the verdict, in that there is no testimony to support it: (a) Because there is no testimony going to show that Edwin Ervin and Phyllis Smith ever came together, taking each other for, and declaring themselves man and wife, in the presence of witnesses or any one. (b) Because, while there is no testimony of marriage, plaintiffs offered testimony going to show that the intestate was not married."

S. S. Davis, for appellants. E. Keith Dargan and W. F. Dargan, for respondent.

GARY, A. J. This is an action for partition of land. The complaint alleges that Edwin Ervin died intestate seised and possessed of the land therein described, and leaving as his heirs at law his brothers and sisters described in the complaint; that the defendant Phyllis Smith is in the unlawful possession of said land and claims the same under a pretended marriage with intestate. The defendant denied the material allegations of the complaint. The jury rendered a verdict in favor of the defendant. The plaintiff appealed upon exceptions which will be set out in the report of the case. The exceptions will be referred to by their numbers.

First, second, and fourth exceptions: The appellant did not state the grounds of objection to the testimony. The exceptions cannot, therefore, be sustained. The ruling of his honor, the presiding judge, is sustained by the following authorities: *Perry v. Massey*, 1 Bailey, 32; *Farr v. Thompson*, Cheves, 44; *Bank v. Shier*, 4 Rich. Law, 240; *Bauskett v. Keltt*, 22 S. C. 187.

Fifth and sixth exceptions: These exceptions relate to the issues presented by the pleadings. If the presiding judge did not state the issues correctly, it was the duty of the appellant's attorneys to call attention to such fact. Furthermore, the defendant had the right to show that the title to the land was in a third person not a party to the record. *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 82 Am. St. Rep. 848.

Seventh exception: His honor not only charged in the manner set forth in the exception, but added: "It may, however, be rebutted, where you bring positive proof to show that the child could not be the lawful child of a man and his wife." This was a correct proposition of law, and, if the plaintiff desired fuller instructions, it was their duty to present requests to that effect.

Eighth and ninth exceptions: The language of the presiding judge refusing the request is set forth in the ninth exception, and states a satisfactory reason for refusing to charge the same.

Tenth exception: No errors are specified.

It does not appear from the record that the request was refused, but, on the contrary, it was substantially charged.

Eleventh exception: The request embodied a sound proposition of law, and was properly charged. If the appellants desired a more specific charge, it was incumbent on them to prepare a request to that effect.

Twelfth and thirteenth exceptions: These exceptions relate to the refusal of the motion to grant a new trial. There is testimony tending to sustain the verdict of the jury, but we do not deem it necessary to cite it at length.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

(105 Va. 23)

TOWNSEND et al. v. NORFOLK RY. & LIGHT CO.

(Supreme Court of Appeals of Virginia, Jan. 18, 1906. On Rehearing Feb. 23, 1906.)

1. NUISANCE—PUBLIC SERVICE CORPORATIONS—MATTERS OF PRIVATE NATURE.

A railway and light company, though a public service corporation, stands on the footing of an individual as respects its power house, so that, it being a nuisance, injurious to adjoining property by reason of the vibration of the machinery, the smoke therefrom, and the escaping electricity, the company is liable for the injury; the authority conferred on it by Acts 1897-98, pp. 495, 1020, cc. 463, 989, to construct and operate plants for the generation of electricity, for its own use and for sale, not being imperative, but permissive, and not conferring statutory sanction for the commission of a nuisance, so that it cannot be said that the Legislature contemplated the doing of the very act which occasioned the injury.

On Rehearing.

2. APPEAL AND ERROR—GRANTING WRIT—REVIEW.

While, on a petition for writ of error, the Supreme Court must grant the writ unless the decision questioned is plainly right, it will not disturb the decision and grant an injunction which the lower court has refused, unless the error in refusing it be manifest.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3970.]

Error to Circuit Court of City of Norfolk.

Action by Thomas Townsend and others against the Norfolk Railway & Light Company. Judgment for defendant. Plaintiffs bring error. Reversed.

Tazewell Taylor and Th. A. Williams, for plaintiff in error. White, Tunstall & Wilcox and W. H. Venable, for defendant in error.

KEITH, P. The plaintiffs in error brought an action of trespass against the Norfolk Railway & Light Company, and their declaration states: That they were seised and possessed, as joint owners, of a certain lot of land, with the buildings and improvements thereon, situated on the west side of Cumberland street, in the city of Norfolk, Va.; that the Norfolk Railway & Light Company,

a corporation organized under the laws of the state of Virginia, owned a certain lot in the city of Norfolk, fronting on Cove street; that the defendant had erected on this lot a power house, equipped with large and heavy machinery, consisting of boilers, engines, dynamos, condensers, and generators, for the purpose of generating electric power, and as a part of its equipment of said power house had erected in connection with its buildings three or more metal stacks; that it was the duty of the defendant so to maintain and operate its power house and plant as not to injure or interfere with the comfort, use, and enjoyment by the plaintiffs of their property, but, disregarding its duty in this behalf, on the 1st day of August, 1902, and on divers other days prior thereto and continuously up to the present time, the defendant did so wrongfully and unjustly operate and conduct its plant, or power house, that large columns of smoke, dust, cinders, sparks, and soot had been emitted from the stacks of the defendant, and thrown, propelled, and hurled against, upon, and through the houses of the plaintiffs on the property aforesaid, thereby preventing its proper and useful enjoyment by the plaintiffs; that their property had been made untenable, and that its rental and salable value had been depreciated; that the houses of the plaintiffs upon their property, as aforesaid, had been and were being greatly shaken and damaged, in such a manner as to cause the same to become and be uncomfortable, dangerous, and uninhabitable; that by reason of the premises the property of the plaintiffs had deteriorated in value, both as income-producing and as marketable property; and, further, that the defendant, by allowing the electric current from the wires and conduits, or on return circuit, to escape from its wires, or returning by ground circuit, to run over and through the pipes of metal placed to carry water and gas to the houses of plaintiffs, has caused the metal pipes, thus acting as conductors of electricity, to be eaten up and destroyed, and that although the defendant has been often requested by the plaintiffs to refrain and desist from the wrongful and unjust operation and management of its said plant, or power house, in the several ways hereinbefore described, yet it has refused to desist from the said wrongful and unjust operation and management of its plant as aforesaid, to the damage of the plaintiffs \$2,000.

To this declaration the defendant filed a special plea, in which it sets out that, before the time of the committing of the alleged grievances in the declaration mentioned, the General Assembly of Virginia had passed an act to incorporate the Virginia Electric Company, by which it was provided that it should have power to construct, lease, purchase, or acquire by consolidation with any other company or companies, and operate and maintain in the city of Norfolk, suitable works, ma-

chinery, or plants for the manufacture of electricity, and for the sale and distribution of the same; that it should have power to sell and distribute the same for public or private illumination, for heating and for power, and for any other purposes which the same might be used for; that it should have power to do such acts and things, and conduct such enterprises as might be convenient in connection with or incidental to the enjoyment of the powers thereinbefore conferred, and that it might, with the consent of the proper authorities of the city of Norfolk, use the streets and roads thereof for laying its mains, pipes, wires, and erecting its poles; that by an act of the Legislature, entitled "An act to incorporate the Old Dominion Electrical Development and Power Company" (Acts 1897-98, p. 1020, c. 989) it was provided that the said Old Dominion Electrical Development & Power Company should have power to erect, maintain, and operate plants in this state for the generation of electricity and the supply of electric current for its own use and for sale to persons, natural or artificial, desiring to use the same for heat, light, or power, or any and all use to which the electric current might then or at any time thereafter be applicable, and might manufacture, use and sell, distribute and furnish the same for said purposes, and all electrical supplies of all kinds, to all and any persons and coporations, upon such terms as might be agreed upon by and between the contracting parties; that by the 7th section (page 1022) of the act last above-mentioned, it was provided that the board of directors of the Old Dominion Electrical Development & Power Company should have the power to change the name of that company and to adopt such other name as they might deem proper upon the fulfillment of certain specified conditions; that in pursuance of said power the board of directors changed the name of the Old Dominion Electrical Development & Power Company, so that it became and was the Norfolk & Ocean View Railway Company; that said last-mentioned company, by virtue of the powers granted to it by its acts of incorporation, acquired the works, property, rights, privileges, and franchises of the Virginia Electric Company; and that said Norfolk & Ocean View Railway Company thereby became and was entitled, empowered, and authorized to do and perform any, all and singular, the acts referred to in the act of incorporation of the Virginia Electric Company, as well as any, all, and singular the acts requisite, necessary, or proper in connection with the powers, privileges, and rights of the said company in the matter of carrying on the business of the said company. The plea further avers that on the 2d day of November, 1899, by an agreement entitled "Agreement of Consolidation of the Norfolk Street Railroad Company and the Norfolk & Ocean View Railway Company under the Name of the Norfolk Railway & Light Company," the said

Norfolk Railway & Light Company became and was possessed, and still is possessed, of any and all and singular the rights, franchises, privileges, powers, works, properties, and all other interests of any sort whatever of the said constituent companies, the Norfolk Street Railroad Company and the Norfolk & Ocean View Railway Company, and especially and particularly the particular powers, privileges, and rights herein before more fully specified as to the operation and maintenance of the plants of the said companies; that under the said consolidation agreement the defendant became and was possessed, and still is possessed, of the said plant, power house, and manufactory, which is the same plant, power house, and manufactory as are complained of in the declaration of the plaintiffs; that not only has it obtained legislative sanction and authority for the operation of the said plant, power house, and manufactory, machinery, and boilers, but that furthermore, at divers times, the defendant has obtained permission and authority from the councils of the city of Norfolk to install the said machinery and boilers in its power house and manufactory; and further avers that, pursuant to the legislative and municipal authority had and obtained as aforesaid, it has ever since operated, and still continues to operate, its said plant, in a proper, careful, reasonable, and suitable manner; that it is necessary to the proper carrying on of defendant's business to operate and maintain the said power house, manufactory and plant in the manner in which it has been and is being operated; and that it has done no damage and occasioned no discomfort that is not the natural, proximate, inevitable, and necessary result of such proper, careful, reasonable, and suitable operation, without this, that the said defendant is guilty of the said supposed grievances, or any of them, in manner and form as the said plaintiffs bath above thereof complained; and of this it puts itself upon the country.

The plaintiffs demurred to this special plea, and that demurrer was overruled by the court. And, the plaintiffs not withdrawing, nor desiring to withdraw, their demurrer, the court gave judgment in favor of the defendant.

Section 153, art. 12, of the Constitution [Va. Code 1904, p. ccclix], declares that the term "public service corporation" shall include "all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley or public highway, whether along, over, or under the same, in a manner not permitted to the general public."

Under the terms of this definition it is apparent the Norfolk Railway & Light Company is to be deemed a public service corporation.

It will be observed that the declaration

nowhere states that the injury of which plaintiffs complain was caused by any negligent act upon the part of the defendant. The contention of plaintiffs is that in the operation of its plant the defendant wrongfully caused smoke, dust, cinders, sparks, and soot from its chimney stacks to be thrown and propelled upon and through the houses of the plaintiffs; that by the operation of its heavy machinery it caused the houses of the plaintiffs to be greatly shaken and damaged; and that by permitting the electric current from its wires and conduits, or on return circuit, to escape from its wires, or returning by the ground circuit, to run over and through the pipes placed to carry water and gas to the houses of plaintiffs, the pipes had been eaten up and destroyed; and the useful and proper enjoyment of the property had been impaired, it had been rendered untenable, and its value diminished.

The defendant replies that it has operated, and continues to operate its plant in a proper, careful, reasonable, and suitable manner, in pursuance of legislative and municipal authority conferred upon it.

The question, therefore, for us to consider, is whether or not the court erred in overruling the demurrer to this plea.

The declaration sets forth a nuisance. The defendant justifies what it has done by pleading legislative authority for its acts.

A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of a public nature which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that, in doing that which under the law it may be required to do, it cannot be considered as doing an unlawful act; and if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*.

This aspect of the case was before this court in *Fisher v. Seaboard Air Line Railway Co.*, 102 Va. 363, 46 S. E. 381, where it was said that a railroad company acting under authority of law, whose road is constructed and operated with judgment and caution, and without negligence, is not liable to an adjacent landowner for damages resulting from noises, jarring and shaking of buildings, or dust and smoke incident to the running of trains; for no action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way. To the authorities relied on in support of this case many others may be added.

Beseman v. Pennsylvania Railroad Co., 13 Atl. 164, from the Supreme Court of New Jersey, is strikingly in point. That was a suit for damages done to the houses and lands of plaintiff by the running of defendant's trains, to which the defendant replied that it acted under franchises derived from

the public grant, and that it had built its road and run its trains, carrying merchandise and freight, near to the lands of the plaintiff, doing the plaintiff no more damage than that which necessarily resulted from the transaction of such acts and business, and that for such incidental and unavoidable damage it was not responsible. The plaintiff contended that, with respect to private property, a railroad is per se a nuisance whenever it throws a detriment, such as would be actionable at common law, on such property. Upon this the court said: "That this proposition, on which the plaintiff's case rests, is a most momentous one, is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damaged by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damaged at all, unless, indeed, the loss sustained be so small as to be unnoticeable by force of the maxim '*De minimis non curat lex*.' The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide-spreading, impairing in a sensible degree some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching such landowners, general tort-feasors. Their tracks run for miles through the cities of the state, and every landowner on each side of the track would be entitled to his action; and so, in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility. Nor is this susceptibility to be sued on all sides the only, or even the worst, consequence of the theory in question; for, if these rights of action exist, it follows, necessarily, that each of the persons in whom they are vested can prevent the continuance of the wrong out of which such rights of action arise. If this plaintiff should recover two or three verdicts against the defendant because of the damage that is inseparable from the running of its trains, there is plainly no ground on which the chancellor could refuse to enjoin a continuance of the nuisance. Nor does there appear to be any relief from such a consequence. The aggrieved landowner would be the master of the situation; for there is no law by force of which the company could

take his land in invitum, or compel him to have his damages assessed once for all. In short, the plaintiff's claim involves the assertion that he can put a stop to the business of the defendant at the point in question." In concluding his opinion, the learned judge says: "I find no embarrassment in disposing of the present subject, for I have put railroads in the category of public agents, and have regarded them as possessed of all the immunities, in the particular in question, belonging to such an office."

That railroad corporations—public service corporations—are in many aspects to be regarded as quasi public corporations, can no longer be doubted. Upon that theory their duties are measured and their rights determined; and the control which the state asserts, the exercise of which is becoming more and more necessary with the growth and development of our transportation system, of which railroads constitute so essential a part, rests upon the public character of such corporations. A railroad, in the operation of its trains in the transportation of freight and passengers, is in the exercise of a public duty, and should be permitted to apply the same principles of construction when it pleads, for its protection, the powers conferred upon it by the Legislature, as are urged when the obligations imposed by the same charter are insisted upon in the effort to compel such corporations faithfully to perform the duties which they have assumed with respect to the public.

It would be easy to multiply authorities along this line. Indeed, *B. & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, upon which plaintiffs in error justly rely in another aspect of this case, uses the following language:

"Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

We shall not press this view of the case further, for counsel for plaintiffs in error state in their brief that they do not "seriously contest" the doctrine enunciated by this court in *Fisher v. Railway Company*, *supra*.

But was the defendant in error acting in its public capacity when it committed the grievances complained of? Every allegation in the declaration is directed against the injuries inflicted by the operation of the power house of the defendant. It is true that an electric railway cannot be operated without a power house; it is true that an engine house

is a necessary adjunct to a steam railway; but they are incidents to the operation of the road, with which the public has no concern.

Pollock on Torts, at page 158 of the second edition of his work, says: "A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of his house."

In *Re Rhode Island R. Co.* (R. I.) 48 Atl. 592, 52 L. R. A. 879, it is said: "The common carrier serves both the public and itself. It has its public and private functions. The public part is the exercise of its franchise for the accommodation of the public; the private part is its incidental business, with which the public is not concerned, and which the company manages for its own interest. The company carries passengers over its road as a public duty, but the generation of the power to propel cars is the private business of the company. Whatever is necessary to the exercise of the franchise is for the benefit of the public, but that which pertains simply to means of supply is a private business of the company."

To the same effect is *Louisville & Nashville Terminal Co. v. Jacobs* (Tenn.) 72 S. W. 957, 61 L. R. A. 192, where it is said: "But over and beyond this, we think a corporation, in selecting a place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use."

In *Beseman v. Railroad Co.*, *supra*, the court said: "A railroad company, in selecting a place for repair shops and engine house, acted altogether in its private capacity. Such location was a matter of indifference to the public; and consequently with respect to such an act the corporation stood on the footing of an individual and was entitled to no superior immunities."

In *Baltimore & Potomac R. Co. v. Fifth Bap. Ch.*, *supra*, the Baptist Church claimed that its services were habitually interrupted and disturbed by the hammering noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam; that these noises were at times so great as to prevent members of the congregation, sitting in parts of the church farthest from the shops, from hearing what was said; that the act of blowing off steam occupied from 5 to 15 minutes, and frequently compelled the pastor of the church to suspend his remarks. The main reliance of the railroad company to defeat the action was the authority conferred upon it by the act of Congress of February 5, 1867, to exercise the same powers, rights, and privileges in the construction of a road in the District of Columbia, the line of which

was afterwards designated, which it could exercise under its charter in the construction of a road in Maryland, with some exceptions not material here. By its charter it was empowered to make and construct all works whatever which might be necessary and expedient in order to the proper completion and maintenance of the road. In its opinion the court says: "It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skillfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit. In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. * * * Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion."

In *Ridge v. Railroad Co.* (N. J. Ch.) 43 Atl. 278, the *Beseman Case*, supra, and *Railroad Co. v. Fifth Bap. Ch.*, supra, are considered, and the court says: "In the latter case it was denied by the Supreme Court of the United States that the railroad had been invested with the privilege of building an engine house or repair shop next to a church in the city of Washington. The court held that the grant of power did not authorize the company to place such structure wherever it might think proper in the city without reference to the property or rights of others. The doctrine of that case was approved in the opinion of *Beseman v. Railroad Co.*, supra, upon the ground that in selecting the place for repair shops the railroad company acted altogether in a private capacity. Such location, it was said, was a matter of indifference to the public, and consequently, with respect to such act, the corporation stood upon the footing of an individual, and was entitled to no superior immunities. What was meant was that while the public was concerned that a railroad company should have all the appliances, including repair shops, to make its public service effective, it was immaterial to the public where

such appliances were placed, so long as the service was efficient. All that concerns the public is to have an efficient service in the way of transportation of persons and freight. The company is shielded from responsibility for incidental damages resulting from acts which are necessary to bring about such service. In the federal decision it was admitted that the company, by virtue of its franchise, had the right to build repair shops and engine houses, but, having the liberty to choose different sites for its structures, it was bound to select one where they would not inflict an injury upon the property of others."

In *Rapier v. London Tramways Company* (1893) L. R. 2 Ch. Div. 588, the syllabus of the opinion delivered by Lindley, L. J., is as follows: "The defendants were a tramway company, who were empowered by their act to lay down and construct two lines of tramway according to deposited plans, together with the works and conveniences connected therewith. The act gave no compulsory powers for taking lands, and made no special mention of building stables. The defendants constructed the lines, and built some large blocks of stables near the plaintiff's house for the horses employed in drawing the cars. The plaintiff complained of the smell caused by the stables, and brought an action for an injunction to restrain the defendants from using the stables so as to cause a nuisance. Held (affirming the decision of Kekewich, J.) that, although horses were necessary for the working of the tramways, the company were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbors, and that it was no sufficient defense to say that they had taken all reasonable care to prevent it."

Other aspects of this case were discussed before us, upon which we have not deemed it necessary to touch; and without intimating any opinion upon them, except in so far as has been herein expressed, we shall content ourselves for the present with saying that we are of opinion that the circuit court should have sustained the demurrer to the special plea.

On Petition for Rehearing.

In the opinion delivered by the court when the judgment sought to be reviewed by this petition for rehearing was pronounced, it is said:

"The declaration sets forth a nuisance. The defendant justifies what it has done by pleading legislative authority for its acts.

"A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that in doing that which under the law it may be

required to do, it cannot be considered as doing an unlawful act; and if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*."

This position is earnestly assailed in the petition for a rehearing, where it is broadly asserted that no such distinction between the public and private functions of a corporation exists, and that all is lawful which the Legislature authorizes to be done, although the authority conferred be not imperative but merely permissive. It may be that in the distribution of the duties of a public service corporation into those of a public and those of a private nature, the classification was inaccurate and unscientific, though it has the sanction of courts of the highest respectability. By other courts the same conclusion is reached by a consideration of the language used by the Legislature in the act of incorporation, and by its construction determining whether or not the lawmaking power intended to permit an act to be done, or to require its performance—to confer a privilege, or to impose a duty.

In the case of *Fisher v. Seaboard Air Line Railway Co.*, 102 Va. 363, 46 S. E. 381, the position of this court is well stated in the syllabus: "A railroad company, acting under authority of law, whose road is constructed and operated with judgment and caution, and without negligence, is not liable to an adjacent landowner for damage resulting from the noises, jarring and shaking of buildings, dust and smoke, incident to the running of trains. No action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way." This is to be understood, of course, in the light of the facts presented in that record, where damages were claimed for the noises, jarring and shaking of buildings, dust and smoke incident to the running of trains. We were of opinion that in the absence of negligence, no damages could be recovered, for the reason that the road was obliged to run its trains, which could not be done, whatever the degree of caution exercised, without the inconveniences and injuries enumerated.

In *Makely v. Southern Railway Company*, complaint was made of the operation of trains of the defendant company, and of a power house maintained by it for the purpose of lighting the various buildings in its yards. There was a bill praying an injunction filed in the circuit court of Alexandria, which the learned judge of that court refused, but without prejudice to the right of plaintiff to seek her remedy at law. There was no question made as to the solvency of the railway company or its ability to respond in any damages which might be adjudged against it. We concurred with the judge of the circuit court in the opinion that, at least in the preliminary stages of

the case, before the right had been established at law, it would be improper to enjoin the defendant company. And just here it may be proper to state that while, upon a petition for a writ of error or appeal, this court is required to grant the writ prayed for unless the decision called in question be plainly right, we should not overrule the decision of the lower court, and grant an injunction which it has refused, unless the error in refusing it be manifest.

We have mentioned the *Fisher Case* and the *Makely Case*, not with any view to vindicating our consistency, but because we felt that it would be well to clear up any doubt that might exist as to the attitude of this court with respect to those decisions.

Coming back to the petition for rehearing, we find the position of the petitioner thus stated: "The application of this doctrine of 'private capacity' is wholly inconsistent with the principles enunciated in the *Fisher Case*. We think that the fact that the doctrine is wholly erroneous can easily be demonstrated by stating it in the form of a syllogism, thus:

"The injuries done to property without negligence by a public service corporation, for which it will be held liable, are those done by it in its private capacity.

"All injuries done to property without negligence by a public service corporation are done by it in its private capacity; i. e., by the means and methods employed.

"Therefore a public service corporation is liable for all injuries to property done by it without negligence.

"The conclusion is manifestly incorrect, and at least one of the premises must therefore be erroneous. The second premise we think we have demonstrated to be correctly stated; that is, that injuries to property are the result of the means and methods employed, and not of the public service performed. The error lies, therefore, in the first premise.

"The vice in this premise, and the simple answer to the various illustrations which we have given above, is demonstrated by a statement of the true principle, which is that a public service corporation, acting without negligence, is not liable for injuries which are the necessary consequence of the performance of its authorized functions. And we need go no further in search for authority for this position than the *Fisher Case* itself, where the court, quoting from *Pollock on Torts*, said: 'It is settled that no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner.'"

We must again advert to the principle that all opinions are to be considered in the light of the facts to which they apply, for the transition from an authorized to an unauthorized act—from that which is lawful to that which is unlawful—is oftentimes by easy and almost imperceptible gradations, so that in the enunciation of a principle the eye

must always be kept upon the precise facts upon which it is to operate.

Almost all the questions upon which the law is doubtful or obscure arise at the vanishing point between contradictory and irreconcilable principles, and mark the effort "to deduce harmony from the reciprocal struggle of discordant powers." Burke.

Law is not an exact science. It has no invariable standard by which rights may be measured. It does not submit to inflexible rules of logic, nor can it, in its application to the varied affairs of men, always clothe itself in the form of a syllogism; and while we might hesitate to go to the full length of the view expressed by the great moralist we have just quoted, it is to a large extent true that "every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter."

We should not, therefore, have been disposed to abandon our position, even though it had failed when subjected to the syllogistic test; but we are not prepared to admit that the test has been correctly applied. We do not admit the truth of the minor premise. We do not admit that all injuries done to property without negligence by public service corporations are done by them in their private capacity.

All injuries done to property without negligence by a public service corporation for which it will be held liable, it may perhaps be conceded, are done by it in its private capacity; but there are injuries done by it in its public capacity for which it will not be held liable, and in that distinction is to be found the very gist of this controversy.

Nor can we concur in the answer which the petitioner suggests to the illustrations which it had given. We cannot admit that a public service corporation, acting without negligence, is, under all circumstances, irresponsible for injuries which are the necessary consequence of the performance of its authorized functions. There must be something more than authority to do the act complained of. It must be an act which the corporation is required to perform—a duty which it owes and which has been imposed upon it by the legislative act granting the charter by which it exists—or at least it must appear that the particular act complained of and immunity from its consequences were within the contemplation of the Legislature. It is true that in *Pollock on Torts*, quoted in the *Fisher Case*, supra, it is said that "no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner." But *Pollock* also says, in his second edition, at page 158: "A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from

them is a nuisance to him in the occupation of his house." The two statements by the same author are apparently opposed to each other, and yet may be in entire harmony as applied to varying conditions of facts.

In *Managers of the Metropolitan Asylum District v. Hill* (1880-81) 6 App. Cas. L. R. 193, the metropolitan poor act, authorizing the formation of districts and district asylums for the care and cure of sick and infirm poor, created corporations for that purpose, and gave authority to the poor law board to issue directions to these corporations, enabled them to purchase lands and erect buildings for the purposes of the act, and made the rates of parishes and unions liable for the outlay thus incurred. But it does not by direct and imperative provisions order these things to be done, so that if, in doing them, a nuisance is created to the injury of the health or property of persons resident in the neighborhood of the place where the land is purchased or the buildings erected, it does not afford to these acts a statutory protection. And therefore, where such nuisance was found as a fact, it was held that the district board could not set up the statute, nor the orders of the poor law board under it, as an answer to an action, or to prevent an injunction issuing to restrain the board from continuing the nuisance; and in continuing his opinion Lord Blackburn states this principle: "On those who seek to establish that the legislature intended to take away the private rights of individuals, lies the burden of showing that such an intention appears by express words or necessary implication." And per Lord Watson it was said: "Where the terms of a statute are not imperative, but permissive, the fair inference is that the Legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights."

That case finely illustrates the effect of a statute merely permissive in its terms.

In *London, Brighton & South Coast Ry. Co. v. Truman and Others*, 11 App. Cas. L. R. 1886, a railway company were authorized among other things to carry cattle, and to purchase by agreement, in addition to the lands which they were empowered to purchase compulsorily, any lands, not exceeding in the whole 50 acres, in such places as should be deemed eligible, for the purpose of providing additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite. The company were also empowered to sell such additional lands and to purchase in lieu thereof other lands which they should deem more eligible for the aforesaid purposes, and so on from time to time. The act contained no provision for compensa-

tion in respect of lands so purchased by agreement. Under this power the company, some years after the expiration of the compulsory powers, bought land adjoining one of their stations, and used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station the noise of the cattle and drovers was a nuisance which, but for the act, would have been actionable. There was no negligence in the mode in which the company conducted the business. Held, that the purpose for which the land was acquired being expressly authorized by the act, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company were authorized to do what they did, and were not bound to choose a site more convenient to other persons; and that the adjoining occupiers were not entitled to an injunction to restrain the company, distinguishing between the case of *Metropolitan Asylum Dist. v. Hill*, just cited. Among those who delivered opinions in this case was Lord Blackburn, from whom we have just quoted, who says, in part: "I do not think there can be any doubt that if, on the true construction of a statute, it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighboring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the legislature"—again resting the case upon a proper construction of the act of incorporation. In this case the House of Lords reversed the decisions of the Court of Appeal, and of North, J., which is to be found in 25 Ch. Div. 428. It undertakes to distinguish, while it does not overrule, *Metropolitan Asylum Dist. v. Hill*, supra, and seems to rest upon the express terms of the act of Parliament under consideration. It is at most merely persuasive authority, and if it decides that a merely permissive authority from the Legislature confers complete immunity from acts which constitute a nuisance, if not negligently performed, it would be irreconcilable with other English cases of high authority—indeed, of equal authority with itself—with the decisions of the Supreme Court of the United States, and with those of state courts, to which we shall presently advert.

In *Cogswell v. Railroad Co.*, 103 N. Y. 10, the syllabus is as follows:

"Whether the Legislature can authorize a railroad corporation to maintain an engine house, under circumstances which, if maintained by an individual, would by the common law constitute a nuisance to private property without providing compensation, *quære*.

"But if this should be conceded, nevertheless the statutory sanction which will justify an injury by a railroad corporation to private property without making compensation

therefor, and without the consent of the owner, must be express or given by clear and unquestionable implication from the powers expressly conferred so that it can fairly be said that the Legislature contemplated the doing of the very act which occasioned the injury; it may not be presumed from a general grant of authority.

"Where the terms of a statute giving authority to such a corporation are not imperative, but permissive, this does not confer license to commit a nuisance, although what is contemplated by the statute cannot be done without."

In *Bohan v. Port Jervis Gaslight Company*, 122 N. Y. at page 18, 25 N. E. at page 246, 9 L. R. A. 711, it is said that:

"Although the acts complained of are inseparably connected with the carrying on of the business itself, and the resulting damages a necessary consequence, if those acts constitute a nuisance per se, it is not necessary to show negligence in order to sustain a recovery.

"Every person is bound to make a reasonable use of his property, having respect for his neighbor's right. A use which produces destructive vapors and noxious smells, resulting in material injury to the property and the comfort of those dwelling in the neighborhood, is not reasonable, and is a nuisance per se.

"As a general rule, corporations authorized by statute to carry on a business, although it may be of a quasi public character, are under the same obligations to make a reasonable use of their property and to respect the rights of others as are citizens.

"While the Legislature may authorize acts, which would otherwise be a nuisance, when they affect or relate to matters in which the public have an interest or over which they have control, the statutory authority which affords immunity for such acts must be express, or a clear and unquestionable implication from powers expressly conferred, and it must appear that the Legislature contemplated the doing of the very act which occasioned the injury."

This whole subject is considered by the Supreme Court of the United States, in *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 710, 27 L. Ed. 739, which was decided in 1883, and has met with general approval. The Baltimore & Potomac Railroad Company was authorized by act of Congress to lay its track within the limits of the city of Washington, and to construct other works necessary and expedient to the proper completion and maintenance of its road. It erected an engine house and machine shop on a parcel of land immediately adjoining the church, and used them in such a way as to disturb, on Sundays and other days, the congregation assembled in the church, to interfere with religious exercises therein, break up its Sunday Schools, and destroy the value of the building as a place

of public worship. Suit was brought against the railroad company to recover damages, and among other defenses the company relied upon statutory authority; and its counsel undertook to maintain that "no action will lie and no recovery can be had for doing that which the law authorizes the party to do, and that cannot be adjudged a nuisance and be held unlawful which the law declares to be lawful." Answering that contention, Mr. Justice Field says:

"The authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road, did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

"Undoubtedly, a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

It is said in the petition that the latter part of this quotation is a dictum. We hardly think so; but even if it were, it is the dictum of a judge whose great ability entitles his every utterance to the highest respect, and is sanctioned by the concurrence of the entire court. We may safely consider that opinion as expressing the fixed views of the Supreme Court of the United States upon the questions discussed.

The legislative authority relied upon in

this case—Acts 1897-98, pp. 495, 1020, cc. 463, 989, respectively—is as follows:

At section 2, p. 496, occurs the following language: "The said company shall have power to construct, lease, purchase or acquire by consolidation with any other company or companies, and operate and maintain in the city of Norfolk, or both, and in any other city, town or village in the said county, suitable works, machinery and plants for the manufacture of electricity, and for the sale and distribution of the same; and it shall have power to sell and distribute the same for public and private illumination, for heating, for power and for any other purposes which the same may be used for, and it shall have power to do such acts and things, and conduct such enterprises as are convenient in connection with or incidental to the enjoyment of the powers hereinabove conferred, and may, with the consent of the proper authorities of the city of Norfolk, and of such other city or county as are named above, use the streets and roads thereof for laying its mains, pipes and wires and erecting its poles."

And at section 3, p. 1020, it is declared that: "The said company is authorized to promote, establish and maintain the business of a general railway and electrical company. To erect, maintain and operate plants in this state for the generation of electricity and the supply of electric current for its own use and for sale to persons, natural or artificial," etc.

In these quotations is found the sole authority of the defendant to permit or to require, to excuse or to justify it in the performance of the acts complained of in this suit. The case is, therefore, plainly to be classed with *B. & P. R. Co. v. Fifth Baptist Church*, and other cases which we have cited, in which the effect of legislative authority has been discussed. It will be seen that the language is not imperative, but permissive, and that it does not confer statutory sanction for the commission of a nuisance in any way whatever, and most assuredly cannot be said to confer it in express terms, "or by clear and unquestionable implication from the powers given," so that it cannot be fairly said that "the Legislature contemplated the doing of the very act which occasioned the injury," and immunity is not to be presumed from a general grant of authority.

But it is said that the decision in this case, if permitted to stand, will "practically debar the use of many of the most important and developing features of our modern growth."

It would be a source of regret if, in the administration of justice by the establishment and enforcement of sound principles, the prosperity of our people should be hindered or checked, but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give to every citizen a

remedy for wrongs he may sustain, even though inflicted by forces which constitute factors in our material development and growth. Courts have no policies, and cannot permit consequences to influence their judgments further than to serve as warnings and incentives to thorough investigation and careful consideration of the causes submitted to them. Those duties being faithfully performed, courts may await the result with patience, if not always with confidence, and say, with the great Lord Mansfield, "Flat justitia, ruat celum."

The petition to rehear is denied.

(105 Va. 867)

SATTERFIELD v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 8, 1906.)

1. INDICTMENT — ALLEGATION OF PREVIOUS CONVICTIONS—SUFFICIENCY.

An indictment for petit larceny alleged that accused had been twice before sentenced for a like offense and described the warrants issued against him for the prior offenses, which charged that accused did unlawfully take, steal, and carry away certain property, without averring that the taking was felonious. *Held*, that the indictment showed prior convictions of petit larceny, under Va. Code 1904, § 3907, prescribing a punishment for one convicted of petit larceny after prior convictions of a like offense.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 304.]

2. SAME.

The procedure provided by Va. Code 1904, § 3907, declaring that when a person is convicted of petit larceny, and it is alleged in the indictment and found by the jury that he has been before sentenced for a like offense, he shall be confined in jail not less than 80 days nor more than 1 year, etc., is cumulative, and leaves unimpaired the authority to prosecute an offender independently for successive offenses of petit larceny; and when that is done the punishment for the crime is unaffected by the fact that he may have been previously sentenced, and in such case the punishment is that prescribed by section 3707, and an indictment for the third offense of petit larceny is not bad because it alleges that accused was fined only for the second offense.

3. SAME.

As courts will take judicial notice of the charter of the city of Danville and the jurisdiction which chapter 5, § 5, thereof, as amended by Acts 1895-96, p. 596, c. 562, confers on the mayor's court, an allegation in an indictment for petit larceny that accused, formerly convicted of a like offense in the mayor's court of Danville, had been convicted by a court of competent jurisdiction, was sufficient, without showing the fact that it had jurisdiction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 304.]

4. SAME.

An indictment, alleging, for the purpose of subjecting accused to additional punishment, that he had been previously convicted of crime, is good for the crime charged, though the former conviction cannot be shown.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 307.]

5. CRIMINAL LAW—VERDICT—SUFFICIENCY.

Va. Code 1904, § 3907, provides that for a third offense of petit larceny accused shall be confined in the penitentiary not less than one year, nor more than two years. An indictment

for larceny charged that accused had been twice before convicted of a like offense. The verdict was: "We * * * find the prisoner guilty as charged in the * * * indictment, and fix his punishment at one year in the state penitentiary." *Held*, that the verdict impliedly showed that the jury found that accused had been twice before convicted of a like offense, and was sufficient.

Error to Corporation Court of City of Lynchburg.

James Satterfield was convicted of petit larceny, and he brings error. Affirmed.

James H. Guthrie, for plaintiff in error. Wm. A. Anderson, Atty. Gen., for the Commonwealth.

WHITTLE, J. At the December term, 1905, of the corporation court of the city of Lynchburg, the plaintiff in error, James Satterfield, was indicted for petit larceny. The indictment also alleged that the accused had been "twice before sentenced in the United States for the like offense," and proceeded to set out in totidem verbis two warrants against him, with the judgment of conviction and sentence of the mayor of the city of Danville, Va., before whom he was tried, imposing a fine for the commonwealth and city, respectively, indorsed on each.

There was a demurrer to the indictment, which the court overruled. Thereupon the accused pleaded not guilty, and upon the trial of that issue the jury returned a verdict of guilty, and fixed his punishment at one year in the state penitentiary. The court likewise overruled a motion to set aside the verdict as contrary to the law and the evidence, and rendered the judgment under review, sentencing the prisoner in accordance with the verdict of the jury.

The grounds of demurrer to the indictment may be considered in the order in which they are stated in the petition for the writ of error.

It is insisted, in the first place, that, the accused having been indicted for petit larceny, the additional allegation that he had been twice before sentenced in the United States for the "like offense" is, standing alone, an insufficient averment in a prosecution under section 3907, Va. Code 1904, and that the warrants described in the indictment are not warrants for petit larceny, because they fail to charge the felonious taking of the property alleged to have been stolen.

The precise question involved in this assignment was passed on by this court in the recent case of *Jones v. Morris*, 97 Va. 43, 33 S. E. 377. At page 48 of 97 Va., page 378 of 33 S. E., the court observes: "For like reasons we are of opinion that the objection to the form of the warrant cannot be maintained. 'A warrant,' says Bishop (volume 1, p. 187), 'need not set out the crime with the fullness of an indictment, but it should contain a reasonable indication thereof. Minor defects will not render it inadequate as a justification to the officer.' It is true

that the warrant in this case charges that Morris unlawfully did take, steal, and carry away money of the value of \$40. It omits to charge that it was done feloniously, and we are not concerned to say that that word ought not properly to have appeared in it, or, if objected to by Morris, the warrant might not, for that reason, have been considered defective. The fact remains that no objection was taken, that the whole subject was investigated, and judgment of acquittal rendered. That judgment, we repeat, is a complete bar for any further prosecution for the same offense."

Wharton, in his work on Criminal Pleading and Practice (section 260), states the doctrine as follows: "The word 'feloniously' was at common law essential to all indictments for felony, whether at common law or statutory, although, the reason for the term being purely arbitrary, it is no longer necessary unless prescribed by statute, or unless describing a common-law or statutory felony." See, also, 1 Bishop's Crim. Law, § 260.

The term "felonious" is not used in the Virginia statute defining petit larceny, and the charge in the warrant that the accused did unlawfully take, steal, and carry away the property of another distinguishes the offense from a mere trespass, and stamps it as petit larceny.

The definition of Webster and other lexicographers of the verb "to steal" is "to take and carry away feloniously"; and the words "steal" and "larceny" are synonymous.

We are of opinion that the foregoing authorities are conclusive as to the sufficiency of the warrants in question, more especially when they are made the subject of collateral attack.

It is further insisted that the indictment is insufficient as an indictment for the third offense of petit larceny, because it alleges that the accused was fined for the second offense, the punishment for which, it is said, is not by fine, but by confinement in jail not less than 30 days nor more than 12 months. Va. Code 1904, § 3907.

This objection is founded upon the erroneous hypothesis that the accused was only amenable to prosecution for the second offense of petit larceny under section 3907. But the procedure provided by that section is not intended to be exclusive. The redress afforded by it is cumulative merely, and leaves unimpaired the authority of the commonwealth to prosecute and punish an offender independently for successive offenses of petit larceny, and when it so elects to proceed the punishment for the crime is unaffected by the fact that he may have before been sentenced in the United States for a like offense, and the punishment in such case is confinement in jail not less than 15 days nor more than 6 months, or by fine of not less than \$5 nor more than \$100, or both. Va. Code 1904, § 3707.

The third and last objection to the indictment is that it does not allege that the conviction of the accused was by a court of competent jurisdiction; that, the mayor's court of the city of Danville being a court of special and limited jurisdiction, there is no presumption in favor of its jurisdiction; and the fact that it has jurisdiction must affirmatively appear.

We are of opinion that this assignment is also without merit.

By section 5 of chapter 5 of the charter of the city of Danville, as amended by the act approved March 2d, 1896 (Acts 1895-96, p. 596, c. 562), it is provided that, "in criminal cases under the laws of the state, he [the mayor] shall exercise all the power and authority of a justice of the peace, not only within the corporate limits of said city, but for the space of one mile without and around the same." The courts will take judicial notice of such a city charter and the jurisdiction which it confers without averment or proof. *Duncan v. City of Lynchburg*, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331.

But, if such were not the case, the rule applicable to this species of indictment is thus accurately and succinctly stated in *Am. & Eng. Enc. of Pl. & Pr.* vol. 10, p. 490: "Where an indictment is drawn with a view to subjecting the defendant to additional punishment by reason of the fact that he had previously been convicted of the same offense, it will not invalidate the indictment itself if the former conviction cannot be shown, or if a former conviction which was not legal is shown, but the indictment will still be good for the offense charged therein without reference to the former conviction."

The trial court, therefore, did not err in overruling the demurrer to the indictment.

The next assignment of error involves the sufficiency of the verdict to warrant the court in rendering judgment upon it, and *Thomas' Case*, 22 Gratt. 912, is confidently relied on to sustain this assignment.

The prosecution is under section 3907. Va. Code 1904, which provides that, "where a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted or, by the jury or justice before whom he is tried, found, that he has been before sentenced in the United States for the like offense, he shall be confined in jail not less than 30 days nor more than one year; and for a third, or any subsequent offense, he shall be confined in the penitentiary not less than one nor more than two years."

In *Thomas' Case*, *supra*, the prosecution was for petit larceny, under chapter 199, § 27, of the code of 1860, which reads as follows: "When a free person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States, for the

like offense, he shall be sentenced to be confined in the penitentiary for one year." The indictment alleged that the accused had before been sentenced in the United States for the like offense. The jury returned a verdict, "We, the jury, find the prisoner guilty as charged in the within indictment," and the court sentenced him to confinement in the penitentiary for one year. Upon writ of error, this court held that in order to justify the punishment inflicted, by express terms of the statute, the fact that the accused had been before sentenced in the United States for the like offense must either have been admitted or found by the jury. That neither requirement of the statute had been complied with, and the judgment of the court, for that reason, was erroneous. The verdict of the jury did not expressly find that the accused had been formerly sentenced for the like offense, nor could that fact be inferred from the language of the verdict of guilty "as charged in the within indictment," for that language was satisfied by finding him guilty of the principal charge of petit larceny merely.

But the question is now presented in quite a different aspect. This prosecution is for the third offense of petit larceny, the punishment for which is confinement in the penitentiary not less than one nor more than two years, and the verdict of the jury is: "We, the jury, find the prisoner guilty as charged in the within indictment, and fix his punishment at one year in the state penitentiary." While the jury, it is true, do not expressly find that the accused had been twice before sentenced for petit larceny, they by necessary implication find that fact by the infliction of a punishment which they could not otherwise have lawfully imposed upon him. This, in our opinion, distinguishes the case in judgment from Thomas' Case, and fulfills the demand of the statute in the particular referred to.

The remaining assignment of error relied on by the prisoner is to the action of the court in overruling his motion for a new trial, on the ground that the evidence was insufficient to sustain the verdict of the jury.

Of this assignment it is sufficient to say that under the rule of decision prescribed by section 3484 of Va. Code 1904, the evidence justified the finding of the jury, and the motion was properly overruled.

Judgment affirmed.

(59 W. Va. 1.)

STATE v. CLIFFORD.

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1906.)

1. HOMICIDE—EVIDENCE—THREATS.

On the trial of an indictment for murder, evidence of threats, made by the deceased or his co-conspirator, previously communicated to the accused, is competent and proper for the purpose of shedding light upon the mental at-

titude of the prisoner toward the deceased at the time of the homicide, and of explaining the possession of the weapon with which the killing was effected, as tending to rebut any inference of malice which might be drawn from the fact of its possession on the occasion of its use.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 338, 399.]

2. SAME.

When, in such case, there is evidence tending to establish a conspiracy on the part of the deceased and other persons to kill the accused, or do him grave bodily injury, and to show that the accused believed, and had reasonable ground to believe, that such conspiracy existed and the deceased was a party thereto, and the killing ensued immediately after an unprovoked assault upon, and severe beating of, the accused, by such other persons, the deceased standing by at the time, and there being evidence tending to show that he joined in the assault, evidence of threats made by such other persons and communicated to the accused before the assault, is admissible.

3. CRIMINAL LAW — INSTRUCTIONS—SETTING FORTH FORMS OF VERDICT.

An instruction setting forth six forms of verdict, proper for findings on an indictment for murder, and telling the jury that under the indictment they can return any one of said verdicts, is defective in failing to direct the attention of the jury to the requirement that any verdict so returned must be based upon their belief from the evidence; but, if it appears from other instructions given at the same time that the attention of the jury was repeatedly directed to this requirement, the giving of such instruction is not error.

4. HOMICIDE — INSTRUCTIONS — INTENT — DELIBERATION.

It is not error to give, as an instruction to the jury in a criminal trial, the following legal proposition: "The court instructs the jury that to constitute a willful, deliberate, and premeditated killing, constituting murder of the first degree, it is not necessary that an intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that said intention should come into existence for the first time at the time of such killing, or any time previous."

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 14, 586.]

5. SAME—DEGREES OF OFFENSE.

On the trial of an indictment for murder, it is not error to give instructions presenting the theories of guilt of murder of the first and second degrees, and directing the attention of the jury to the presumption of guilt arising from certain facts, in case the jury should believe them to be established by the evidence, if there is any evidence tending in any appreciable degree to prove such offense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 642-646.]

6. SAME—MANSLAUGHTER.

When the homicide, in respect to which the accused is on trial, immediately followed an unprovoked assault upon, and severe beating of, him, and the evidence tends to prove the offense of manslaughter, the court may properly give instructions based upon the theory of guilt of murder, if there is any evidence in the case tending to prove the commission of such crime.

7. SAME—DEFENSES—ACCIDENT.

The defense of accidental and unintentional killing does not preclude the giving of instructions embodying the law relating to any offense charged in the indictment which the evidence tends to prove.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 638-641.]

8. CRIMINAL LAW — INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

To determine whether the trial court has erred in the giving of instructions, all the instructions must be read together, and, if being so read and interpreted, according to the plain common sense meaning of the terms used, they state the law correctly as applied to the evidence, and it appears that the jury could not have been thereby misled to the prejudice of the accused, the verdict will not be disturbed, because they disclose a mere technical conflict in terms.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1990.]

9. SAME—APPEAL—EXCLUSION OF EVIDENCE.

Refusal of the court to permit a witness to answer a question which, by its own terms and subject-matter, taken in connection with facts and circumstances already in evidence, shows its relevancy and materiality, is not available as error on a motion for a new trial, if the expected answer of the witness was not disclosed to the court at the time of the ruling. An appellate court, in reviewing a judgment on writ of error, cannot assume in such case that an answer favorable to the exceptor would have been given. So much of the decision in *Gunn v. Railroad Co.*, 14 S. E. 465, 36 W. Va. 165, 32 Am. St. Rep. 842, as conflicts with this principle is disapproved.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2932.]

10. HOMICIDE — MANSLAUGHTER — EVIDENCE — KILLING IN HEAT OF BLOOD.

A sudden intentional killing with a deadly weapon, by one who is not in any way at fault, in immediate resentment of a gross provocation, is prima facie a killing in heat of blood, and therefore an offense of no higher degree than voluntary manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 59-64.]

11. SAME—EVIDENCE—SUFFICIENCY.

When in such case the evidence discloses that no time intervened between the giving of the provocation and the act of killing, within which passion could have subsided and reason regained its dominion, and the fatal act itself was not attended by circumstances of extreme cruelty and inhumanity, nor preceded by conduct from which malice can be inferred, a conviction of murder in the second degree should be set aside and a new trial allowed.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 59-64, 502, 522.]

12. CRIMINAL LAW—MOTION FOR NEW TRIAL.

A motion for a new trial, based on alleged insufficiency of evidence, is an appeal from the jury to the court on a question of law.

13. SAME — PASSING ON MOTION—FUNCTIONS OF COURT.

In passing on such a motion the court does not retry the case on the evidence nor disturb any findings made by the jury on evidence sufficient in law to sustain them. It simply determines whether, in law, the facts found, or which could have been found, constitute the right in action or the offense charged.

14. HOMICIDE — MALICE — QUESTIONS FOR JURY.

In homicide cases, the question of malice is for the jury, when there is sufficient evidence to sustain a finding of its existence. Whether there is any evidence of it is a question for the court in giving or refusing instructions. Whether there is sufficient evidence of it to sustain a verdict is for the court on a motion for a new trial.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 562, 563.]

15. SAME—ACCIDENTAL KILLING.

In cases where the blow intended for one person by accident falls upon and kills another, the thing done follows the nature of the thing intended to be done, and the guilt or innocence of the slayer depends upon the same considerations that would have governed had the blow killed the person against whom it was directed. Hence the homicide is murder, or manslaughter, or excusable homicide, for precisely the same reasons that would have determined its character had the event conformed to the intent; and the principle is the same whether the misadventure proceeded from the misdirection of the blow or from a mistake in the identity of the victim.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 84.]

Brannon, P., dissenting.
(Syllabus by the Court.)

Error to Circuit Court, Berkeley County.

Paul Clifford was convicted of murder, and brings error. Reversed.

Faulkner, Walker & Woods, for plaintiff in error. C. W. May, Atty. Gen., Frank Lively, and Allen B. Noll, for the State.

POFFENBARGER, J. Paul Clifford, under sentence by the circuit court of Berkeley county of imprisonment for the period of 10 years, upon conviction of the murder of Jacob Turner, has brought his case here on a writ of error.

The deceased came to his death by a shot from a pistol in the hands of the accused, but the circumstances of the killing were peculiar and unusual in some respects. Clifford was set upon and beaten in the nighttime by Charles and Joseph Cook, by way of punishment for an alleged insult to Jennie Cook, the wife of Joseph Cook, in the afternoon of the same day. No provocation was given by Clifford at the time of the assault. Having been accosted by the Cooks and charged with the language imputed to him, he denied it and attempted in every way to avoid any trouble with them. At that time Jennie Cook was absent and the conversation continued until she came up and charged Clifford with having used the language in question, and thereupon Charles Cook struck him with his fist, and Joseph joined in the assault. At the time of the blow thus given, Clifford was standing with a pitcher of milk in his left hand, while his right hand held the pistol in the pocket of his pantaloons. There is evidence tending to show that the Cooks were aware of his possession of the pistol at that time, but, if they were not, they immediately discovered it and attempted to wrest it from him. In the struggle which ensued over the possession of the pistol, and during which the beating of Clifford continued, the pistol was discharged and the ball injured one of the fingers of Charles Cook. Soon afterwards a second discharge of it sent a ball through the thigh of Joseph Cook. While the struggle was in progress, J. R. Clifford, father of the accused, came upon the scene with a repeating shotgun and called upon his

son's assailants to let go of him, threatening, in the event of their refusal, to shoot them. Thereupon they broke away from him, Charles Cook being the last to do so; but, before doing so, he threw the accused backwards and then ran. Immediately after this the pistol was discharged a third time and the ball struck Turner in the head, killing him instantly. Whether it was fired by design or accident is a matter of controversy, as is also the exact position in which the accused was at the time of the shot. Another matter as to which there is contradictory evidence is whether Turner participated in the assault. Charles Cook testifies that his brother Joe, after having been shot, called upon Turner to assist in taking the revolver from the accused. The accused and one other witness testify that, after the second shot, Turner did join in the assault and continued to engage in it until the arrival of J. R. Clifford. J. R. Clifford testified that his son was engaged with three men when he came up, but he was unable, owing to the darkness, to recognize any of them. Turner was found dead at a point about 10 feet distant from that at which the accused was released, and J. R. Clifford says he saw a man fall a short distance from his son and in that direction, at the time of the third shot. Charles Cook says he ran in that direction, upon leaving the accused, and in this he is corroborated by another witness. Several witnesses swear that the accused rose to his feet and fired the fatal shot after taking a step forward in the direction of Turner. One says he not only did this, but looked at the deceased for about a minute before he fired. The father of the accused says the shot was fired as the latter arose from the backward position in which he had been thrown by Cook. The accused says he is unable to tell whether the pistol was discharged as he was thrown backward or as he was in the act of rising, and that he saw nobody and shot at nobody at the time, and is unable to state whether he discharged it by accident or design. Two of the officers who took him into custody on the night of the shooting, testify to an admission by him to the effect that he shot Turner, in which he said, by way of justification, that the deceased was coming towards him with a razor in his hand.

To show justification for possession of the pistol by the accused at the time of the affray, as well as to excuse the killing, on the theory of a conspiracy on the part of the deceased and the Cooks to kill the accused or do him great bodily harm, or, in case the jury should find the shooting to have been intentional, to mitigate the offense and reduce it to manslaughter, the facts relating to the transaction out of which the affray arose, and the conduct of Turner and the Cooks in the time intervening between that transaction and the affray, have been brought into the record. Some time in the afternoon of April 6, 1905, the day of the killing, a dispute arose between

two children, a brother of the accused and a son of the deceased, near the house in which the accused resided. This house and the one in which Joseph and Charles Cook resided stood almost opposite each other on West Martin street, in the city of Martinsburg. Jennie Cook, the wife of Joseph, was a niece of Jacob Turner. The accused separated these two children, and, in doing so, did or said something that offended Jennie Cook, in consequence of which there was verbal altercation between him and her. She claims he called her a vile name. He admits that, but says he was provoked to it by an opprobrious epithet applied to him by her; and, after he had done so, she informed him that she would tell her husband who would shoot him like a dog, and later repeated the threat in different form, in the presence of Dr. Gray and a sister of the accused, saying: "That's all right; you wait till Joe catches you; he'll fix you. He'll kill you, you dirty nigger." He says he was further warned by a little boy, Walter Johnson, who said: "Mr. Paul, Mr. Cook's going to shoot you." Charles Cook worked at a hotel in Martinsburg, where he was called for by Joe Cook at about 5 o'clock that evening. Just what passed between them in the conversation there he did not state. He first said he was busy and had no time to talk, but later admitted that he did talk to him, and said, in response to a question as to whether he made an engagement: "I told him would be up home after a while." As soon as his work at the hotel was completed, he did go up to Joseph Cook's house, where he made his home, and where he found Jacob Turner and his brother Joe, standing near the front door. He either went in the house or started to go in, and very soon thereafter the two Cooks and Turner started out the street in the direction of the place at which the shooting occurred. Turner did not live on that street, but on a 15-foot alley, 198 feet south of said street back of the lot at the front of which he was killed on that street. The place of the killing was about 410 feet west of the house in which the Cooks resided. Charles Cook says Turner remarked as he started with them, "I am going over home," and that he and his brother were going out on the hill, in the same general direction. Whether Jennie Cook accompanied them all the way is not clear, but, if not, she followed them at no great distance, for she appeared on the scene very soon after the quarreling began. Just before this procession started from the house of Joseph Cook, the accused had left his house and gone in the same direction to the house of one Smith, which stood outside of the corporate limits, for a pitcher of milk, and, on the advice of his father, who knew of the threats, he took the pistol with him. He staid at the house of Smith only long enough to obtain the milk, and, on his return, when but a short distance from Smith's house, he was met by the two Cooks, and, ac-

cording to his testimony, Jacob Turner. Thereupon the quarreling began, as hereinbefore detailed, and continued until they reached the point at which the assault was made. The distance from Cook's house to Smith's is 650 feet. According to all the testimony, the assault was made in front of the house of William Brown, standing on the north side of the street, 470 feet from Cook's house, and Turner's body was found at a point about 410 feet distant therefrom, on the south side of the street. The street at that point is about 60 feet wide.

The assignments of error are six in number, the first of which relates to instructions given at the instance of the state; the second, third, fourth, and fifth, to the refusal of the court to permit a witness to answer certain questions; and the sixth, to the refusal of the court to set aside the verdict and grant a new trial.

In the interest of clearness, the second, third, fourth, and fifth assignments of error will be disposed of first. In the course of the examination of J. R. Clifford he was asked if he knew the occasion for Paul Clifford having a revolver on his person that night; if he had heard any threats communicated to his son by Joseph and Charles Cook; if he had heard any threats communicated to his son that evening from Jennie Cook, the wife of Joseph Cook; and what, if anything, he knew of his own personal knowledge of any threats communicated to his son, made by Joseph and Charles Cook, or either of them, to do him great bodily harm. The court refused to permit the witness to answer any of these questions, but did allow the accused himself to testify to his knowledge of such threats, and then allowed witnesses to contradict him in respect thereto. This evidence was admissible. It is proper to prove communicated threats to shed light upon the mental attitude of the prisoner toward the deceased when the homicide occurred, and for the purpose of explaining the possession of the weapon and establishing justification for carrying it, and thus rebutting any inference of malice which might arise from the fact of its possession on the occasion of its use. *State v. Evans*, 33 W. Va. 417, 10 S. E. 792; *State v. Clark*, 51 W. Va. 457, 41 S. E. 204. By way of sustaining the action of the court in refusing to admit this evidence, it is urged that the threats did not emanate from Turner, but only from the Cooks. But, as they constituted parts of the series of events which led up to the killing of Turner bearing materially upon the situation of the accused at the time, and are logically inseparable from that event, they could not properly be excluded. The deceased was the father of the child concerning whom the difficulty arose. He, in company with Jennie Cook, had called upon the accused in the afternoon of that day for an explanation of his conduct toward the child. He was the uncle of Jennie Cook.

In consequence of these two relationships of the parties concerned, the accused might well suppose that he felt a deep interest in the controversy and might very naturally participate in any attempt which the Cooks might make upon him. No threat on the part of the accused against any one is proved until after the killing of Turner, and, at the time of the assault upon him, he declined combat and endeavored to avoid it. These facts, accompanied by proof of the previous threats against him, tended to show his possession of the weapon to be consistent with a lawful purpose and to negative any motive of revenge or other ill feeling towards his assailants or the deceased, which might arise from the possession thereof.

The evidence of communicated threats, although purporting to have been made by Jennie Cook, or all the Cooks, but not by Turner, was admissible for another reason. The evidence of conspiracy among the Cooks is amply sufficient to take the case to the jury on the question whether they confederated and conspired to injure the accused. *State v. Prater*, 52 W. Va. 132, 43 S. E. 230. Turner accompanied them from their home toward the place at which the assault was made, very shortly before it occurred, and was found at the place which the evidence indicates was appointed by the Cooks for their rendezvous. He was present while the assault and beating were in progress, and near enough to render assistance. His relation to the Cooks, being the uncle of Joseph Cook's wife, was such as was calculated to make him feel an interest in the matter. He was the father of the child concerning whom the original trouble had arisen. Two witnesses swear that he actually participated in the assault. All these circumstances tend to prove that he had knowledge of the common design and purpose of the Cooks, and, if having such knowledge he joined in that purpose and design, he made himself their co-conspirator and was as much at fault as the Cooks themselves. The threats previously communicated to the accused, if any, together with the assault, constituted evidence of ground for a reasonable belief on his part that he was then and there the victim of a conspiracy, and, if the deceased joined in the assault, that he was their co-conspirator. Upon this evidence, it was the right and duty of the jury to inquire whether the provocation involved in the attack upon the accused was provocation given by Turner as well as by the Cooks. The legal effect of such provocation touches and bears upon the nature of the offense, if the shooting of Turner was intentional, as the testimony of some of the witnesses indicates, and not accidental. The intentional taking of life in hot blood and under excitement, occasioned by sufficient provocation, is not murder, but manslaughter. *State v. Beatty*, 51 W. Va. 232, 41 S. E. 434. Voluntary manslaughter is the intentional, unlawful,

and felonious, but not deliberate or malicious, taking of life. The common-law definition of involuntary manslaughter is an unintentional killing, resulting from an unlawful act on the part of the accused, not amounting to a felony or from a lawful act, negligently performed. Whar. Hom. §§ 4-6. As the shot was fired immediately after the assailants of the accused had released him, it was the duty of the jury, upon their oaths and honest belief, from all the evidence, to say, in view of this provocation, if they believed there was a conspiracy of which the accused had knowledge, whether the firing of the shot which killed the deceased was intentional, and, if so, whether it was the result of passion, anger, and excitement, occasioned by the assault of the conspirators, and, if so, to return a verdict of guilty of manslaughter. But, if on consideration of all the evidence they believed the shot was unintentional, they should have acquitted, and, if from all the evidence they believed the shooting was deliberate and malicious, as well as intentional, their verdict should have been guilty of murder.

Since the degree of the offense, when the killing is intentional and the evidence tends to establish provocation, as known in the law of manslaughter, depends upon the mental condition of the accused, he is entitled to prove all facts and circumstances that tend to show reasonable ground for belief on his part that the deceased was a party to the assault made upon him. If Jennie Cook had made the threats, and Turner had accompanied her when she came to him to obtain satisfaction and then appeared at the place of the assault with the Cooks, these were circumstances tending to produce belief, on the part of the accused, that Turner had joined them in purpose and design. The evidence of the threats, therefore, became material, although the jury might disbelieve the testimony as to Turner's having joined in the assault. "Where two conspire to kill or inflict grave bodily injury on a third person, and in carrying out this purpose one of them fires a pistol at such person, who immediately pursues them and kills the one who did not fire the pistol, it is manslaughter." *State v. Gaskins*, 93 N. C. 547. To the effect that in determining the degree of the offense the jury must consider the knowledge and belief of the accused, as to the attitude of the deceased towards him during the assault, and are not controlled by his actual attitude, see 21 Am. & Eng. Ency. Law, 185. "If two be fighting, and another interfere with intent to part them, but does not signify such intent, and he be killed by one of the combatants, this is but manslaughter; for the latter might think that he came in aid of his opponent, unless he had notice of his real intent." 1 East, P. C. 292. "The statute does not require the actual occurrence of an insult, either by words or conduct, but it is sufficient that the accused

acted on information given by another, if he believed it, and the killing was done in consequence of passion thereby aroused, though in fact no insult had been given. The homicide must be viewed from the standpoint of the accused." 21 Am. & Eng. Ency. Law, 181.

It has been suggested that failure of the attorneys for the accused to state to the court, when objection was made to the questions, what they expected to prove in response thereto, precludes a reversal for this error. To make such an error cause of reversal, it is only necessary that the relevancy and materiality of the evidence offered shall appear. When this is not disclosed by the nature of the question, it is necessary that it be made to appear in some other way, and this is usually done by statements of counsel, showing what he expects to prove and how it becomes relevant to the issue. Until a comparatively recent date, there was no suggestion of necessity for the statement of the anticipated answer of the witness, when the question, viewed in the light of its subject-matter, the evidence in the case, and the issues, disclosed its relevancy and materiality. Commencing with *Kay v. Railroad Co.*, 47 W. Va. 467, 35 S. E. 973, this court has, from time to time, added this requirement, relying for its authority, for the most part, upon *Childress' Adm'r v. Railway Co.*, 94 Va. 186, 26 S. E. 424; *Insurance Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; *Kimball v. Carter*, 95 Va. 77, 27 S. E. 823, 38 L. R. A. 570; and *Railway Co. v. Reiger*, 95 Va. 418, 28 S. E. 590. It is asserted in *Sesler v. Coal Co.*, 51 W. Va. 318, 41 S. E. 216, and *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217. In the older Virginia decisions, having binding authority upon this court, this requirement is not found. In *Carpenter v. Utz*, 4 Grat. (Va.) 270, the court say it must appear, from a statement of the evidence offered and excluded, that error has been committed, in order to reverse a judgment; or, if its relevancy depends upon other facts in the cause, the party alleging the error should present such a case on the record as shows the relevancy of the evidence rejected. They further say testimony which does not appear of itself, or upon the facts stated in the record, to have been relevant, will be held in the appellate court to have been properly excluded. In that case the court undoubtedly heard the evidence offered and then passed upon its relevancy. It did not refuse to allow the party to disclose by his witness what he desired to prove. In other words, it did not sustain objections to proper questions asked, nor is there anything in the opinion which in any degree sustains the position that the court may refuse to permit a witness to answer a question, which, on its face, discloses the relevancy and materiality of its subject-matter. *Johnson's Ex'r v. Jennings' Adm'r*, 10 Grat. (Va.) 1, 60 Am. Dec.

323, only requires the bill of exceptions to show relevancy of the excluded evidence; and an examination of the opinion discloses that the evidence was before the court, but there was nothing in it from which the court could see that it was relevant. Those parts of the syllabus and opinion which say the bill of exceptions must show the answer of the witness, as well as the question, relate to the admission of alleged improper evidence. Of course, where evidence has been admitted, the court cannot say it is prejudicial without knowing what it is. That is the ruling in *Belrne v. Rosser*, 26 Grat. (Va.) 537. This court held the same in *Nease v. Capehart*, 15 W. Va. 299. This rule is invariable in all courts. *Mays v. Deaver*, 1 Iowa, 216; *Speers v. Fortner*, 6 Iowa, 553; *Mosier v. Vincent*, 34 Iowa, 478; *Willey v. Hall*, 8 Iowa, 62; *Campbell v. Chamberlain*, 10 Iowa, 337; *Hanan v. Hale*, 7 Iowa, 153; *Howard v. Patrick*, 43 Mich. 121, 5 N. W. 84; *Somerville v. Richards*, 37 Mich. 299; *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840; *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144; *Carpenter v. Corinth*, 58 Vt. 214, 2 Atl. 170. In this class of cases the party loses the benefit of his exception by no improper action of the court, but by his own failure to have a record made of what transpired. *McDowell's Ex'r v. Crawford*, 11 Grat. (Va.) 377, decided by a divided court, held it error in the trial court to refuse to permit a witness to be recalled and to have produced certain books which had never been tendered as evidence in the court below, but the nature of the contents of which had been disclosed by oral testimony.

In *Gunn v. Railroad Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842, this court said: "Where the form of the question propounded to the witness on the stand indicates of itself that it is framed and intended to elicit in reply something said at the time and place of the accident as part of the res gestæ, held, it is error to refuse the question, but the answer should be heard or seen, and then its competency passed upon." This has never been overruled by any express reference to it. In *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575, it is recognized and the two cases distinguished in the following language: "This question does not itself, like that in *Gunn v. Railroad Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842, import proof of anything but that single fact, which itself would be immaterial." The question in *Jackson v. Hough* related to an isolated fact, which, without other evidence connecting it with the issue, would have been irrelevant. The ground of its exclusion was not failure to say what the answer would be, but want of anything in the question to show its materiality. The distinction marked in *Jackson v. Hough* seems to have been lost sight of in *Kay v. Railway Co.*, 47 W. Va. 467, 35 S. E. 973, where the syllabus in the former is

quoted as importing that the answer must be given in order to show materiality, when the question is itself disclosed. Then that case is followed by the other late cases to which reference has been made. The result is that we have two rules, in consequence of which it becomes necessary to determine which is the correct one.

Many cases from other states hold that, in order to make an exception to the action of the court in refusing to allow a witness to answer a question, the record must show what the answer would have been, if permitted. See *Spaulding v. Jennings*, 173 Mass. 65, 53 N. E. 204; *Springer v. Pritchard*, 22 Nev. 313, 39 Pac. 1009; *McGowan v. Railroad Co.*, 95 N. C. 417; *Railroad Co. v. Cheek*, 152 Ind. 663, 53 N. E. 641; *Paddleford v. Cook*, 74 Iowa, 433, 38 N. W. 137; *Small v. Navigation & Mining Co.*, 40 Me. 274; *Sullivan v. Schultz*, 22 Mont. 541, 57 Pac. 279; *Le May v. Brett*, 81 Minn. 506, 84 N. W. 339; *Kraxberger v. Rolter*, 91 Mo. 404, 3 S. W. 872, 60 Am. Rep. 262; *Fire Ins. Co. v. Berg*, 44 Neb. 522, 62 N. W. 862; *Hummel v. State*, 17 Ohio St. 628; *Railroad v. Stonecipher*, 95 Tenn. 311, 32 S. W. 208; *Felker v. Grant*, 10 S. D. 141, 72 N. W. 81; *Avery v. Wilson*, 47 S. C. 78, 25 S. E. 286; *Roach v. Caldbeck*, 64 Vt. 593, 24 Atl. 989. After careful consideration of *Carpenter v. Utz* and *McDowell's Ex'r v. Crawford*, I am convinced that they are not in conflict with this rule. In the former, the excluded evidence appeared in the record. It was not a case of refusing merely to allow a proper question to be answered. In the latter, the offered evidence was documentary, and the record disclosed its existence and character. *Gunn v. Railroad Co.* is the only Virginia or West Virginia case enunciating the rule therein stated. As authority for it, *Scotland Co. v. Hill*, 112 U. S. 183, 5 Sup. Ct. 93, 28 L. Ed. 692, was cited. At that date, it seemed to be about the only case of its kind. As the opinion was delivered by Chief Justice Waite, it was entitled to great respect, although he cited no precedent or authority for it, and admitted that other courts had held the contrary. In *Patrick v. Graham*, 132 U. S. 627, 10 Sup. Ct. 194, 33 L. Ed. 460, the opposite rule was rigidly enforced. The only other case found sustaining *Gunn v. Railroad Co.* is *Commissioners v. Gantt*, 78 Md. 286, 28 Atl. 101, 29 Atl. 610. The late decisions of this court are all the other way. In addition to cases already cited, see *Snooks v. Wingfield*, 52 W. Va. 441, 448, 44 S. E. 277; *Williams v. Belmont, etc., Co.*, 55 W. Va. 84, 46 S. E. 802. This accords with the great weight of authority everywhere. 2 Cyc. 1045; 3 Cyc. 165, citing numerous cases; *Elliott, App. Pro.* §§ 743, 744. In view of this vast array of authorities, we are bound to say that, if *Gunn v. Railroad Co.* has not been already overruled, as regards this question of practice, it must now be disapproved and declared to be not

law in this state. Error must affirmatively appear in order to reverse. It cannot, in any case, be presumed. To reverse this judgment for refusal to allow these questions to be answered, it would be necessary to assume that the witness could have answered them favorably to the accused. That the court cannot do, however unfortunate the result may be.

The first instruction complained of set forth six forms of verdict—guilty of murder in the first degree without recommendation, guilty of murder in the first degree with recommendation of imprisonment, guilty of murder in the second degree, guilty of voluntary manslaughter, guilty of involuntary manslaughter, and not guilty—and told the jury that, under the indictment, they could return any one of said verdicts. Instructions Nos. 2, 3, and 4 are as follows: (2) "The court instructs the jury that to constitute a willful, deliberate, and premeditated killing, constituting murder of the first degree, it is not necessary that an intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that said intention should come into existence for the first time at the time of such killing, or any time previous. (3) The court instructs the jury that, where a homicide is proved, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, she must establish the characteristics of that crime, and, if the prisoner would reduce it to manslaughter, the burden is on him. (4) The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act; and, if the jury believe from the evidence in this case that Paul Clifford, the prisoner, with a deadly weapon in his possession, without any, or upon a very slight provocation, gave to the deceased, Jacob Turner, a mortal wound, then the said Paul Clifford is *prima facie* guilty of willful, deliberate, and premeditated killing, and the necessity of proving extenuating circumstances is thrown upon the prisoner; and, unless the prisoner has proved such extenuating circumstances, or such circumstances arise out of the case made by the state, the jury must find the prisoner guilty of murder in the first degree."

The objection to instruction No. 1 is that it contains no reference whatever to the evidence. Failure to qualify it by saying that, in order to return any one of said verdicts, the jury must believe the defendant guilty of the offense named in the verdict, is the basis of criticism. The court, no doubt, intended nothing more than to advise the jury as to their power, if from the evidence they believed the defendant guilty of any one of the offenses charged in the indictment, to find accordingly. The other instructions given for the state do not supply

this defect, if defect it be, by saying any verdict the jury should find must rest upon their belief from the evidence, but, in the instructions given for the defendant, three in number, the attention of the jury is specifically and repeatedly directed to the requirement of the law that their verdict must rest upon the evidence and their belief therefrom of the guilt of the accused beyond a reasonable doubt. Though instruction No. 1, standing alone and unaided by other instructions, might be erroneous, it is correct as far as it goes, and, the defect in it having been supplied by other instructions, the defendant cannot be deemed to have been prejudiced or injured thereby. A similar instruction was given in *State v. Prater*, 52 W. Va. 132, 154, 43 S. E. 230, and an assignment of error was predicated thereon, but the court refused to disturb the verdict on account thereof. If an instruction correctly states the law as far as it goes, and is defective only in failing to state all that should be said in reference to its subject-matter, the court commits no error in giving it, provided the defect is supplied by another instruction given. *State v. Clark*, 51 W. Va. 457, 462, 41 S. E. 204; *State v. Prater*, 52 W. Va. 132, 43 S. E. 230.

The last clause of instruction No. 2, relating to the element of intent in the crime of murder, says: "It is only necessary that said intention should come into existence for the first time at the time of such killing, or any time previous." The existence of such intent at the time of the killing is a necessary ingredient of crime, and it is clearly not enough that the prisoner intended such purpose at some previous time. The jury must be satisfied beyond a reasonable doubt that, though he entertained such purpose before the killing, it must have continued and moved him in the act of the killing. The instruction correctly quotes the law as laid down in *Wright's Case*, 33 Grat. (Va.) 880, and approved in *State v. Morrison*, 49 W. Va. 210, 217, 38 S. E. 481, and, no doubt, other cases decided by this court. But, in these decisions, it is given as abstract law, addressed to the legal profession, and not as a formula for the guidance of a jury of laymen in the trial of a case, and is not as accurate as it might be for that purpose. However, it seems to have been deemed, by the prisoner and his counsel as well as by the attorney for the state, unnecessary to advise the jury of the necessity of the existence of criminal intent at the very moment of the killing. Two instructions relating to the element of intent were given at the instance of the accused, in neither of which was the attention of the jury directed to this point. The irresistible inference is that it was so plainly and palpably obvious to the jury as to render such action useless. The plain object of the instruction is set forth in the first clause thereof. It was to relieve the jury of any difficulty they might encounter from finding that the con-

ception of a design to kill and the act of killing were contemporaneous. The last clause pursues the same object. It relates to the time of forming the intent, assuming it to have continued until the time of the killing. This is the plain sense and meaning of the instruction, and the court cannot assume that a jury of reasonable and prudent men would probably be misled by it. A judgment cannot be reversed except for some act of the court which may have prejudiced the party complaining though there be inaccuracy of statement of an instruction, it does not amount to an error, unless it is calculated to mislead the jury and may have done so, and did, for aught that the court can see. In determining whether it may have had such effect, the court must view the language as having been addressed to men of, at least, average intelligence. There is no other standard by which to test it. So viewing this instruction, we are unable to say it could reasonably have had such effect, and it is evident that counsel on both sides, looking at the instruction from the same point of view, having the advantage of personal presence at the scene of the trial, knowledge of the jurors, the tenor and course of the argument, and all that transpired before the jury, were of the same opinion. Therefore we hold that no error was committed in giving it.

The objections to instructions 3 and 4 are substantially the same as were urged against them in the case of *State v. Taylor*, 50 S. E. 247, 57 W. Va. —. A further contention against the propriety of these instructions is the lack of evidence that the accused was the aggressor, or in any way in fault, at the time the assault was made upon him, and the presence of evidence tending to show that the discharge of the pistol was accidental and unaccompanied by any criminal intent. After a careful inquiry as to the propriety of giving such instructions, this court declared, in *State v. Taylor*, as follows: "When the state of the evidence in a criminal case tends to prove facts, from which presumptions of guilt arise, under rules of evidence, established by a long and uniform course of judicial determination, the trial court may properly bring them to the attention of the jury by instructions, aptly and correctly stating them. Such instructions, if properly framed, neither assume the existence of the facts, from which the presumptions arise, nor interfere with the province of the jury as to the weight of the evidence." Their application, therefore, depends upon the state of the evidence. If there is any evidence tending to prove the offense of murder of the second degree and murder of the first degree, the court did not err in giving these instructions. Upon one view of the evidence, its tendency is to prove the Cooks to have been the only actors and Turner an innocent bystander. Certain witnesses testify that he stood at the place at

which he was found dead, from the beginning until the end of the affray, with his hands in his pockets, and one witness, at least, says his hands were still in his pockets when found dead. If he did not participate in the assault, as stated by the accused and another witness, the evidence as to his connection with the conspiracy is purely circumstantial. One witness testifies that the accused, after rising, took one step toward the deceased, stopped, looked at him a minute, and then fired. The testimony tending to prove these things as circumstances constitutes evidence of intentional, deliberate, and malicious shooting, although the jury must, in the same connection, consider whether the accused had reasonable ground to believe, and did believe, the deceased was a co-conspirator and present as an aider and abettor, but taking no actual part in the assault, in order to determine whether the accused is guilty of anything more than manslaughter. It therefore affords foundation and justification for the giving of these instructions. Other instructions in the case present other and different theories, founded upon different and conflicting tendencies of other portions of the testimony and circumstances shown. In determining what instructions shall be given the court does not consider the weight of any evidence. It simply lays down rules for the analysis and application thereof by the jury. It is enough that there is evidence appreciably tending to prove or establish a certain theory of a case, however slight the degree of its weight. And a court need not withhold an instruction for paucity of evidence, if there be any, tending in any appreciable degree to establish the hypothesis embodied in the instruction.

In *Hopkins v. Richardson*, 9 Grat. (Va.) 485, Judge Lee, speaking for the court, said: "In a plain case of a total absence of evidence tending to make out the supposed case, the court may well refuse to give any instruction based upon it. But where there is such evidence, of however little weight it may appear to the court, or however inadequate in its opinion, to make out the case supposed, it is best and safest for the court not to refuse to give the instruction asked for, if it propound the law correctly." See, also, *Early v. Garland's Lessee*, 13 Grat. (Va.) 1; *Honesty v. Commonwealth*, 81 Va. 283; *Fire Association v. Hogwood*, 82 Va. 342, 4 S. E. 617. Certain decisions of this court may seem to be in conflict with the above-quoted doctrine of the early Virginia decisions. Certain it is that some general expressions used in them indicate deviation from the rule declared by them. *Blloyd v. Pollock*, 27 W. Va. 75, holds that a court should not give an instruction based upon an hypothesis, though supported by some evidence, if the evidence is so weak that the court would set aside a verdict based thereon. *State v. Belknap*, 39 W. Va. 427, 19 S. E. 507, says the evidence must fairly tend to prove the facts

upon which the instruction is based. *Parkerson Industrial Co. v. Schultz*, 48 W. Va. 470, 27 S. E. 255, holds that the hypothesis embodied in the instruction must be fairly presented by the evidence. *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033, holds that the evidence must fairly present the hypothesis and be sufficient to sustain a verdict predicated thereon. No authority whatever is cited in the first three of the above decisions for the propositions asserted in them. The last one cites *Bloyd v. Pollock and Industrial Co. v. Schultz*. In *Carrico v. Railroad Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, the ruling in *Bloyd v. Pollock* was virtually condemned, and those of the early Virginia cases above cited approved, to this extent, that this court will not reverse because the court below gave an instruction predicated upon evidence, "though that evidence be very weak in the opinion of this court." *Carrico v. Railroad Co.* would be sufficient authority for refusing to disturb the verdict on account of the giving of instructions 3 and 4, as not having been based upon sufficient evidence. But a new trial is allowed on another ground, and the case must go back. Therefore this court must say whether it is the duty of the trial court to determine, in passing upon the propriety of the instruction complained of, to weigh the evidence and see whether it will sustain the hypothesis presented by the instruction. To so hold would put it in the power of the court to take any case from the jury, when the evidence on one side seems to be too weak to sustain a verdict in favor of that side, and this, without any motion or application for such action by either of the parties. Since the parties are content to proceed in the exercise of their constitutional right of trial by jury, however weak their respective cases may be, it seems that an interference by the court, upon its own motion, would be a virtual denial of such right. Until the court is asked to interfere, its duty is merely to preside over the trial by the jury. Decision after decision says the weight of the evidence during the progress of the trial, and until after verdict, is for the jury and not the court, and any instruction or other action of the court, invading the province of the jury, by direction as to the weight of the evidence, is cause of reversal. After verdict, when the jury has completed its work and the parties have had the benefit of the constitutional guaranty, the function of the court begins, upon a motion to set aside the verdict for insufficiency of evidence. The law regards jurors as being better calculated to weigh evidence than judges. A suitor may prefer the judgment of twelve men upon the weight of his evidence to that of one man upon the bench, and, however weak or strong his case may be upon the evidence, he has the right to proceed with it before the jury until, upon some proper application, such as a motion to direct a verdict, a motion to exclude evidence, or a demurrer to the evidence,

the court has no right to interfere. The cases which seem to be in conflict with this view are only so in the generality of expressions used in the syllabi and opinions. An analysis of the evidence shows that it did not really tend, in any appreciable degree, to sustain the hypothesis stated in the instructions. In some of them, there was none. "It is not for the court, in ruling upon evidence, or in framing instructions, to determine the probative force of evidence. If the evidence is material, relevant, and competent, it is for the jury, and instructions bearing upon the evidence, without respect to its weight or credibility, cannot be deemed irrelevant. Accordingly, an instruction cannot be deemed erroneous if there be any evidence on which to base it, no matter how slight and inconclusive that evidence may be." 11 Enc. Pl. & Pr. 181, citing decisions from Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Missouri, Nebraska, Ohio, South Carolina, Texas, and Virginia. The very excellent work just quoted from qualifies this only to the extent of saying an instruction should not be given upon evidence which raises at the most a mere conjecture, nor upon evidence which is so slight as to amount merely to an assumption. Nowhere does it state that the evidence to warrant an instruction must be sufficient to support a verdict founded upon it. This constitutes no exception to, or qualification of, the general rule above stated, and that rule seems to be universally observed, except in the general expressions found in some of the decisions of this court and heretofore referred to.

Freedom from fault on the part of the accused, at the inception of the assault upon him, is a circumstance in his favor on the issue as to whether he is guilty of any offense graver than that of manslaughter, but it is clearly not conclusive in his favor, and therefore does not preclude the giving of instructions predicated upon the theory of murder. One who is attacked without cause, and having the greatest provocation, may nevertheless be guilty of murder. "Where the killing, although intentional, is done in passion, in heat of blood, upon sudden provocation by gross indignity, out of tenderness for the frailty of human nature, the law reduces the offense to manslaughter, but, however great the provocation may have been, if there has been sufficient time for passion to subside and for reason to return, the homicide is murder." *State v. Beatty*, 51 W. Va. 232, 41 S. E. 434; *McWhirt's Case*, 3 Grat. (Va.) 594, 46 Am. Dec. 196; *Whar. Hom.* § 443. The time intervening between the cessation of the beating and the firing of the shot which killed the deceased was very short, according to all the testimony, but there was an intervening period, and whether there was sufficient time for reason to regain its sway depends upon other circumstances, such as the temperament of the accused, the nature of the provocation, his

surroundings, etc., as well as lapse of time. Whar. Hom. § 449. Another element entering into the case is whether there was any provocation on the part of the deceased, within the meaning of the law, a matter concerning which a good deal has been said herein.

Does the defense of accidental killing render these instructions improper? It is urged, upon the authority of *State v. Cross*, 42 W. Va. 253, 24 S. E. 996, that it does. The theory upon which the majority of the court reached a conclusion in that case is made very plain by the opinion. They said: "There was no evidence of premeditated or intentional killing." If not, no instructions based upon such theory could properly be given, and every instruction that presented any hypothesis of guilt of such offense was held improper. In the course of the opinion, want of evidence is repeatedly adverted to, and on page 257, 42 W. Va., page 497, 24 S. E., it is said: "This instruction was improper, in this case, for the same reason that all the others were improper." This case, as practically all others, presents a number of issues and theories. Some of them are inconsistent necessarily. If they were not, there could be but one view of the case. The defendant himself presents inconsistent theories, and has a perfect right to do so, and it is the duty of the jury to adopt that one, whether presented by the state or the prisoner, which, upon their oaths, they believe, beyond a reasonable doubt from the evidence, to be the true hypothesis. A proper instruction upon one theory should not be refused because it is inconsistent with a proper instruction based upon another. What modification of the two instructions here under consideration would be necessary to keep before the jury, without the aid of any other instruction, the defense of accidental killing? Nothing more than to insert in instruction No. 3 the word "intentional" before "homicide," and in No. 4 the word "intentionally" before the word "gave." If this had been done, what basis would there be for the contention against the propriety of these instructions? Absolutely none that could be founded upon their language or terms. Not a word in these instructions countenances the view that the killing would be murder in the absence of the element of intent. They assume nothing except that the jurors, as intelligent men, know that accidental killing is not criminal. Two instructions given for the defendant impressed upon the jury in the strongest terms the necessity of the existence of intent, on the part of the accused, to kill the deceased, as a prerequisite to their finding him guilty of any offense. All these instructions taken together, and the jury had them all before them at the same time, cannot be so read as to leave the jury without instruction or guidance on the question of intent; nor, when read together, is there any contradiction in their meaning, though there may be a technical one in terms. "The in-

structions given to the jury must be taken together; and it is not necessary to insert in each separate instruction all the exceptions, limitations, and conditions which are inserted in the instructions as a whole." *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228. "Instructions to the jury must be taken and read as a whole, and, if, upon being so read and construed, they state the law correctly, and do not misstate it in any particular, and no proper instruction asked for has been refused, the verdict will not be disturbed on the ground that additional proper instructions could have been given, or that some particular instruction, standing alone, might tend to mislead the jury." *State v. Kellison*, 56 W. Va. 690, 47 S. E. 166.

A motion made to the court for a new trial, on the ground of insufficiency of evidence, presents an entirely different question from that which arises upon a request for an instruction. Upon such motion the court has more extensive powers to deal with the evidence. The jury trial is complete. The function of the jury has been performed, and that of the court begins. By his motion, the accused appeals from the decision of the jury to the court on a question of law. He prays the judgment of the court as to whether the evidence upon which the jury has founded its verdict is sufficient in law to sustain it. By his own act, he brings the question before the court. In entertaining this motion, the court does not officiously meddle with the province and function of the jury, or the rights of parties, respecting jury trial, but simply takes under advisement and consideration the legal question presented, and, after argument and mature consideration, disposes of the motion. In this way, all confusion in, and danger of prejudicing, the jury trial, by hasty and ill-considered rulings, are avoided. In sustaining a motion to set aside a verdict on this ground, the court does not undo anything the jury has legally performed. It simply restores to the party what the jury, in contemplation of law, has deprived of him, or withheld from him. It is in no sense a retrial of the case by the court on the evidence, as the jury tried it. The court merely ascertains, from all the facts which were found by the jury, or could have been found, whether the elements necessary to make out title to the right in action, or to constitute the crime charged, are shown, and then declares the law accordingly.

It was held in *State v. Henry*, 51 W. Va. 283, 41 S. E. 439, that in criminal cases the court, in passing upon a motion for a new trial, will reject all the conflicting oral evidence of the exceptor, and give full faith and credit to that of the adverse party, as was formerly done in civil cases. Whether there is any reason for discriminating between civil and criminal cases in this respect, it is not necessary to determine now; for nothing presented by the evidence in this case would produce a result, under the operation of the

new rule, different from that which is produced by the application of the old one. Having disregarded the conflicting oral evidence adduced on behalf of the accused, it still appears that there was gross provocation to the accused, growing out of the transaction between him and the son of the deceased. The deceased was present at the assault, and the accused knew the relationship existing among all these parties, as well as the purpose for which the Cooks had accosted him. As Turner was present, it is not to be assumed that the accused did not know he was there. Therefore he had reasonable ground for believing that the purpose of this assemblage was to inflict bodily injury upon him. This was done in a most unequal contest, as regards physical strength; two men assailing one. For the purposes of this inquiry, it must be assumed that the fatal shot was intentionally fired toward the deceased. If the shooting had occurred during the progress of this fight, the jury could not have said, without disregarding the evidence, that the accused was not then in a high state of passion and excitement, such as to preclude a finding of deliberate shooting. It did not occur until after his assailants had left him, but it did occur immediately after. J. T. Carter, one of the witnesses for the state, says: "He made about one step towards Jake, and then shot." On cross-examination, the same witness said the accused had fired "just as quick as he could get himself together." Robert Spears made the following statement in answer to a question: "Why Paul made one step toward Jake, and he looked at him for about a minute, and he fired." On cross-examination he said: "Paul made one step towards Jake, and shot." This is all the evidence that could be regarded as tending to show time for the subsidence of passion. According to Carter's testimony, there was no act on the part of the accused indicating reflection. The other witness' testimony is very indefinite. "About a minute" is absolutely devoid of any certainty, for it is a phrase very commonly used to denote a mere point of time, and not the lapse of any certain period. This testimony rather implies that there was a halt, as if for deliberation, before the firing of the fatal shot, but it is wholly uncertain as to the purpose. It all occurred in the darkness of night. Was it for deliberation or for the purpose of locating the man who had been beating him? However this may be, it was almost imperceptible, and indicated no departure from the struggle which had preceded it. There was no turning aside to some other and distinct matter, such as a social or business transaction, indicative of relaxation of the passion which confessedly had dominated the mind of the accused up to that point. This is too slight to sustain a finding of such subsidence or relaxation.

In *State v. Beatty*, 51 W. Va. 232, 41 S. E. 434, it was held that: "When time has in-

tervened between the date of provocation and the date of the killing, the question whether the killing was done in the heat of blood is for the jury." The application of this law requires evidence of the lapse of some period of time within which the jury might deem it reasonable to say either that reason had regained her sway, or, if not, it is reasonable to suppose that the accused had nursed and fed his anger and deliberately kept it alive. What is the rule where there has been no such lapse of time? Is the question of intent one for the jury under all circumstances, without regard to the existence or nonexistence of a "cooling period"? It is often said by the authorities that intent is a question of fact, the determination of which is peculiarly within the province of the jury. It is to be observed, however, that this most frequently occurs in the discussion of the action of the court in giving or refusing instructions. As has been indicated, these rulings are made without reference to the weight or probative force of the evidence, and the declarations made by the courts of review respecting them are not applicable, when it is the duty of the court to deal with the weight of the evidence. A great many decisions hold that it is the duty of the court to grant a new trial when the facts disclosed by the evidence are not such as to justify the finding of the jury. Is it true that in every case in which it appears that the accused has taken the life of his fellow man, and the jury has found him guilty, after weighing the evidence, under proper instructions by the court, neither the trial court nor the appellate court can grant a new trial, because the question of intent is, under all circumstances, one of fact for the jury? The authorities answer this in the negative. In numerous instances, convictions of murder have been reversed because the evidence did not justify them. *Gulford v. State*, 24 Ga. 315; *Thompson v. State*, 1 Tex. App. 56; *State v. Brown*, 15 Rich. Law (S. C.) 59; *People v. Kohler*, 49 Mich. 324, 13 N. W. 608; *Hayward v. People*, 96 Ill. 492; *Holly v. State*, 10 Humph. (Tenn.) 141; *Leake v. State*, Id. 144; *Ake v. State*, 31 Tex. 416; *Harris v. State*, 36 Ark. 127; *Miller v. State*, 74 Ind. 1; *Petty v. State*, 65 Tenn. 610; *Brown v. State* (Miss.) 7 South. 359.

The better opinion seems to be that in criminal as well as civil law there are certain limits within which the jury must be confined. They cannot find the elements of murder or any other offense when the evidence wholly fails to establish them. That a grievous provocation immediately resented with violence, resulting in death, reduces the offense from murder to manslaughter, is a rule of law, seems to be asserted by all the books. In *McWhirt's Case*, 3 Grat. (Va.) 594, 46 Am. Dec. 196, the court entered upon a long and laborious analysis of the evidence, on the motion for a new trial, for the purpose of determining whether sufficient time had elapsed between the provocation and the

killing to allow the passion of the accused to subside. Had it been a mere question for the jury and not for the court, why did not the court dispense with such a useless performance as a review of the evidence on the motion for a new trial? Though this court has not, in many instances, if any at all, set aside verdicts in cases of homicide because of insufficiency of evidence, the decisions do not deny to it the power to do so in any case in which it ought to be done. In *State v. Scott*, 36 W. Va. 704, 15 S. E. 405, this court said: "It is quite true that the fatal blow struck by the prisoner with an unlawful weapon of deadly character was given in what might be termed a chance medley or affray, which occurred in an unpremeditated manner. If the prisoner had been able to prove that he himself was entirely blameless in the quarrel which thus fatally resulted, and that his assailant was bent upon inflicting great bodily harm, these circumstances ought to have reduced his offense to manslaughter. But the evidence of the state would seem to justify the jury in concluding that the prisoner started the quarrel by very boisterous and unseemly behavior, where the deceased and his companions, including two women, were engaged in drinking beer; that, when asked to desist, the prisoner retorted with foul and abusive epithets; and that he thus provoked the quarrel, and concluded it by throwing a two-pound iron weight with deadly aim at his antagonist, who could not have been distant from him more than 8 or 10 feet. Furthermore, he himself, in his testimony, states that before throwing it he 'steadied' himself; and further evidence of the state tends to show that he must have advanced two or three steps towards his adversary. The commencement of the quarrel by him, and the violence of his resentment out of proportion to the provocation, tended to prove that malignity of disposition which the law defines to be malice towards mankind." The principle here asserted is that a homicide on a gross provocation is manslaughter only; but the prisoner put himself beyond that rule by provoking the quarrel, inducing a provocation to himself and resenting it by means wholly disproportionate to the injury thus brought upon himself. This conduct shed light on the intent. In *State v. Clark*, 51 W. Va. 457, 41 S. E. 204, the court refused to set aside a verdict of murder, where the killing had resulted from a quarrel or controversy, but it was expressly held that the deceased had not done any act which the court could say, as matter of law, amounted to such provocation as would reduce the offense from murder to manslaughter. It was therefore a question for the jury. In other words, there was evidence sufficient to sustain the verdict.

In *Rex v. Ayes, R. & R. 166*, the 12 Judges of England, in the year 1810, on a question reserved by the trial court, expressly decided that the question of malice is not one

solely for the jury. The syllabus of the case briefly states the decision and facts of the case as follows: "After mutual blows between the prisoner and the deceased, the prisoner knocked the deceased down, and, after he was upon the ground, stamped upon his stomach and belly with great force. Held, manslaughter only." The statement of the case shows that the prisoner had first pushed the deceased down on his back, after which the latter arose and struck the prisoner two or three times with his fist. Then the prisoner pushed him down again on his back, and, as he lay there on his back, gave him two or three stamps with great force with his right foot, and after he had gotten up kicked him in the face. The jury found the prisoner guilty of murder, and the judges, on a question reserved, ordered the verdict set aside. In *Wharton on Homicide*, at section 446, the following is stated as sound law: "In an English case, given by Lord Hale, A. and B. were walking together in Fleet street, and B. gave some provoking language to A., who thereupon gave B. a box on the ear, upon which they closed, and B. was thrown down and his arm broken. Presently B. ran to his brother's house, which was hard by; and C., his brother, taking the alarm, came out with his sword drawn and made towards A., who retreated 10 or 12 yards; and, C. pursuing him, A. drew his sword, made a pass at C., and killed him. A. being indicted for murder, the court directed the jury to find it manslaughter, not murder, because it was upon a sudden falling out, not *se defendendo*, partly because A. made the first breach of the peace by striking B., and partly because, unless he had fled as far as might be, it could not be said to be in his own defence; and it appeared plainly upon the evidence that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C. than to avoid him; and accordingly, at last, it was found manslaughter." Another illustration appears in *Wharton on Homicide*, in section 454, which reads as follows: "Upon an indictment for murder, it appeared that the prisoner and the deceased, who had been upon terms of intimacy for three or four years, had been drinking together at a public house till about 12 o'clock at night. About 1 they were together in the street, and had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and, on a policeman coming, went away; he, however, returned again, between 5 and 10 minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen. The knife, a common bread and cheese knife, was one that the prisoner was in the habit of carrying about with him, and he was rather weak in his intellect, but

not so much as not to know right from wrong. Lord Tenterden, C. J.: 'It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter; but it depends upon the time elapsing between the blow and the injury; and also whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place.' It is uncertain, in this case, how long the prisoner was absent—the witness says from 5 to 10 minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain. The prisoner may have been absent less than five minutes. There is no evidence that he went anywhere for the knife. The father says it was a knife he carried about with him. It was a common knife, such as a man in the prisoner's situation in life might have. For aught that appears he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other. If there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say the prisoner is guilty only of manslaughter. But if you do think the act was the act of a wicked, malicious, and diabolical mind (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder."

It may be supposed that the uncertainty in the evidence as to whether the prisoner fired at the deceased, thinking him to be Charles Cook, who, just about that time, ran in the direction of the deceased, or fired knowing the party to be the deceased, constitutes an insuperable obstacle to the reversal of this judgment. If the accused fired at Cook in a transport of passion, and by mistake killed Turner, many cases, holding that the degree of the offense would be the same as it would have been had Cook been killed, are to be found among the reported decisions. "And so, in cases where the blow intended for one person by accident falls upon and kills another, the thing done follows the nature of the thing intended to be done, and the guilt or innocence of the slayer depends upon the same considerations that would have governed had the blow killed the person against whom it was directed. Hence the homicide

is murder, or manslaughter, or excusable homicide, for precisely the same reasons that would have determined its character had the event conformed to the intent; and the principle is the same whether the misadventure proceeded from the misdirection of the blow or from a mistake in the identity of the victim." 21 Am. Eng. Ency. Law, 105, citing a number of decisions which fully sustain the text. See, also, 1 Bish. Cr. Law, § 334; Plummer v. State, 4 Tex. App. 310, 30 Am. Rep. 165; Aaron v. State, 31 Ga. 167. If the accused knew he was shooting Turner, as is indicated by the testimony of the two witnesses whose testimony has been quoted, the conclusion must be the same, for he had reason to believe that Turner was a party to the conspiracy and was present for the purpose of aiding and abetting the assault made upon him. He knew the relations existing between Turner and the Cooks, and that the assault was the result of the transaction which had taken place between himself and Turner's little boy. The trouble had all grown out of that incident. Jennie Cook had become involved in it, and all the parties concerned were together at the time and the place of the assault. The trivial, insignificant affair had been developed by them, the Cooks and Turner, as their presence indicated, into a sort of family feud against the accused, and all were present for the purpose of visiting, or seeing visited, upon him, a very severe chastisement. Under these circumstances, the jury were bound to find that the accused was justified in regarding the provocation as having emanated from all of them, or to disregard the evidence and make an arbitrary finding. The prisoner knew himself to be the victim of a conspiracy. Turner had stood by and seen him assaulted by two men, on account of a matter which had its origin in the transaction between himself and the son of Turner. They were all related. He knew, too, that Turner had been displeased on account of that matter and had consorted with Jennie Cook concerning it. They had come together to him about it. A reasonable view, from the standpoint of the prisoner at the time, was that Turner was a party to the conspiracy, and the jury had no right to proceed upon a fanciful theory, having no basis in the evidence.

In view of these principles and conclusions, we think the evidence is not sufficient to sustain a conviction of murder in the second degree, nor of any offense greater than voluntary manslaughter, and that the circuit court erred in refusing to set aside the verdict.

The judgment will therefore be reversed, and the verdict set aside, and the case remanded for a new trial.

BRANNON, P. (dissenting). I dissent because the court reverses only because the evidence is not, in its opinion, strong enough

to support the verdict. It thus assumes the office of a jury—or rather takes from a jury its functions. I cannot conceive that this case presents in this point a question of law. It is purely a question of fact under evidence. Two witnesses say that the accused, when the Cooks had left him and were running away, looked at Turner standing 10 feet away and fired upon him, while standing with his hands in his pockets. One says the accused looked at Turner a minute and fired. The accused and his father deny this. They do not deny that Turner was 10 feet away; but the father says the accused fired as he was in the act of rising from the ground. Here is conflict. There is no conflict as to the exact position of Turner when shot. Nobody says he was beating the accused when shot. This is a critical point in the case. On it turns the degree of the crime, whether murder or voluntary manslaughter. Some evidence says that Turner joined in the battery on the accused; other evidence denies this. On much evidence the jury found, on these test questions of fact, that Turner was not a conspirator with the Cooks, was not a party to the battery, was not assailing Clifford when shot, but standing off silent. This court, on this conflict, finds that the evidence of the state, in these important matters, is unworthy of belief, virtually takes the evidence of the father, because, if the state's evidence is truthful, the jury could find as it did. There was as much evidence for the state in these vital matters as for the accused, if not more. In fact, in some of them the evidence of the prisoner's father alone controls. Once it was law that the court need not certify conflicting evidence for appeal, so final was regarded the verdict approved by a judge. Now, it is different; but, when such evidence gets into this court, the rule prevails that we cannot defeat a verdict, except we reject all evidence of the party against whom the jury decided conflicting with that of the adverse party, and give full faith and credit to the evidence of the latter, and, if the remaining evidence tends to or goes fairly to support the verdict, it must stand, unless it is clearly not sufficient. *State v. Chambers*, 22 W. Va. 779, 46 Am. Rep. 550; *Kimmins v. Wilson*, 8 W. Va. 584; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639, Syl., pt. 4. We treat it as we treat a demurrer to evidence. In *State v. Sullivan*, 55 W. Va. 597, 47 S. E. 267, we said, on what we thought was sound authority, that the evidence must be considered most favorably to the verdict. But in this instance evidence to support the verdict is discredited, and full faith given to the evidence to overthrow the verdict. Whilst this court possesses power to defeat a verdict, though the evidence is conflicting, still it should rarely do so, and only do so with extreme caution, and only where the verdict is plainly contrary to right and justice. *Robertson v. Harmon*, 47 W. Va. 500,

35 S. E. 832. This court cannot set aside the verdict, in conflict, "merely because it thinks there is a preponderance of evidence against it, or doubts its correctness, or would itself have found a different verdict." *Morlen Case*, 102 Va. 622, 46 S. E. 907. Indeed, where evidence conflicts, it may be seriously questioned, even at this date, as a matter of strict legal principle, whether an appellate court can grant a new trial; for it has been held that, "upon familiar principles, recognized and approved in numerous cases, when there is a conflict of evidence, an appellate court will never set aside a verdict where the court which tried the case and heard the witnesses concurs with the jury and has refused a new trial." *Caldwell v. Craig*, 21 Grat. (Va.) 186; note to *Grayson's Case*, 6 Grat. (Va.) 712; *Michie v. Cochran*, 93 Va. 641, 646, 25 S. E. 884; *Seibright v. State*, 2 W. Va. 596; *State v. Thompson*, 21 W. Va. 741, 756; *Miller v. Insurance Co.*, 12 W. Va. 116, 124, 29 Am. Rep. 452; *Andrews Case*, 100 Va. 801, 40 S. E. 935. In *Grayson's Case*, cited, it is held: "Where the evidence is contradictory, and the verdict is against the weight of evidence, a new trial may be granted by the court which presides at the trial; but its decision is not the subject of a writ of error or supersedeas, or examinable by an appellate court." In 14 Ency. Pl. & Prac. 780, it is laid down that the trial court can weigh conflicting evidence and grant a new trial, but an appellate court cannot. In strict principle I doubt whether a verdict should ever be set aside on evidence materially conflicting, but this court has sometimes done so, especially under the acts found in the Codes of 1891 and 1899 (chapter 131, § 9). See *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 688. The opinion by Judge Dent, in *Akers v. De Witt*, 41 W. Va. 229, 23 S. E. 669, does not seem to give this statute force to change much the rule of treatment of evidence in the appellate court on a motion for a new trial. I do not think it revolutionizes and tears down established rules in this matter, as I said in the *Johnson-Burns Case*. But what is above said will at least show that rarely, only in extreme cases, will this court reverse a jury trial on conflicting evidence. But even where there is not involved a conflict of evidence, but the question is one of weight of evidence, this court has said in many cases that: "In Virginia and this state the courts have always guarded with jealous care the province of a jury. If the question depends on the weight of testimony or inferences and deductions from the facts proved, the jury, not the court, are exclusively and uncontrollably the judges. This conclusion is based upon the well-established rule that the jury are the sole judges of the evidence, the credibility of all admissible testimony, and the inferences from the facts and circumstances proved." *State v. Cooper*, 26 W. Va. 338; *State v. Baker*, 33 W. Va. 335, 10 S.

E. 639. And this rule has been often said to apply with stronger force in this court than in a circuit court. *Grayson's Case*, 6 Grat. (Va.) 712; *Sheff Case*, 16 W. Va. 307. Why? Because the jury and judge saw the witnesses face to face and are much more competent to judge of their veracity and demeanor and weight of their evidence than are we. The opinion of Judge Faulkner, a judge of long experience and competency, is therefore better than that of any judge on this bench. So is that of the jury. For this reason we said, in *Baker's Case*, 33 W. Va. 336, 10 S. E. 639, upon authority then regarded by the court good: "Where a case depends on the tendency and weight of evidence, and the jury and judge who tried the case agree in the weight and influence to be given the evidence, it is an abuse of the appellate powers of this court to set aside a verdict because the judges of this court, from the evidence as it is written down, would not have concurred in the verdict." *Gilmer Case*, 42 W. Va. 52, 56, 57, 24 S. E. 566; *Hill's Case*, 2 Grat. (Va.) 594. Now, the corpus delicti is proven beyond question. It only remains to find whether the accused is excusable by way of self-defense, or, if not excusable, what is the degree of his crime? Who will question that this is peculiarly a question for the jury, dependent on the credit of witnesses and the weight of their evidence? *State v. Welch*, 36 W. Va. 690, 15 S. E. 419. It does appear to me that this court has taken up scales and not only passed on the credit of witnesses, but undertaken to weigh their evidence with nicety just as a jury would. A circuit court can do this, but an appellate court cannot weigh evidence. *Norfolk v. Spencer* (Va.) 52 S. E. 310 (Syl., pt. 8); 14 Ency. Pl. & Prac. 770.

I dissent because I cannot consent to defeat and frustrate the administration of criminal justice by overruling verdicts approved by circuit courts after full and fair trial, when there is much evidence to sustain the verdict, simply because this court thinks the jury and judge erred. My understanding is that, where different men may form different conclusions upon the weight of a mass of evidence, especially if credit of witnesses is involved and the evidence is conflicting, an appellate court should not annul the trial. I venture to repeat, touching the force of verdicts, language in *State v. Bowyer*, 43 W. Va. 180, 27 S. E. 301: "The witnesses were face to face before the judge and jury. The prisoner was before them. They saw him in the ordeal of examination. They scrutinized his countenance, his demeanor, his words, his tone. They were to judge of his veracity. They discredited his denial of guilt. They saw and heard all the witnesses, all the circumstances of the trial—often silent, but potential, evidence of the real truth. That judge and those jurors would average with us, had we been present, in capacity to judge of evidence; and,

as we have nothing of the actual appearance of the trial, and only the evidence in cold type, they are vastly more competent than we to pass safe judgment upon the facts. We are not a jury. We have power—mere power—to discredit verdicts; but we must be cautious in so doing. Why have juries, if appellate judges are to go into the business of weighing evidence as if by the ounce and pound? We ought not to do this. It is an abuse of power, and a misconception of our functions and of the jury functions. The jury institution is sacred under our Constitution, and a verdict is to be highly respected. In long experience, I must say that, as a general thing, they evince good sense and do justice. From the frequency of requests to us to set aside verdicts, it seems to be thought that we can and will do so merely because we would not have found, judging from type, the same verdict; but such is not the rule, though instances deviating from these principles may be found, and I am very much averse to looseness in this matter on the part of appellate courts. And then, too, we must not forget that a learned and experienced judge approved the verdict, after witnessing the trial; and his opinion is entitled to great respect in an appellate court. *State v. Hunter*, 37 W. Va. 744, 17 S. E. 307. We must be careful lest we set ourselves up as judge and jury present at the trial, and usurp their functions." To same effect, *State v. Morgan*, 35 W. Va. 260, 277, 13 S. E. 385. It is not merely for this case that I write this dissent, but it is to express dissent against a growing tendency to depart from volumes of decisions and treat lightly verdicts approved by trial courts and overthrow them on insufficient grounds. A verdict of 12 men, as competent to judge evidence as we, had we been present at the trial, confirmed by a judge, is overthrown by four men on evidence held as insufficient. Insufficient to prove what? Not the homicide. This is admitted. But to prove that the evidence is not sufficient to prove murder in the second degree, but only voluntary manslaughter, a matter dependent on evidence on which a jury is peculiarly fitted to judge and entitled by law to judge.

(36 W. Va. 36)

BRUNER et al. v. MILLER.

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1906.)

1. CANCELLATION OF INSTRUMENTS—EQUITY—JURISDICTION.

Rescission of contracts affecting any estate or interest in land on the ground of fraud in the procurement thereof, or mutual mistake of the parties in effecting the same, belongs to the exclusive jurisdiction of courts of equity.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, §§ 1-7.]

2. SAME—INADEQUATE REMEDY AT LAW.

Courts of law have jurisdiction and power to afford relief in such cases by judgment for

money or property, under some circumstances, when a right to rescind exists and has been properly claimed; but the remedy at law is incomplete and inadequate, because of lack of power to affect a rescission by a direct adjudication thereof.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 7.]

8. MINES AND MINERALS—OIL LEASE—SALE—RESCISSIION.

Owing to the peculiar nature of oil and gas, both the quantity and location of land covered by a lease thereof for oil and gas purposes are elements going to the substance and essence of a contract of sale of such lease, obligating the vendee to develop the property by drilling a well thereon and deliver to the vendor part of the product thereof, free of cost or expense; and a gross misrepresentation as to either, relied upon by the vendee under the belief that it is true, is ground for rescission of the contract.

4. CANCELLATION OF INSTRUMENTS—DECREE.

On rescinding a contract, the court should, by its decree, put the parties in statu quo, by requiring each to restore to the other what he obtained by virtue of the contract.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, §§ 119-125.]

5. SAME—RECOVERY OF CONSIDERATION.

Money paid as rental to the landowner for delay in drilling a well under a lease held by assignment, in accordance with the terms of the lease, may be recovered back on rescission, when the contract of sale does not bind the vendee to drill, but extends to him the right to pay such rental in lieu of drilling.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, §§ 119-125.]

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County.

Bill by A. Bruner and others against R. W. Miller. Decree for plaintiffs, and defendant appeals. Affirmed.

Thos. P. Jacobs, for appellant. Hall & Hall, for appellees.

POFFENBARGER, J. R. W. Miller has appealed from a decree of the circuit court of Tyler county canceling a contract executed between him, as party of the first part, and A. Bruner and James McCoach, as parties of the second part, whereby Miller assigned and made over to said Bruner and McCoach a lease of certain lands of Nelson Myers for oil and gas purposes; Bruner and McCoach binding themselves, in the contract of assignment, to develop the property in accordance with the terms of the lease. The considerations paid by them to Miller were \$600 in cash and an agreement that he should have a one-fourth interest in the first oil well drilled on the property, free of any cost or expense to him. The bill sought rescission of the contract and repayment of said sum of \$600, together with an additional \$215, paid by Bruner and McCoach as rental for delay in drilling, on the ground of fraudulent representations on the part of Miller as to the location and quantity of the property on which the lease was. It does not appear that any of the parties were very familiar with the land. Miller resided in the city of Wheeling and Bruner and

McCoach in the city of Sistersville, Tyler county; while the land was situated in the Wetzel county. For a number of years James Lane, of Wheeling, had held part of the Myers land under lease, and, he having died, Miller became executor of his will. As such executor, he and the devisees or heirs of Lane allowed it to lapse, believing it not to be of any value. In view of development in the neighborhood of the land, Miller obtained a lease of it himself, with a view to disposing of it to one Jennings. He first went to Myers and obtained a sort of option for which he paid \$600. Bruner and McCoach, having been informed of this, made to him the proposition, with reference to the lease, afterwards embodied in the contract or deed in question here. The lease from Myers to Miller is indefinite and uncertain as to the description and quantity of the land; no quantity being stated, except in that part which relates to the boundaries, reading as follows: "On the north by the lands of W. M. Wyatt; on the east by the lands of James Ice; on the south by the lands of John Mills; on the west by the lands of N. Myers, containing (215) two hundred and fifteen acres, more or less." In discussing the merits of the property in the negotiations for the assignment of the lease, the parties had before them certain plats of the lands mentioned in the lease and adjoining lands; and, on reading the lease in connection with these plats, the description and the plats did not correspond in respect to the names of the owners of adjacent lands. The plat was prepared upon information afforded by the lease and knowledge of the parties, and especially information communicated by Miller. This plat showed a tract of 215 acres designated as "Nelson Myers No. 1." Then the deed of assignment was prepared describing the land as follows: "Containing 215 acres, more or less, and bounded and described as follows: On the north by the lands of William M. Wyatt; on the east by the lands of James Ice; on the south by the lands of John Mills; on the west by the lands of N. Myers and others; a plat of which said leasehold and surrounding territory is hereto attached marked in red ink 'R. W. M.' and the leasehold above described or intended so to be, and the leasehold that is sold by this indenture is marked on said plat in red ink 'Nelson Myers No. 1.'" The plat was annexed to the deed of assignment. These deeds bore date, respectively, on the 13th and 14th days of February, 1900. The lease required the commencement of drilling within 40 days from its execution, or, in lieu thereof, payment thereafter to Myers of the sum of \$215. It further required the completion of a well on the premises within six months from the date of the contract, or payment of a rental of \$1 per acre. These obligations Bruner and McCoach assumed in the deed of assignment. In view of the bad condition of the weather and roads, they failed to commence drilling

within 40 days, and paid said sum of \$215. On examining the property, some time in April, 1900, they found that all of the property described in the plat annexed to the deed, except 25 or 30 acres, was covered by a lease held by the South Penn Oil Company, under which said company was then operating. The clause in the lease saying the land was bounded "on the west by the lands of N. Myers and others, containing (215) two hundred and fifteen acres, more or less," plainly appears now not to have been a statement of the quantity of the land in the lease given to Miller, but the quantity of land belonging to Myers included in the South Penn Oil Company's lease, adjoining and bounding the Miller lease on the west. Upon a proper construction of that lease, in view of the facts then existing, some of which were not known to the parties, the lease from Myers to Miller stated no quantity. It described the lands by boundary only. Under a misapprehension in this respect, the deed of assignment was made to call for a specific quantity, 215 acres, and to cover land not included in the lease. Under it Miller no doubt held a considerable quantity of land, possibly as much as 215 acres, and his right in it passed by the deed of assignment, but it was not the same land, a leasehold in which his deed of assignment purported to pass, nor is it located where said deed of assignment represents it to be.

In a contract of this kind both quantity and location are material. It imposed upon Bruner and McCoach the duty of drilling a well for oil, at an expense of \$8,000 or \$10,000, partly for the benefit of Miller. Such a well is valuable, not only for its actual product, but as a revelation or disclosure of the mineral value of the territory on which the well is. If the territory be of no greater extent than to justify the drilling of a single well, the obligation to pay over one-fourth of its product would be equivalent to one-fourth of the value of the territory; but if the territory is sufficient to require, or justify, the drilling of 10 wells, one-fourth of the product of the first one would be of slight relative value. The testimony shows that some tests had been made in the community in which the land lies, some of which had disclosed the presence of oil, while others had not. These tests indicated the value, for oil purposes, of the land lying near the wells. A lease on property near a producing well is valuable, while one on property lying in close proximity to a "dry hole" is considered worthless. Hence, in contracts of this kind, the location is peculiarly material.

A misrepresentation concerning the subject-matter of a contract, and especially a contract relating to land, though innocently made, as a result of lack of knowledge, amounts in law to fraud, not actual, but constructive legal fraud, and gives as complete a right of rescission as if it were actual fraud, subject, however, to the limitation or qualification that the representation must

relate to some matter or thing which is of the very essence or substance of the contract. *Crislip v. Cain*, 19 W. Va. 438; *Newman v. Kay* (W. Va.) 49 S. E. 926, 68 L. R. A. 908. Ordinarily a deficiency or an excess in the quantity of land sold or leased is not deemed to be a matter of substance. *Newman v. Kay*, cited; *Tucker v. Cocke* (Va.) 2 Rand. 51. But a misrepresentation and mutual mistake or a fraud on the one side, accompanied by ignorance on the other, resulting in a sale of property having a different location from that which the purchaser supposed it to have, will always afford ground of relief in equity. The identity of the property or thing sold is always a matter of substance. If, as to it, there is a mistake or one of the parties has been misled by the fraud of the other, the purchaser is not deemed to have gotten the thing he bought. *Fearon Lumber Co. v. Wilson*, 51 W. Va. 30, 41 S. E. 137; *Chamberlaine v. Marsh*, 6 Munf. 284; *Graham v. Hendren* (Va.) 5 Munf. 185; *Glassell v. Thomas* (Va.) 3 Leigh, 113. Under these principles, if Miller be absolved from the charge of fraud and the case regarded as one of mutual mistake, the right to relief is equally as clear as if there had been a fraudulent representation. The bill sets out the facts, showing the erroneous belief of the plaintiffs as to the location of the land, and prays a cancellation thereof. It shows that the purchasers did not get what they supposed they were buying. Hence, according to its allegations, there was either a mutual mistake or a fraud on the part of the defendant, actual or constructive, and the allegations of the bill are fully sustained by the evidence. The evidence shows that immediately upon a discovery of the misrepresentation or mistake and failure of title the appellees made a demand upon Miller to take back the lease and refund the money paid by them to him as purchase money for the lease and to Myers as rental. Miller was willing to repay the \$600 and relieve them from their contract, but unwilling to pay said sum of \$215. It is not pretended that he would have been materially injured or prejudiced, aside from the loss of the benefit of his contract, had he accepted a reassignment of the lease and paid back the money. The lease was still alive and no considerable period of time had elapsed. The offer to rescind was made not later than May 3, 1900, and this suit was commenced on the 18th day of July, 1900. The refusal to pay the rental was based upon the theory that its payment to Myers was occasioned by the fault of the appellees themselves; they having agreed to comply with the terms of the lease, one of which was to pay said rental if the drilling of the well should not be commenced within 40 days from the date of the lease. But there was no covenant requiring them to commence the well within 40 days and thus avoid the payment of rental. They were allowed in the

deed of assignment the full option in respect to this matter accorded by the lease. They agreed to drill the well, but the covenant contained the following provision: "Such drilling to be done at such time or times as is most convenient to said parties of the second part, but any and all rentals accruing upon said leasehold under and by virtue of the terms of said lease shall be paid for and borne by said parties of the second part in proportion as above stated." Money paid as rental in consequence of delay in drilling was money paid out and expended under the contract and in reference to the property. It was contemplated and provided for by the deed of assignment. It was paid before the appellees had knowledge of the fraud or mistake, and was, therefore, an expenditure resulting directly from a misrepresentation of the appellant. The payment inured to the benefit of Miller, for, had they not paid it, he would have been bound to do so. Had they spent \$1,000 in drilling, instead of paying the rent, before discovery of the fraud, would they not have been entitled to be placed in statu quo? Rescission goes to the whole transaction and places the parties in their former positions, when that can be done. We think it clear that the appellees were entitled to have refunded to them upon rescission all they had paid out under the contract. Whatever loss the appellant may have sustained, therefore, by reason of the failure to develop the property, was occasioned by his own refusal to rescind the contract upon the demand of the appellees and their offer to restore the lease to him. He might then have protected himself fully by developing the property or selling the lease to some other person. A subsequent sale of it would no doubt have been less advantageous to him than the one he had made to the appellees, but that was a misfortune of his own, for which they were in no way to blame. It was his lease. He had acquired it, and from the consequences of his own negligence or oversight in procuring it he could not relieve himself by laying them upon the shoulders of other persons. Having refused to rescind when the appellees demanded it of him in the exercise of their clear right to do so, it does not lie in his mouth now to say they have injured him either by refusing to develop the property or preventing him from doing so. They held on to the lease because he refused to take it back and pay them the money to which they were entitled. He contested their right to rescind at his peril, and they were under no obligation to prevent or minimize damages resulting from his act, and which it was his own duty, and in his power, to prevent. Appellees were not in possession of the leasehold. They had expressly notified him of their intention not to drill or otherwise develop it. He could have entered upon and developed it, and at the same time prosecuted

an action for the vindication of any rights he had under the contract.

Want of jurisdiction in equity is, however, the proposition mainly relied upon as ground for reversal, and the argument made to sustain it is that an action at law for recovery of the money paid is an adequate remedy. In this connection many authorities are cited, including *Gall v. Bank*, 50 W. Va. 597, 40 S. E. 390, and *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257. The concrete cases disposed of by these two decisions are not in any respect similar to the one presented in this record. The former was a suit in equity to enjoin an action at law for the recovery of money on a common-law bond, and to cancel the bond, on the ground that it had been satisfied, in a compromise, by payment of a smaller sum than was called for by it. Assuming that there is concurrent jurisdiction in courts of law and courts of equity for the relief of the obligor under such circumstances, the decision is right and in perfect accord with the authorities everywhere, because when there is concurrent jurisdiction, and the law court has acquired jurisdiction of the matter, equity will not ordinarily interfere, although it would have readily taken cognizance, had its aid been first invoked. That is the ground of the decision of that case. The syllabus says, where an action is pending on the law side of the circuit court, equity will not take jurisdiction. 24 Am. & Eng. Ency. Law, 617; *Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. Ed. 174. The concurrent jurisdiction of equity is very broad. In many instances it gives exactly the same relief that may be had in a court of law—a mere decree for money corresponding to a judgment at law for money. But there is some equitable ground in addition to the right to recover money. Pom. Eq. Jur. §§ 171-189, inclusive. In most instances of this kind of jurisdiction the right to go into equity is lost by allowing the law court to assume jurisdiction first. *Id.* § 179. The case, therefore, is no authority for the proposition that equity will never take jurisdiction where there is a remedy at law. It does not deny the doctrine of concurrent jurisdiction. The legal remedy was entirely adequate, for a judgment in favor of the defendant would have been absolutely conclusive. It could have been pleaded as an adjudication against any right to recover on the bond in any subsequent action. In the other case (*Amick v. Ellis*) the object was specific performance of an alleged contract, if that could be had, and, if not, then a rescission of the contract and recovery of money paid under it. What was relied upon as the contract was not a contract. It was an absolutely void paper, presenting no contract either to be enforced or rescinded. There was no element of contract in it. Of course, there was no jurisdiction to undo a thing that had never been

done. The only right the plaintiff had, if any, was a right of recovery of money from the defendant, a right purely legal and absolutely devoid of any semblance of equitable right. The inapplicability of the other authorities cited is equally clear. Most of them were cases in which mere cancellation of void or voidable obligations was sought. Cancellation is not always the equivalent of rescission. An obligation for the payment of money differs from a contract or covenant to do some collateral thing. A note or bond simply binds one of the parties to pay money to the other. If it is voidable or void for any reason, the mode of getting rid of it is mere cancellation. There is no condition precedent to be performed. A fraudulent or void deed, passing no title, may be canceled and thereby destroyed. Nothing is to be done by the party attacking it as a condition precedent to the relief asked. If a suit at law has been brought on a note or bond that is voidable, because fraudulently procured, there is no reason why equity should intervene. The result of that action will settle forever the question of liability. It is already in suit, wherefore there is no probability that it will be negotiated or used in any other way to harass or annoy. Equity, by cancelling it, could do no more than put an end to the question of liability on it. That a court of law does by its judgment. In cases of deeds and other muniments of title affecting the status of property cancellation is the only adequate remedy, for no court of law can adjudge and order that deed be canceled or set aside. It can only give a judgment for money or for property. In these cases nothing is needed but cancellation.

This case belongs to neither of the two classes above mentioned. The contract involved is not an obligation to pay money, and the appellees did not merely ask, by their bill, to be relieved from a voidable paper obliging them to pay money. They seek a recovery of money against the very letter of the contract, and they ask that the contract be rescinded in order that they may have back the money which they have paid under it. They might have a recovery of that money in an action at law on allegations of fraud and deceit, but that would be only an action for damages for a wrong. They might also recover it as money had and received by the appellant to their use; but that would not obtain an adjudication of the rescission of the contract. A rescission can no more be adjudged in a court of law than a cancellation. Such adjudications are wholly foreign to the law courts and are peculiarly and exclusively equitable in their nature. Rescission may be enforced in a court of law, or, rather, there may be a recovery of money or property in a court of law as the result of a rescission made by the parties. 24 Am. & Eng. Ency. Law, 643. In such case the plaintiff, before suit, tenders

back to the defendant the money or property which he has received under the contract, and then sues for what he has parted with, and his recovery is one of money or property, as the case may be. The rescission is not by the adjudication of the court, but by the act of the party himself. He is not bound, however, to pursue this course, and it is not often done in the case of written contracts. He is entitled to an adjudication, a judicial determination, of the fact of rescission. That he can get only in a court of equity. "A court of equity entertains a suit for the express purpose of procuring a contract or conveyance to be canceled, and renders a decree conferring in terms that exact relief. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and although nothing is said concerning it, either in the pleadings or in the judgment, a contract or a conveyance, as the case may be, is virtually rescinded. The recovery is based upon the fact of such rescission, and could not have been granted unless the rescission had taken place. Here the remedy of cancellation is not expressly asked for, nor granted by the court of law, but all its effects are indirectly obtained in the legal action. It is true the equitable remedy is much broader in its scope and more complete in its relief, for its effects are not confined to the particular action, but by removing the obnoxious instrument they extend to all future claims and actions based upon it." Pom. Eq. Jur. § 110. Such cases belong to the exclusive jurisdiction of equity. Id. §§ 171-188; 24 Am. & Eng. Ency. Law, pp. 613-618, inclusive. From the peculiar nature of the jurisdiction for the purpose of rescission, this court has always recognized the right of a party who is the victim of a fraud or mistake to come into equity for relief, notwithstanding the existence of concurrent jurisdiction in the law courts. See *Kelly v. Riley*, 22 W. Va. 247; *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. 717; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Nichols v. Cooper*, 2 W. Va. 347; *Anderson v. Snyder*, 21 W. Va. 632; *Crislip v. Cain*, 19 W. Va. 438; *Boggs' Ex'r v. Harper's Adm'r*, 45 W. Va. 554, 31 S. E. 943; *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625; *Newman v. Kay* (W. Va.) 49 S. E. 926, 68 L. R. A. 908. Jurisdiction in equity was asserted in *Fearon Lumber Co. v. Wilson*, 51 W. Va. 30, 41 S. E. 137, a case almost the exact parallel of this case. A purchaser of real estate was permitted, by way of rescission, to recover back in equity the purchase money paid for the land. The principles upon which the foregoing decisions of this court rest are almost universally recognized by the authorities. *Taymon v. Mitchell*, 1 Md. Ch. 496; *Higgins v. Crouse*, 63 Hun (N. Y.) 134, 17 N. Y. Supp. 696; *Bruner v. Meigs*, 64 N. Y. 506; *Crump v. Ingersoll*, 44 Minn. 84, 46 N. W. 141; *Crump v. Ingersoll*,

47 Minn. 179, 49 N. W. 739; Bosley v. National Machine Co., 123 N. Y. 550, 25 N. E. 990; Cocke v. Hardin, Litt. Sel. Cas. (Ky.) 374; Mayne v. Griswold, 3 Sandf. (N. Y.) 463; Relf v. Eberly, 23 Iowa, 467; Hosleton v. Dickinson, 51 Iowa, 244, 1 N. W. 550; Davis v. Peabody, 170 Mass. 397, 49 N. E. 750; Caldwell v. Caldwell, 1 J. J. Marsh. (Ky.) 53.

The decree of the circuit court, however, has departed from the case made by the bill and the evidence in canceling the deed of assignment. By that deed the appellant passed to the appellees title to the lease. As a condition of receiving back their money, they should have conveyed the lease back to him. As hereinbefore shown, the case is not one of mere cancellation. There was something to be done on both sides. The lease was to be restored to Miller and the money to Bruner and McCoach. The decree requires Miller to pay back the money without requiring Bruner and McCoach to restore the lease. It may be of no value by reason of its having expired, but neither its validity nor its status appears from this record. This court cannot say whether it is still alive, nor was the court below in a position to do that. But as no objection to the decree is made on this ground, and this court cannot see that the appellant has been prejudiced in this respect, it cannot be reversed on a mere presumption of error. The presumption is the other way.

For the foregoing reasons, the decree appealed from will be affirmed, with costs and damages to appellees according to law.

(59 W. Va. 46)

LOVERIN & BROWNE CO. v. BUMGARNER.

(Supreme Court of Appeals of West Virginia. Feb. 13, 1906.)

1. GUARANTY — CONSTRUCTION — ACTION AGAINST GUARANTOR.

The following written guaranty made by J. H. B. to L. & B. Co. for the benefit of his infant son H. B., viz.: "For the purpose of enabling H. Bumgarner to purchase goods upon credit from Loverin & Browne Co., of Chicago, I hereby guarantee that said H. Bumgarner shall promptly pay them for all goods which they may hereafter sell to him upon credit until this guarantee is revoked. Said payment to be made within ten (10) days after receiving goods. My liability hereunder shall cover any balance to become due not exceeding five hundred dollars. Goods ordered under this guarantee may be returned within 10 days after receiving same at invoice price if goods are returned in good order properly packed. Dated Elizabeth, W. Va., July 11th, 1903. J. H. Bumgarner. [Seal.]" Held to be a guaranty of payment absolute and unconditional, upon which a suit may be commenced against the guarantor without any previous suit against the principal.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, § 89.]

2. SAME—TIME OF PAYMENT—BREACH.

When the terms of a guaranty of payment fix the time within which the payment shall be made, if the payment is not made within the time prescribed, there is a breach of the guaranty, and no steps need be taken against

the principal, nor need his insolvency be shown in order to charge the guarantor.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, §§ 87-89.]

3. EVIDENCE—LETTERS—GENUINENESS.

The genuineness of a letter is sufficiently established to permit its introduction in evidence, when it is shown that it was received in due course of mail in response to a letter sent to the supposed writer.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1649.]

4. SAME—BEST AND SECONDARY.

And, upon notice having been given to such writer to produce the original of the letter to which his was a reply and his failure to produce such original, a letter-press copy thereof is admissible in evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 596.]

5. SAME—HARMLESS ERROR.

The admission of incompetent evidence over objection will not reverse a judgment, when it is clear that such error could have worked no prejudice to the exceptor.

6. PLEADING—EXECUTION OF INSTRUMENT—DENIAL—AFFIDAVIT.

Syllabus point 4, Robinson v. Dix, 18 W. Va. 528, and syllabus point 1, Maxwell v. Burbridge, 28 S. E. 702, 44 W. Va. 248, approved.

(Syllabus by the Court.)

Error from Circuit Court, Wirt County.

Action by the Loverin & Browne Company against J. H. Bumgarner. Judgment for plaintiff, and defendant brings error. Affirmed.

T. A. Brown and D. C. Casto, Jr., for plaintiff in error. F. T. Lockhart and W. N. Miller, for defendant in error.

McWHORTER, P. This is an action of assumpsit, brought by the Loverin & Browne Company, a corporation, against J. H. Bumgarner in the circuit court of Wirt county upon two guaranties in writing, the first in the following words: "For the purpose of enabling H. Bumgarner to purchase goods upon credit from Loverin & Browne Co., of Chicago, I hereby guarantee that said H. Bumgarner shall promptly pay them for all goods which they may hereafter sell to him upon credit until this guarantee is revoked. Said payment to be made within ten (10) days after receiving goods. My liability hereunder shall cover any balance to become due not exceeding five hundred dollars. Goods ordered under this guarantee may be returned within 10 days after receiving same at invoice price if goods are returned in good order properly packed. Dated Elizabeth, W. Va., July 11th, 1903. [Signed] J. H. Bumgarner. [Seal.]" The second, without date, but made in August, as appears from the record, is an addition to the former, and is as follows: "For the purpose of enabling Harry Bumgarner to purchase goods upon credit from Loverin & Browne Co., of Chicago, we or I hereby guarantee that said Harry Bumgarner shall promptly pay them for all goods which they may hereafter sell to him upon credit until this guarantee is revoked. Said payment to be made within

10 days after receiving goods. We or my liability hereinafter shall cover any balance to become due not exceeding one thousand dollars. Goods ordered under this guarantee may be returned within 10 days after receiving same at invoice prices if freight charges are paid and goods returned in good order properly packed. [Signed] J. H. Bumgarner. [Seal.]”

Plaintiff filed with its declaration a bill of particulars showing that it had sold in all under said guaranties to Harry Bumgarner goods to the amount of \$2,001.97, and had been paid by said Bumgarner \$1,312.46, leaving a balance due, as claimed, of \$681.51, which bill of particulars was duly sworn to and the defendant notified that the plaintiff would rely upon the said stated account as its bill of particulars upon the trial of the action. The defendant filed his counter affidavit that he believed there was no sum due from him to the plaintiff upon said demands stated in plaintiff's declaration, and entered his plea of non assumpsit. The defendant also tendered his special plea that the plaintiff ought not to have or maintain his said action against him, because he says that the contract which the plaintiff was seeking to enforce against him was one in which the defendant was a guarantor for Harry Bumgarner, who was the alleged principal; that said Harry Bumgarner was the principal in said contracts, and that defendant was only guarantor for said principal; that at the time of the making of said contracts and promises and undertakings the said Harry Bumgarner was an infant under the age of 21 years; and for further plea defendant says, as to the several bills and articles of goods, wares, and merchandise mentioned in plaintiff's declaration alleged to have been sold and delivered to said Harry Bumgarner, he, the said Harry Bumgarner, was an infant, and that said goods, wares, and merchandise were not necessities for the said infant. Plaintiff took issue upon said plea, and at the October term, 1904, of said court plaintiff by leave of court withdrew its reply to the special plea filed, and moved the court to strike out said special plea, which motion was sustained, and the said special plea stricken out, to which ruling the defendant objected and excepted. The defendant then tendered a second special plea, which was filed over the objections of the plaintiff, to which ruling plaintiff excepted. Said special plea was to the effect that the contract upon which the plaintiff's action was based was a contract of guaranty that Harry Bumgarner, the principal, should be first required to pay the same, and that plaintiff should have exhausted its remedy against him before looking to the guarantor; that plaintiff had been negligent in not pursuing its remedy against Harry Bumgarner, and that Harry Bumgarner was solvent at the time of making the said accounts, and at the time of the institution of the action against defendant; and that, if

Harry Bumgarner was insolvent, he had become so since default made in the payment of the said claim—to which plea plaintiff replied generally. On the 8th of February, 1905, a jury was sworn in the case, and, not being able to agree upon a verdict, were discharged. On the 10th of May, 1905, another jury was impaneled and sworn, and, after hearing all the evidence and the arguments of counsel and the instructions of the court, returned a verdict for the plaintiff, assessing the damages at \$630.90. The defendant then moved the court to set aside the verdict and grant him a new trial, on the ground that the verdict was contrary to the law and the evidence, which motion was overruled by the court, and judgment entered upon said verdict. In the progress of the trial the defendant took several bills of exceptions, which were signed, sealed, and saved to the defendant. The case was brought to this court upon writ of error and supersedeas.

The first cause of error assigned is in overruling the motion of defendant to set aside the verdict of the jury and grant him a new trial. This assignment will be disposed of in connection with other assignments hereinafter treated relative to the admission of testimony objected to by the defendant. The second assignment is that the court erred in giving to the jury instructions Nos. 1, 3, 4, 5, and 6, asked for by the plaintiff and set out in bill of exceptions No. 5; and the third assignment, in refusing to give to the jury defendant's instruction No. 2, as set out in bill of exceptions No. 6. These instructions involve the character and effect of the two written guaranties made by the defendant, J. H. Bumgarner, and filed with the plaintiff's declaration.

The plaintiff's instructions as set out in bill of exceptions No. 5 are to the effect that if the jury should believe from the evidence that the defendant signed and executed to the plaintiff the guaranty contracts sued upon and shown in evidence, and that upon the faith of such guaranties Harry Bumgarner or H. Bumgarner obtained the goods sued for from plaintiff and did not pay for some of the same within 10 days thereafter, as provided for in said contracts, then the defendant became at once liable to pay for the said goods up to the limit of his guaranty contracts, and plaintiff was not bound to first pursue the principal before instituting this suit on said guaranty contracts, and should find for the plaintiff the value of all such goods as they should find from the evidence had not been paid for by the principal within such limits. These instructions are given on the theory that the guaranties sued upon are unconditional guaranties for the payment of the money for Harry Bumgarner within 10 days after the delivery of the goods to said Harry Bumgarner on the default or failure of the principal to pay the same. Harry Bumgarner was the infant son of the defendant, J. H. Bumgarner, who was anxious to start him

in business, and for that purpose made the guaranties sued upon in this case. The goods furnished to Harry Bumgarner under these guaranties were not shipped to any place of business of the said Harry Bumgarner, but were sold by him to his customers, and put up in packages to fill the orders received by plaintiff from Harry Bumgarner, and the goods shipped in packages convenient to be delivered, and consigned to the plaintiff itself at such places as would be most convenient for the delivery by the said Harry Bumgarner, and the bills of lading were sent indorsed over by the plaintiff to Harry Bumgarner, and in a few instances indorsed by plaintiff over to defendant, to be by him indorsed over to Harry Bumgarner to enable him to get the goods. The circumstances of this case clearly indicate that the defendant intended by his guaranty to be primarily liable for the goods so delivered to his son, who was a mere boy, not competent under the law to contract or do business for himself, and it was evidently contemplated that the 10 days after the receipt of the goods were given as time for Harry Bumgarner to deliver the goods and collect the money and make immediate payment thereof to the plaintiff, less the profits to the said Harry Bumgarner. It is not reasonable to suppose that plaintiff would have knowingly entered into a business arrangement with an infant and furnished him goods to sell and collect the proceeds, and it take all the risk of being defeated in the collection of the price of the goods on his plea of infancy. The proposition is too unbusinesslike to be entertained for a moment, and defendant, knowing this, fully intended that his guaranty should be absolute and unconditional, and his correspondence with the plaintiff, at least such of it as was properly admitted as evidence at the trial, clearly shows his intention in the premises to that effect. It is shown that he furnished money to his son, Harry Bumgarner, on at least one occasion a check for \$400 to pay on his indebtedness to plaintiff, of which Harry paid to plaintiff only \$300. In *Arents v. Commonwealth*, 18 Grat. (Va.) 750, it is held that although, in general, the contract of a guarantor is to pay if, after due diligence, the debt cannot be made out of the principal, yet the intention of the parties must govern, and if it was the guarantor's intention to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him or proof of his insolvency, he will be held accordingly. That his contract in such a case is a guaranty of payment or of punctual payment by the principal debtor, and not merely a guaranty of solvency or of ultimate payment after the usual means of enforcing it are employed. In the case in 18 Grat. 750, cited above, *Joynes, J.*, in delivering the opinion of the court, at page 770, after discussing the differences between the contract of a guarantor

and that of a surety, says: "But while this distinction exists, in general, between the contract of a surety and the contract of a guarantor, we must in every case look to the terms of the guaranty and to the circumstances under which it was made to ascertain by the rules of construction the character and extent of the undertaking. If it thus appears to have been the intention of the guarantor to make himself liable on the default of the principal debtor without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly. This contract in such a case is a guaranty of payment, or of punctual payment, by the principal debtor, and not merely a guaranty of solvency, or of ultimate payment after the usual means of enforcing it are employed." See, also, *Douglass v. Reynolds*, 32 U. S. (7 Pet.) 113, at page 126 [8 L. Ed. 626]. In *City of Memphis v. Brown*, 20 Wall. 239 [22 L. Ed. 264], the contracts there under consideration contained a provision as follows: "The city of Memphis will and does hereby guaranty to the contractor the payment of said accounts as so assessed against the property owner, or owners for the payment according to the plans and specifications." The opinion of the court, at page 311 of 20 Wall. [22 L. Ed. 264], referring to this provision, says: "It will be perceived that this is a guaranty of payment and not of collection merely, and upon which upon general principles of law a suit may be commenced against the guarantor without any previous suit against the principal"—citing *Railroad Company v. Howard*, 7 Wall. 407 [19 L. Ed. 117]; *Zabriskie v. Railroad Company*, 23 How. 381 [16 L. Ed. 488]; *Leggett v. Raymond*, 6 Hill [N. Y.] 641. In *Campbell v. Baker*, 46 Pa. 243, it is held: "A guaranty of the payment of a note 'when due' is broken by nonpayment at maturity; and the guarantor is then liable upon his contract to the creditor, who is not bound either to pursue the principal or show his insolvency." And so in *Roberts v. Riddle*, 79 Pa. 468: "A guaranty of the payment of a written obligation 'according to its terms' is broken by nonpayment when the time for payment arrives, and the guarantor is liable without pursuing the debtor to insolvency."

The defendant, to maintain his proposition that the guaranties sued upon were the ordinary collateral and secondary guaranties of payment only after plaintiff's remedy against the principal should be exhausted, relies upon the case of *Building & Loan Association v. Engle*, 45 W. Va. 588, 31 S. E. 921, and *Kearnes v. Montgomery*, 4 W. Va. 29. In the *Engle* case the guaranty was upon a loan of \$800 from the loan association to Frank Engle, to secure which Engle had executed a mortgage on certain property, and had given bond, and the guaranty was: "The payment of said sum of \$800 by the said Engle to the said company on the terms

and in the manner set out in said bond and mortgage." The bond and mortgage were according to the forms and terms peculiar to building and loan association contracts, and the guaranty could only mean that in case the mortgaged property failed to pay the debt, in case it had to be resorted to, and, further, that the bond of Engle should prove insufficient to supplement it by the payment of any balance remaining unpaid after exhausting the mortgaged property, the guarantors would then be liable; their guaranty not being for the payment of money absolutely at or within a specified time, but "on the terms and in the manner set out in said bond and mortgage," so that it was clearly the intention of the parties that they should not only exhaust the mortgage, but pursue the bond, when the guarantors would be liable for any deficiency after the mortgage and bond were proven insufficient. In case of *Kearnes v. Montgomery*, as stated by the court, at page 40: "Whether the defendant is guarantor or maker depends on the understanding of the parties. * * * If a stranger indorse his name in blank on the back of paper not negotiable, he is prima facie guarantor; but this presumption may be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred." Brandt on Suretyship, p. 256, § 116, says: "When the terms of a guaranty of payment fix the time within which the payment shall be made, if the payment is not made within the time prescribed, there is a breach of the guaranty, and no steps need be taken against the principal, nor need his insolvency be shown in order to charge the guarantor." See cases there cited. In *Tobacco Company v. Held* [D. C.] 62 Fed. 962, the court quotes with approval from *Rand. Com. Paper*, § 850, where it is said: "A guaranty may be absolute or conditional. One who guarantees payment becomes absolutely liable on any default of payment by his principal." In *Moore v. Holt*, 10 Grat. [Va.] 284, it is said, at page 294: "But as a guaranty is regarded as a mercantile instrument, it is not to be interpreted by any strict technical rules of construction, but by what may be fairly presumed to have been the intention and understanding of the parties"—citing *Douglas v. Reynolds*, 7 Pet. 113 [8 L. Ed. 626]; *Bell v. Bruen*, 1 How. 169 [11 L. Ed. 89]; *Lee v. Dick*, 10 Pet. 482 [9 L. Ed. 508]. *Stearns, Suretyship*, § 61: "If the liability of the promisor is fixed by the mere default of the principal, it is an absolute guaranty; but, if the promisor's liability depends upon any other event than the nonperformance of the principal, it is a conditional guaranty. * * * It is not necessary to first pursue and exhaust the principal before proceeding against the guarantor in cases where the guaranty is absolute." See, also, 25 Cent. Dig. col. 191, § 89. It seems unnecessary

to cite further authorities upon this proposition. That the defendant's guaranties in this case are absolute and unconditional, from the circumstances of the case and the authorities, is unquestionable. This being so, the instructions asked by the plaintiff and given by the court were properly given; and, because this is so, and the instruction asked for by the defendant and refused by the court being based upon the opposite theory that the guaranties were conditional and required the principal to be pursued to insolvency, the same was properly refused.

Bills of exceptions Nos. 1, 2, and 3 go to the rulings of the court in admitting certain testimony over the objection of the defendant. The first objection is an objection to the reading of the deposition of Arthur Coon taken in Chicago on the 5th day of April, 1905, first, because of the insufficiency of the notice and the service thereof. The notice seems to be very full as to when and where the same should be taken and ample time given. The notice was served by a deputy sheriff of Wirt county by delivering a copy of the same "into the hands of J. H. Bumgarner in Wirt county, W. Va., March 20, 1905." It is further objected to because it is not properly certified. The objector points out no deficiency in the certification, and it appears to be sufficient. A third general objection is "because the notice shows that the deposition taken under it shows that the same were to be read on behalf of the witness, and not on behalf of the plaintiff." It is only necessary in reply to this objection to say that the notice shows no such thing, but says the depositions to be taken are "to be read in evidence in my behalf in the trial of a certain action at law now pending in the circuit court of Wirt county, state of West Virginia, in which action the undersigned is plaintiff and you are defendant." This notice was addressed to J. H. Bumgarner, and signed by Loverin & Browne Company, plaintiff, by counsel. Upon the introduction and reading of the depositions of Arthur Coon at the trial we have a labyrinth of objections and exceptions, being almost without number. The plaintiff undertook to prove by the witness Arthur Coon the written correspondence between the plaintiff and the defendant, as well as that between the plaintiff and Harry Bumgarner, concerning the shipment and delivery of goods and the receipt of orders for same, and inclosing bills of lading, which were always made to plaintiff, consignee, and either indorsed over to Harry Bumgarner to enable him to receive the goods shipped, or indorsed over to defendant, to be by him indorsed over to Harry Bumgarner. Some of these exceptions are well taken, because they fail to show with particularity the inclosing of letters in envelopes and stamping them, and placing the same in the postoffice, but content themselves with such proof as the following as a sample. The witness testi-

fied that "on the 31st day of August, 1903, Loverin & Browne Company sent a letter to Harry Bumgarner, inclosing a statement of his account, showing a balance due to Loverin & Browne Company of \$468.94, and asking him to remit," etc., without saying how the letter was sent, whether by mail, private messenger, or otherwise, and then offer the letter-press copies of such letters as secondary evidence; the original letters not being in possession of the plaintiff or under its control. In most of such cases on such objections the letter itself was permitted to go in evidence, and so much of the witness' testimony as related to the contents of the letter was stricken out. On the 25th day of November, 1904, the plaintiff caused to be served on the defendant a notice, dated October 24, 1904, to produce on the trial of said action certain letters written to the defendant by the plaintiff in relation to the matters here in controversy, giving the dates thereof, and notifying him that upon his failure to produce such letters it would offer secondary evidence of the contents thereof. On the 23d of September, 1903, plaintiff wrote a letter to defendant, notifying him of the balance due on account of Harry Bumgarner to that date, \$684.32, that there would be a credit on such balance of about \$40 on account of goods returned as soon as they were in, and informing him that they had written Harry Bumgarner several times, requesting him to keep his account paid up to date, but he seemed to be getting behind, which was the reason of this notice, and asked defendant to take up the matter with him, and have him settle the matter as soon as possible, as they could not have the matter run so long. October 6, 1903, the plaintiff received from J. H. Bumgarner a letter requesting a statement of Harry Bumgarner's account, which letter, witness stated, was mislaid, and plaintiff was unable to produce the same on trial. At any rate, on the same day, October 6th, plaintiff wrote a letter to defendant, replying to said request, inclosing statement of Harry Bumgarner's account, showing balance then due plaintiff of \$890.37, called his attention to the fact that they had repeatedly requested Harry Bumgarner to settle this account, but that he had kept putting it off from time to time, and that the account ought to be all settled by that time, "with the exception of the last shipment, which we presume has not yet been delivered," and informing him that a credit would go on the account of about \$60 or \$70 for merchandise that was not yet in, and asking him to take up the matter at once and arrange for an immediate settlement. On the 8th of October, 1903, plaintiff received a letter from J. H. Bumgarner, dated October 7th. In which he says: "I wrote you about a week ago for a statement of Harry Bumgarner a/c with you, as he is my son and I am on his bond I think it justis to me to have a full statement of all the Business he has

don, the total amount of goods shipped to him & also the Commission he would be entitled to." On the same day, the 8th of October, plaintiff wrote defendant that it had mailed him statements on the 7th and presumed that he had received them by that time, stating that the amount of shipments itemized in those statements was simply the net cost of the goods shipped, and was the balance due the plaintiff; that it had nothing to do with the commission. Witness stated that on October 15th plaintiff wrote to defendant that it had received \$300 from Harry Bumgarner since sending statement to J. H. Bumgarner, which had been credited to his account. On the same day, October 15th, J. H. Bumgarner wrote plaintiff, inclosing freight bill of \$2.25, for which he asked plaintiff to give his son, Gay Bumgarner, credit, and says: "I don't want my boys to owe anybody when it ought to be paid but they have sold a good many goods but it seems they come out behind at every shipment and I have to make up the deficiency." Then in a postscript he adds: "Please let me know at once how Harry Bumgarner stands with his a/c. I sent him a check for \$400 that he said he had fell behind, and that he could square up with that amount."

On the 19th day of October plaintiff received from defendant a letter, dated October 17, 1903, as follows: "Elizabeth, W. Va., Oct. 17, 1903. Loverin Browne Co. Dear Sirs: I rec. your letter stating that Harry Bumgarner had sent \$300 to be credited on his a/c, when I had sent him my check for \$400, which was to be sent to you. It does seem to me that he either spends all the money he gets for goods or keeps it & if he is not reducing his a/c I don't want you to send him any more goods on my a/c so send me a statement of all the money he has ever sent you since he commenced business with you & in the mean time don't send him any more goods on my bond until you hear from me." This letter is in answer to the letter of plaintiff informing him of the receipt of \$300 from Harry Bumgarner. It will be seen that in the postscript of defendant's letter of October 15th he had mentioned sending a check to Harry Bumgarner for \$400. When he finds that he had paid over to plaintiff only \$300 of the \$400 sent to him by the defendant, he is inclined to not further guaranty payment for him. Witness stated that on the 20th of October, 1903, plaintiff wrote a letter to defendant in reply to his letter of October 15th inclosing the freight bill for \$2.25, and his letter of October 17th countermanding his guaranty of Harry Bumgarner, which would take effect of that date and inclosing statement of account showing balance due of \$737.90; that a little shipment of \$9.76 was made on that day before his countermand was received; that the bill of lading was mailed to Harry Bumgarner and charged to his account. This letter goes on to reply to defendant's letter in relation

to the business of his sons, when he says: "They have sold a good many goods but it seems as though they come out behind on every shipment and I have to make up the deficiency," and states that that was not any fault of the business they were in, but, as they learned on good authority, it was the fault of the disbursement of the funds they received, and expressed a regret that his sons had not been careful about their habits; that they would be very sorry to close their business relation with defendant and his sons, but would not advise that it be continued in the manner it was then done. On the 22d of October plaintiff wrote to defendant that it had received a check from Harry Bumgarner for \$313.76, which it had credited, together with \$20.40 on account of freight, also \$32 for goods returned from Nelsonville, to the introduction of which last-named letter no objection was made. On the 26th day of October plaintiff wrote to J. H. Bumgarner that it had received an order from Harry Bumgarner for delivery October 30th at Nelsonville, Ohio, amounting to \$375, stating that it would ship the goods to its order, and hold the bill of lading until it should hear from defendant, and ask whether it should send the bill of lading to Harry Bumgarner for the shipment and charge same under the guaranty given by defendant for his account, and asking for a reply at once.

In reply to this letter, on the 30th of October, plaintiff received from defendant the following letter, dated October 28th: "Your letter of the 26th Rec. & in reply—Well you can let Harry Bumgarner have the goods shipped to Nelsonville, \$375, on my bond, and in the meantime urge him to send his collections as fast as he can. I want to do all I can for the boys, but don't want him to get too far behind, there is one thing about Harry, he is thorley honest, but he let a lot of his workers get away with him & has been reckless with his money, but has lots of business about him & any advice you will give him to hold him down will be highly appreciated by me." Upon receipt of said letter plaintiff mailed the bill of lading and invoice to Harry Bumgarner at Nelsonville, Ohio. On the 6th day of November plaintiff wrote inclosing to him bill of lading for shipment consigned to plaintiff at Buchtel, Ohio, amounting to \$23.15, for Harry Bumgarner, informing him that M. C. Clarke was there, and stated that it was his understanding and Harry Bumgarner's that defendant would stand good for future shipments to Harry Bumgarner, but that plaintiff did not understand it that way, as defendant only instructed it to turn over the Murray City shipment and the Nelsonville shipment, which it had done, and asked whether he would stand good for future shipments to Harry Bumgarner up to the amount of his guaranty, and ask for a definite reply, so there would be no delay in mailing the bill of lading to Harry Bum-

garner, and if it was his intention to stand good for future shipments to please indorse the inclosed bill of lading over to Harry Bumgarner, and mail to him at Nelsonville, so that he could get the goods, and would charge to his account. Witness stated that on November 9th plaintiff made a shipment to Harry Bumgarner to Glouster, Ohio, for \$58.52, invoice of shipment mailed to Harry Bumgarner at Glouster, and bill of lading was indorsed over to J. H. Bumgarner, and mailed to him at Elizabeth, W. Va., and asking defendant to indorse the bill of lading over to Harry Bumgarner, and mail to him at Glouster in case he wished to have the goods charged to him under his guaranty, and inquiring of him about the bill of lading mailed to him a few days before for the same purpose. By letter dated November 9, 1903, to plaintiff, defendant acknowledged the receipt of this letter of November 6th, and "in reply will say I want to do what is best to help Harry Bumgarner and am willing to stand on his bond for \$800, which I think is best for all parties concerned, and will mail him the bill of lading for \$23.13 and you can let him have the goods. Please let me know how his a/c stands and oblige." On the 13th of November plaintiff wrote defendant, among other things, as follows: "We have your letter of Nov 9th and note what you say about standing good for future shipments made to Harry Bumgarner to the amount of \$800.00 and we will be governed accordingly. We enclose statement of his account to date, showing balance due \$859.72. This will be reduced somewhat by goods returned. We have also sent him statement, requesting him to arrange to settle without further delay, so that we can mail him bills of lading for future shipments." On November 12th, defendant wrote plaintiff: "I just recd. a letter from Harry Bumgarner stating that Mr. Clarke would make the orders for goods in the future and he would work for him and that he would not want to ship any more goods on my bond until further orders." On the 14th of November plaintiff wrote defendant: "We have your letter of November 12th, countermanding guarantee given for account of Harry Bumgarner, and we will not ship any more goods under your guarantee until further instructions from you. We wrote you yesterday, sending statement of balance due on his account, which we trust will be settled up as soon as possible." On the 10th of December plaintiff wrote defendant: "As guarantor for the account of Harry Bumgarner, we hand you herewith statement of his account to date, showing balance due \$689.51. This account has been running some time, and as we do not see any prospects of getting it out of Harry Bumgarner we shall have to ask you to settle same. Kindly send us draft by return mail to balance, and oblige." This is the amount of plaintiff's claim, as shown by its bill

of particulars filed with its declaration, which is an itemized statement of all the shipments made to Harry Bumgarner, as well as all payments made by him during the whole time of their dealings, showing goods shipped in all to amount of \$2,001.97, and credits to the amount of \$1,312.46, leaving balance due plaintiff said sum of \$689.51, which account was proved by the deposition of Arthur Coon, bookkeeper of plaintiff, as true and correct, and showing the true balance unpaid.

A notice hereinbefore mentioned given by plaintiff to defendant to produce certain letters written by plaintiff to defendant named specifically letters dated September 23, October 6, October 8, October 15, October 20, October 22, October 26, November 6, November 9, November 13, November 14, December 10, and December 30, 1903, respectively. The correspondence between plaintiff and defendant introduced in evidence with the deposition of Arthur Coon shows the letters of defendant in reply to letters of plaintiff asking and receiving statements of account of his son, Harry Bumgarner, all the time acknowledging his liability to plaintiff on his guaranties, usually calling it his bond; that he was on the bond for Harry. Carbon copies of these letters from plaintiff to defendant from its letter-book became admissible as secondary evidence under the notice to defendant to produce the originals of such letters, taken together with replies thereto written by defendant, which reply letters are admissible without proof of the handwriting. In 2 Whart. on Ev. § 1828, it is said a letter in answer to one written is presumed to be genuine. *Bank v. Geisthardt* (Neb.) 75 N. W. 582: "The genuineness of a letter is sufficiently established to permit its introduction in evidence, when it is shown that it was received in due and regular course of mail in response to a letter addressed to the supposed writer." In *Davis v. Robinson*, 67 Iowa, 255, 25 N. W. 280, it is held: "Letters written with a typewriter and received by defendant through the mail, and purporting to be answers to letters written by him to plaintiffs, were admissible in evidence against plaintiffs without further proof that they were written by them." And *Scofield v. Parlin*, 61 Fed. 804, 10 C. C. A. 83: "A letter received in due course of mail in response to a letter sent by the receiver is presumed, in the absence of any showing to the contrary, to be the letter of the person whose name is signed to it." 1 *Greenleaf* on Ev. 575 (c), and cases cited; 3 *Wig. on Ev.* p. 2893 (d); 1 *Ell. on Ev.* 107; *Cobb v. Glenn Boom & Lumber Co.* (W. Va.) 49 S. E. 1005. In *Ovenston v. Wilson*, 2 Car. & Kir. 1, cited by 1 *Greenleaf* above, it is held that, where a letter was written by the managing clerk of plaintiff's attorney to the defendant, a letter received in answer was admissible in evidence without proof of the

defendant's handwriting; and it was also held that a letter proved to be received of an earlier date, in the same handwriting as the last-mentioned letter, was likewise admissible, and also a copy of a letter written by the said clerk of plaintiff's attorney of a still earlier date, to which the last-mentioned letter was an answer, was also given in evidence (the original not having been produced after a notice to produce) without any proof that the original had been put in the post, or had reached the defendant. *Boykin v. State* (Fla.) 24 South. 141; *Plow Co. v. Munger*, 52 Kan. 371, 35 Pac. 11.

In defendant's letter of October 28th to plaintiff, in reply to plaintiff's letter of two days before, informing him that it had an order from Harry Bumgarner for delivery of goods at Nelsonville, Ohio, amounting to \$375, and that it would hold the bill of lading until it heard from defendant, he gave plaintiff explicit directions to ship them "on my bond, and in the meantime urge him [Harry Bumgarner] to send his collections as fast as he can." Some two or three times defendant would temporarily suspend his guaranty, or his bond, as he termed it; then would again authorize goods shipped to his son thereon. Plaintiff would sometimes send the bills of lading indorsed by it to defendant, and by him to be indorsed over to Harry Bumgarner in case the defendant was willing to stand liable on his guaranty to plaintiff for the shipments, which were always made to plaintiff and could only be received by the holder of the bill of lading. The last time defendant renewed his guaranty was on the 9th of November, 1903, in response to plaintiff's letter of November 6th, as above stated. Defendant, J. H. Bumgarner, was present in person at the trial, and was placed upon the witness stand by plaintiff for the purpose of showing, and did prove, that his principal, Harry Bumgarner, had become insane and was an inmate of an hospital for the insane, and also for the purpose of accounting for papers supposed to be in his possession relating to this case, which he obtained from Harry Bumgarner. He admitted to having a large bundle of papers in the courthouse at the term of court before that relating to the case, but stated that he had turned them over to his attorney, Mr. Casto. He gave no testimony in relation to the correspondence between either himself and the plaintiff, or between Harry Bumgarner and plaintiff. While the fact that defendant was present in person at the trial and did not as a witness for himself deny the authenticity of the letters purporting to be signed by him, nor the fact that he had received the letters of the plaintiff put in evidence, may not be conclusive of anything, it strengthens the presumption that the letters were received and sent by him as shown. *Railroad Co. v. Roberts*, 10 Colo. App. 87-91, 49 Pac. 423. The de-

fendant offered no evidence in the case. In addition to the evidence of Arthur Coon, who proves the account of plaintiff, J. G. Clarke, a witness for plaintiff, testified that he was with Harry Bumgarner, saw the orders, and helped to deliver the goods; went with him on the wagon when he was delivering them; saw the invoices that were sent to him; that he was showing Harry how to take the goods out, and they were put in piles, and then taken and delivered to the customers, the different packages of goods with the orders on. Harry had several men working for him in selling and delivering the goods, orders were taken by all the men, and the goods would all come together to Harry. Clarke says Harry got the goods, that he saw him get them, and that he collected the money for them; says there might have been one order he did not see Harry get—he is not sure about that—“but the other orders I was with him, and helped him receive them, and check them out, and distribute them, and deliver them, and collect the money for them; that is, he did the collecting.” J. W. Woodyard also testifies to Harry Bumgarner receiving quite a large delivery of goods; did not know how much. Howard Showalter also helped Harry make delivery of two lots of goods and Harry collected the money for them. Arthur Coon testifies to the actual delivery of the goods, all the shipments, to the common carrier, and the presumption is that they were delivered in due course of business. I have said above that the exceptions of defendant to the rulings of the court in many instances in admitting certain letters of plaintiff to Harry Bumgarner and inclosures therewith, and Harry Bumgarner's letters to plaintiff, over the objections of defendant, were well taken, because of insufficient proof of mailing and identification. While this is true, they were immaterial errors not prejudicial to the defendant. If all such objections had been sustained, and the evidence excluded, still the plaintiff had ample proof to sustain its action and to entitle it to its verdict. In *Railroad Co. v. Roberts*, 10 Colo. App. 87, 49 Pac. 423, it is held: “The admission of incompetent evidence over objection should not reverse a case when it is clear such evidence could have worked no prejudice.” And in *Plow Co. v. Munger*, 52 Kan. 371, 35 Pac. 11, it is held: “Immaterial errors, not prejudicial to the rights of the defeated party, are no ground for a new trial.”

During the trial the defendant demanded the production of the plaintiff's books of original entry, and excepted to the ruling of the court in overruling his motion. The production of the books at the time they were so demanded would have been a great inconvenience, and could not have been done except at much delay in the trial, and they should have been called for, if wanted, at the taking of the deposition of Arthur Coon,

the bookkeeper, which deposition was taken in the city of Chicago, where the plaintiff's place of business was. The account from the books, made by said bookkeeper and filed with the declaration, and proved by him from entries made in the due course of business, was proved in the usual way of proving accounts in assumpsit according to the universal practice in our courts, and was sufficient. *Vinal v. Gilman*, 21 W. Va. 301. Counsel for defendant says plaintiff failed to show that notice was given to defendant of the failure of his principal, Harry Bumgarner, to pay for the goods purchased within a reasonable time after default. It is shown that statements were furnished him of the status of his son's account time after time and several times at his request.

Counsel for defendant further claims that the declaration was not good, but seems to forget that he failed to demur to the declaration. Section 3, c. 134, Code 1899, provides that no judgment shall be stayed or reversed for any defect, imperfection, or omission in the pleadings, which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of. *Land & Improvement Co. v. Karn*, 80 Va. 589.

Counsel for defendant says it was error to admit in evidence the guaranties mentioned in the declaration, and excepted to the ruling of the court in refusing to strike them out as evidence. Section 40, c. 125, Code 1899, says: “Where a declaration or other pleading alleges that any person made, endorsed, assigned or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it in issue.” *Robinson v. Dix*, 18 W. Va. 528; *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. 702, in which last case it is held that, unless the affidavit is filed denying such paper, it is error to admit testimony attacking the genuineness thereof.

For the reasons stated, there is no reversible error in the judgment of the circuit court, and the same is affirmed.

(124 Ga. 539)

LEE et al. v. HUMPHRIES et al.

(Supreme Court of Georgia. Dec. 22, 1905.)

1. EJECTMENT—MESNE PROFITS—WHAT CONSTITUTE.

When, in an action of ejectment, the defendant is a bona fide possessor under a claim of right, the mesne profits are to be assessed upon the value of the property as it stood when the defendant's title accrued, and the plaintiff is prohibited from recovering as mesne profits the increase of income resulting from improvements made by the defendants in good faith.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 438, 446.]

2. TRIAL—VERDICT—AMENDMENT.

When a jury returns a verdict which is incomplete on account of a failure to embrace therein a finding on a material issue, it is not error for the court to call the attention of the

jury to the fact and require them to return to their room and complete the verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 867.]

3. EJECTMENT—EVIDENCE.

The evidence authorized the verdict, and no sufficient reason has been shown for granting a new trial.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Thomas Lee and Sarah Sheffield against Charlotte Humphries and others. Verdict for plaintiffs. From an order denying a new trial, they bring error. Affirmed.

Thomas Lee and Sarah Sheffield brought suit against Charlotte Humphries and others for a certain described tract of land and mesne profits. The jury returned the following verdict: "We, the jury, find for the plaintiffs the land and mesne profits \$3.00 per annum for rent of land. We find for defendant the value of the improvements \$188.50. April 21, '05. J. R. Bowdre, Foreman." Whereupon the court immediately ordered the jury to return to their room and make a verdict in accordance with the form given in his charge, and the jury retired and returned the following verdict: "We, the jury, find for the plaintiffs the premises in dispute. We find the value of the lands to be \$100. We find the value of the improvements to be \$175.00. We find the mesne profits per year to be \$3.00, offset by taxes. April 21, '05. J. R. Bowdre, Foreman." To this verdict the plaintiff objected, and moved the court to set it aside; but the motion was overruled, and it was ordered that the verdict be recorded. The plaintiffs moved for a new trial, upon the general grounds, and because of the following charge of the court: "The plaintiffs concede that the defendants put the improvements upon the land in good faith. I charge you that in considering the question of mesne profits that you cannot find for the plaintiff against the defendants the mesne profits arising by virtue of the increased value of the premises for renting purposes by reason of any improvements put thereon by the defendants; and in determining the amount of mesne profits you are not authorized to find for the plaintiffs the mesne profits based upon the value of the land as improved by the defendant, but only such mesne profits as represent the value of the premises for rent without the improvements made by defendant." To the judgment overruling the motion for a new trial, and to the action of the court in ordering the jury to find the second verdict and ordering that it be recorded, the plaintiff excepted.

M. W. Bayne, for plaintiffs in error. Steed & Ryals, for defendants in error.

COBB, P. J. The charge of the court excepted to correctly set forth the law governing the recovery of mesne profits in an action where the defendant is a bona fide possessor under a claim of right. In estimating mesne profits in such a case, the basis must be the rental value of the land without the improvements placed thereon by the defendant. In the case of *Dean v. Feely*, 69 Ga. 822, this court approved the following from *Sedgwick & Wait on Trial of Title to Land*: "The principle of law which prohibits the true owner from recovering as mesne profits the increase of income resulting from improvements made by the occupant is manifestly just and equitable. It cannot be said that the additional profits are taken from the owner's land; on the contrary, they spring from practically an independent source. While it is true that the improvements pass to the owner by a recovery in ejectment, yet they are the property of the occupant until set off against mesne profits, or, in some states, until after their value is ascertained and the occupant's lien upon the land therefor is satisfied." See, also, *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351. The act of 1897 changed the law with regard to the recovery of mesne profits, to the extent that, in the event the improvement exceeded the sum total of mesne profits found for the plaintiff, the excess might be set off against the value of the land itself; but what constitutes mesne profits, and the method of arriving at what should be allowed as mesne profits, were not affected by that act.

2. The first verdict of the jury rendered in this case did not cover the issues. The act of 1897 distinctly provides that the verdict shall embrace a finding as to the value of the land. Acts 1897, p. 80. It was therefore the duty of the court to order the jury to retire and make their verdict conform to the law. *Jordan v. Downs*, 118 Ga. 546, 45 S. E. 439.

3. The foregoing disposes of all of the special assignments of error. There was no specific complaint against that portion of the verdict which reduced the mesne profits by the amount of taxes paid by the defendant, nor is there anything in the brief of counsel for plaintiff in error on this subject. We express no opinion as to whether this was proper reduction, but see in this connection *Clewis v. Hartman*, 71 Ga. 813, *Austell v. Swann*, 74 Ga. 281, and *Tripp v. Fausett*, 94 Ga. 330, 21 S. E. 572 (3). The evidence, though conflicting, was sufficient to authorize the verdict, and we see no reason for reversing the judgment.

Judgment affirmed. All the Justices concurring.

(105 Va. 200)

POPE v. PRINCE'S ADM'R.(Supreme Court of Appeals of Virginia.
March 15, 1908.)**1. ADMINISTRATORS — CLAIMS AGAINST DECEDENT'S ESTATE — PREFERRED CLAIMS.**

Where two persons were appointed commissioners to sell the real estate of an infant with power in either to act, but only one gave bond and acted as commissioner of sale, selling the land and reporting his sale to the court, and the decree ratifying the sale directed him to collect the purchase money and make deeds to the purchaser, and on making such collections he turned over a large part of the fund to the other person who had been appointed commissioner, the latter is not liable as commissioner of the court for the funds turned over to him, so as to render his deed to the infant a preferred debt of the fourth class, under Code 1904, § 2660, prescribing the order in which debts of a decedent are to be paid.

2. SAME.

A guardian of an infant, having no authority to receive proceeds of sale of the infant's real estate by a court commissioner, is not liable as guardian either de jure or de facto to the infant for the amounts paid to him by the commissioner, so as to render his debt to the infant a preferred debt of the guardian's estate of the fourth class, under Code 1904, § 2660.

3. TRUSTS — CONSTRUCTIVE TRUSTS.

Where a commissioner for the sale of real estate of an infant transferred proceeds of a sale to a third person, the latter became a constructive trustee holding the amount transferred to him for the benefit of the infant, and was not merely indebted to the commissioner for the amount so transferred.

4. ADMINISTRATORS — CLAIMS AGAINST DECEDENT'S ESTATE — PREFERRED CLAIMS.

An infant's claim against a constructive trustee, holding a fund for his benefit, is not a preferred claim against the trustee's estate.

Appeal from Circuit Court, Southampton County.

Creditors' bill by J. B. Prince, Sr., guardian of Abner S. Pope, infant, against J. B. Prince, Jr., administrator of the estate of J. B. Prince, deceased. Judgment was rendered against the infant, and, on his becoming of age, he appeals. Modified and affirmed.

Jas. H. Corbitt and J. U. Burgess, for appellant. J. C. Parker and E. E. Holland, for appellee.

HARRISON, J. This is a general creditors' bill, brought for the purpose of convening the creditors and settling up the estate of J. B. Prince, deceased.

The sole question presented by the record involves the right of appellant to have audited in his favor the sum of \$6,383.93, claimed to be due from the decedent in a fiduciary capacity, as a preferred debt of the fourth class, under section 2660 of the Code of 1904. It is insisted that the decedent held this sum, either as commissioner of the court, or as guardian of the appellant.

We are of opinion that the fund was not, as contended, in the hands of the deceased, in his lifetime, as commissioner of the court. It appears that in a suit brought to

sell the lands of appellant, who was at the time an infant, J. B. Prince and J. L. McLemore were appointed commissioners to sell such real estate, with power in either to act; that J. L. McLemore alone gave bond and acted as commissioner of sale under this decree, selling the land and reporting his sale to the court, which was confirmed. The decree ratifying the sale directed McLemore alone to collect the purchase money and make deeds to the purchasers. This was done; McLemore settling his accounts before the court, showing a balance in his hands of \$9,321.75, to the credit of the cause. No decree was made authorizing or directing the distribution of this fund to any one, but McLemore, without authority and in violation of his trust, turned over at different times a large part of the fund to J. B. Prince, who was his law partner, taking in one instance the bond of Prince therefor, and in other instances paying debts of Prince out of the fund without taking any evidence of such payments. It is clear that these moneys did not go into the hands of Prince as commissioner of the court, and that he cannot be held liable as such.

We are further of opinion that this fund did not go into the hands of Prince, either as guardian de jure or guardian de facto. It appears that J. B. Prince was in his lifetime the statutory guardian of appellant, but as such he had no right to receive funds arising from the sale of his ward's real estate. The court itself would have had no authority to order the proceeds of the sale of these lands to be paid to the statutory guardian of the infant. It could have only had it paid for the purposes of investment into the hands of some person, who may or may not have been the guardian, upon special bond being given for the care of the same, as prescribed by section 2622 of the Code of 1904. J. B. Prince, having no right to receive this fund as guardian de jure, cannot be held liable for it as guardian de facto.

It follows from these conclusions that the claim in question is not entitled to preference under the statute, but that it belongs to the class with other general creditors.

The circuit court held that the debt constituted a mere personal claim of J. L. McLemore, commissioner, against the estate of J. B. Prince, deceased. This we think was error. The fund was certainly not in the hands of J. B. Prince as an express trustee, but we are of opinion, upon well-settled principles, that, to the extent the funds belonging to appellant were traced to his hands, Prince will be treated as a constructive or de facto trustee holding the same for the benefit of appellant. This fact does not, however, advance the claim from the general class of creditors, as the statute does not contemplate a preference in favor of constructive trustees. *Brown v. Lambert's Adm'r*, 33 Grat. 256.

It being conceded that the estate of Prince is insolvent, and that its assets will not pay the preferred debts, it is a matter of no practical importance whether the claim in question is audited in favor of McLemore, commissioner, or of the appellant. We will, however, modify the decree appealed from so as to hold the estate of J. B. Prince liable to appellant, as constructive trustee, for this claim; and thus modified the decree must be affirmed.

CARDWELL, J., absent.

(105 Va. 205)

NEWPORT NEWS & O. P. RY. & ELECTRIC CO. v. CLARK'S ADM'R.

(Supreme Court of Appeals of Virginia.
March 15, 1906.)

MUNICIPAL CORPORATIONS — STREETS — OBSTRUCTIONS—LIABILITY OF THIRD PERSONS.

Where a railway and electric company was required by municipal authorities to remove its poles inside the curb line of the sidewalk, and while the company's linemen were engaged in repairing and swinging wires on the poles they stretched a rope across the sidewalk about four feet above it to warn pedestrians not to pass under the poles on which the men were at work, it was not negligence rendering the company liable for the death of a child from coming in contact with the rope which passed under her chin as she was running along the sidewalk, and threw her backward on the pavement.

Error to Circuit Court, Elizabeth City County.

Action by W. F. Clark, as administrator of Elizabeth Clark, against the Newport News & Old Point Railway & Electric Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

S. Gordon Cumming, for plaintiff in error.
O. D. Batchelor and W. H. Power, for defendant in error.

WHITTLE, J. The circumstances leading up to the accident which terminated in the death of plaintiff in error's intestate are as follows:

In compliance with the requirement of the municipal authorities, the plaintiff in error had removed its poles inside the curb line of the sidewalk along Mallory street, in the town of Phoebus. Subsequently, on the morning of the accident, while the company's linemen were engaged in repairing and stringing wires on the poles, by its order, a rope three-fourths of an inch in diameter was stretched across the sidewalk, one end of which was attached to the blind hinge of a building, and the other to one of the company's poles, about four feet above the surface of the pavement. The object in erecting this barrier was to warn pedestrians not to pass under the poles on which the men were at work, and thus to protect them from molten lead used in repairing wires, and from tools carried up on the poles by the

linemen, which were liable to fall upon and injure persons passing along the sidewalk beneath.

Between 8 and 9 o'clock in the morning, shortly after the rope had been adjusted, plaintiff's intestate, a girl between 9 and 10 years of age, while running with a companion on her way to school, came in contact with the rope, which passed under her chin, and she was thrown backward upon the pavement, sustaining injuries from which she died two days after the accident.

The jury found a verdict for the plaintiff, upon which the judgment under review was rendered.

From this outline of the salient facts of the case, it is obvious that the plaintiff has failed to establish actionable negligence on the part of the defendant. Though it involved a temporary obstruction of the sidewalk at the time of the accident, the company was engaged in lawful business. Indeed, it was discharging a duty imposed upon it by the town authorities. The work was attended with some danger to those who might pass along and use the sidewalk at that point, and the law devolved upon the company the duty of exercising ordinary care for their protection. Elliott on Roads & Streets (2d Ed.) § 717; Modern Law of Mun. Corp. (Smith) § 1310g; Nolan v. King, 97 N. Y. 565, 49 Am. Rep. 561.

The instrumentality (a three-quarter rope) employed for the purpose of warning the public was not per se a dangerous appliance. It was manifest to the ordinary observer, and in the light of experience the accident which befell the child could not reasonably have been anticipated. The uncontradicted evidence and collective experience of all the witnesses who testified on the subject is that they had never known or heard of such an accident before.

In the case of Sjogren v. Hall, 53 Mich. 274, 278, 18 N. W. 812, Judge Cooley observes: "The fact that it [the accident] was avoidable does not prove that there was fault in not anticipating and providing against it. If a farm laborer falls from the hay mow, the fall does not demonstrate that the farmer was culpable for not railing the mow in. A man stumbling in a blacksmith shop might have his hand or even his head thrown under the trip hammer, but it would not follow that there had been any neglect of duty on the part of the blacksmith in leaving the hammer exposed. So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers, and it does not go to the extent of requiring him to render accidental injury impossible. * * * If the fact that prevention was possible is to render the employer liable, then he may as well be made an insurer of the safety of those in his service in express terms, for to all intents and purposes he would in law be insurer, whether nominally so or not."

It plainly appears that the instruction of the court and verdict of the jury were founded upon a misapprehension of the evidence of a single expert witness, who testified that, in addition to stretching a rope across the sidewalk, it was customary to station a guard there also to warn the public. But the warning contemplated by the witness was manifestly against the danger of walking under the poles where the men were at work and being struck and injured by falling substances, and not the remote contingency of injury from contact with a rope plainly visible to any one using ordinary care for his own safety.

In view of the lack of evidence to sustain the verdict in any aspect of the case, it is not deemed necessary to notice the remaining assignments of error.

The judgment must be reversed, and the case remanded for a new trial.

KEITH, P., absent.

(105 Va. 132)

NEWPORT NEWS & O. P. RY. & ELECTRIC CO. v. BICKFORD.

(Supreme Court of Appeals of Virginia.
March 8, 1906.)

1. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED.

On a motion by a lessor for a judgment for rent due under the lease, the lessee set up a claim for damages arising from wrongful acts of the lessor. The lessee had previously instituted a suit for specific performance, in which the lessor was compelled to renew the lease for another term. The suit was terminated before the acts complained of by the lessee had been committed. *Held*, that the decree in the suit in equity was not res judicata on the question of the lessee's claim for damages.

2. SAME.

On motion by a lessor for judgment for rent, it appeared that a suit had been previously filed by the lessee asking that the lessor be enjoined from placing guards at the gates to the fence around the leased premises, etc. A temporary injunction was granted, which was subsequently dissolved in vacation on the ground that the matters involved were within the jurisdiction of the federal courts. *Held*, that the suit did not prevent the lessee from setting up a claim for damages arising from the lessor's wrongful interference with the leased premises.

3. PLEADING—BILL OF PARTICULARS—AUTHORITY TO REQUIRE.

Where, on a motion by a lessor for a judgment for rent, the lessee set forth in detail acts of trespass committed by the lessor on the leased premises whereby the lessee's business was destroyed, it was not error to refuse to require the lessee to file a statement giving the particulars of his defense: the object of Code 1887, § 3249 [Va. Code 1904, p. 1709], authorizing the court to require the filing of a statement of the particulars of the ground of defense, being to give plaintiff notice of the defense relied on.

4. LANDLORD AND TENANT—MOTION FOR JUDGMENT FOR RENT—SET-OFF.

On a motion by a lessor for judgment for rent due under the lease, a claim by the lessee for damages growing out of trespasses committed by the lessor on the leased premises is directly connected with and grows out of the

contract forming the basis of the lessor's action, and the lessee may assert the claim as an offset, under Code 1887, § 3299 [Va. Code 1904, p. 1740], authorizing defendant in an action on contract to file a plea of set-off for any matter which would entitle him to damages from plaintiff.

5. SET-OFF AND COUNTERCLAIM—ACTION IN WHICH REMEDY IS AVAILABLE—MOTION FOR JUDGMENT FOR RENT.

A motion by a lessor for a judgment for rent is an action at law, within Code 1887, § 3299 [Va. Code 1904, p. 1740], authorizing defendant in an action on a contract to file a plea of set-off.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, § 16.]

6. WRIT OF ERROR—ERROR IN VERDICT—RIGHT OF DEFEATED PARTY TO COMPLAIN.

The error in a verdict for a sum less than its face shows that the prevailing party is entitled to is no ground of complaint on the part of the defeated party.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4060, 4061.]

7. SAME—BRIEFS—SUGGESTION OF ERRORS—REVIEW.

Errors suggested in the brief of plaintiff in error, filed after the brief of defendant in error was filed, cannot be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3097.]

Error to Circuit Court, Elizabeth City County.

Motion for judgment by the Newport News & Old Point Railway & Electric Company against J. V. Bickford. There was a judgment for defendant, and plaintiff brings error. Affirmed.

S. Gordon Cumming, for plaintiff in error.
B. A. Lewis, S. J. Dudley, and Ashby & Read, for defendant in error.

HARRISON, J. The foundation of this motion for judgment is an open account which grows out of a lease contract between the plaintiff as lessor and the defendant as lessee, dated March 21, 1903, supplemented by additional terms dated April 16, 1904.

In addition to the general issue, the defendant pleaded an eviction from the leased premises, and also filed three special pleas. These pleas aver that the plaintiff's motion is based upon a written lease for certain hotel premises known as "Buckroe Beach," situated about three miles from the town of Hampton, Va.; that under the terms of the lease the defendant was to have absolute control of the premises as a summer resort, and to be free from any molestation or interference by the plaintiff; that although the defendant had fully performed the contract of lease on his part, yet the plaintiff had wholly disregarded and broken the same. The pleas then set forth in detail the most flagrant acts by the plaintiff of trespass upon the leased premises and violation of the defendant's rights, whereby his business was broken up and destroyed. The damage thus sustained is pleaded as offset to the plaintiff's demand.

The result of the trial was a verdict and

judgment in favor of the defendant for \$429.38.

Considering the assignments of error in the order set forth by the plaintiff in its petition to this court, we are of opinion that the contention that the defendant's claim for damages was *res adjudicata* is not well founded.

It is insisted that this claim for damages had been settled in two chancery suits theretofore terminated in the circuit court of Elizabeth City county. The same judge who sat in the causes mentioned conducted the trial of the case at bar, and held, we think properly, that the matters set up in these pleas were not settled or intended to be concluded by the decrees in the chancery causes vouched by the plaintiff. One of these causes was a suit for specific performance, which compelled the plaintiff to renew this lease with the defendant for the year 1904. It was terminated before the acts complained of were committed by plaintiff, and therefore could not have adjudicated the present controversy. The other cause was a bill filed by the defendant asking that the plaintiff be enjoined from placing guards at the gates to the fence around the leased property and from interfering with the defendant's management thereof. A temporary injunction was granted, which was subsequently dissolved in vacation, upon the ground that the matters involved were then under the control and direction of the Circuit Court of the United States for the Eastern District of Virginia. It is clear that these chancery causes did not conclude the rights of the defendant with respect to the matters involved in this controversy.

We are further of opinion that there was no error in the refusal of the circuit court to require the defendant to file a statement giving the particulars of his defense.

The object of section 3249 of the Code of 1887 [Va. Code 1904, p. 1709] was to provide that the plaintiff in any action or motion should have notice of the defense to be relied on. The pleas filed by the defendant in this case gave with detailed particularity every ground of defense relied on, and no matter of defense was brought forward at the trial that was not fully described in the pleas. Under these circumstances, to have required a statement to be filed in addition would have been an idle ceremony.

We are further of opinion that there was no error in the refusal of the circuit court to strike out the special pleas filed by the defendant.

These pleas are objected to upon the ground that, if their averments were true, they constituted torts committed by the plaintiff, independent of the contract sued on, and because it was improper to permit a claim for unliquidated damages to be set off against a liquidated debt.

It is not permissible to settle in one action all differences that may exist between litig-

ants. Section 3299 of the Code of 1887 [Va. Code 1904, p. 1740], however, contemplates the settlement of all differences that are connected with the subject-matter of the plaintiff's claim. It is immaterial whether the defendant's claim is in tort or for unliquidated damages. If it be based upon matters directly connected with, and injuries growing out of, the contract sued on by the plaintiff, it can be asserted as an offset under section 3299.

In the case of *Kinzie v. Riely's Ex'r*, 100 Va. 709, 42 S. E. 872, it is held that a grantee of real estate, when sued at law by his grantor for the purchase price, may, under Code 1887, § 3299 [Va. Code 1904, p. 1740], file a special plea claiming damages for a breach of warranty or covenant for title by his grantor, unless the defense would require the contract to be rescinded and the grantor to be reinstated with the title conveyed; citing *Watkins v. West Wytheville Land Co.*, 92 Va. 1-9, 22 S. E. 554; *Mangus v. McClelland*, 93 Va. 786, 789, 22 S. E. 364, and other cases.

In the case of *Am. Mang. Co. v. Va. Mang. Co.*, 91 Va. 272, 21 S. E. 466, this court said, citing *Huff v. Broyles*, 26 Grat. 283, that the plain purpose of the Legislature in enacting section 3299 of the Code of 1887 [Va. Code 1904, p. 3299] was "to give precisely the same measure of relief on a plea filed under the same, as could be obtained in an independent action brought for the same cause, and to prevent one cause of action from being divided into two." It is further said that, "the term, 'or for any other matter,' was added so that such purpose could be fully accomplished by allowing, not only the defenses particularly and specifically named in the preceding part of the section, but to allow all defenses of that character or kind based upon such contract or for injuries growing out of it, to be disposed of in one case." In this case a special plea under section 3299 was held to be objectionable because it was based upon the breach of a contract other than the contract sued on by the plaintiff.

Exactly the reverse is true in the case at bar. Every item of the plaintiff's account sued on arises under and grows out of the contract of lease mentioned, and each of the defendant's pleas is a claim for damages for breach by the plaintiff of the lease contract and for the inexcusable, if not wanton, violation by the plaintiff of the defendant's rights thereunder. These are matters directly connected with and injuries growing out of the contract which is the basis of the plaintiff's action, and the defendant has the right to assert such a claim as an offset under section 3299.

There is no merit in the contention that these pleas of offset cannot be filed in a proceeding by motion under the statute, because such a proceeding is not an action at law. This court has held that a motion for a judg-

ment for money, under the statute, is an action at law. *Reed & McCormick v. Gold*, 102 Va. 37, 40, 45 S. E. 868.

We are further of opinion that there was no error in the action of the circuit court in overruling the plaintiff's motion in arrest of judgment, because of error on the face of the verdict.

The foundation of this motion was that the verdict was for \$14.50 less than its face showed the defendant entitled to. This error to the prejudice of the defendant is no ground of complaint on the part of the plaintiff.

In a brief filed on behalf of the plaintiff in error after the brief of the defendant in error was filed, a number of other errors are suggested, which, if tenable, could not be considered under the repeated ruling of this court. *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928; *N. & W. R. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614; *Hawpe v. Bumgardner*, 103 Va. 91, 48 S. E. 554.

For these reasons the judgment complained of must be affirmed.

KEITH, P., absent.

(59 W. Va. 66)

DAY v. FAY et al.

STATE v. DAY et al.

(Supreme Court of Appeals of West Virginia. Feb. 20, 1906.)

1. TAXATION — TAX SALE — AFFIDAVIT OF SHERIFF.

The syllabus in *State v. McElldowney et al.* (W. Va.) 47 S. E. 653, approved.

2. PRINCIPAL AND AGENT — EVIDENCE OF AGENCY—BURDEN OF PROOF.

Where a tax deed is sought to be set aside on the ground that the vendee therein was the agent of the former owner to pay the taxes on the land conveyed, the burden is on the party seeking to set such deed aside to prove such agency.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 36.]

3. TAXATION — SETTING ASIDE TAX DEED — EVIDENCE.

A case where the evidence is insufficient to establish the allegations of the bill.

McWhorter, P., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Greenbrier County.

Bills by Alice C. Day against H. H. Fay and others and by the state against Alice C. Day and others. Decree for Alice C. Day against A. G. Williams, and bill by the state dismissed; and the state and said Williams appeal. Affirmed in part, and reversed in part, and bill of Alice C. Day dismissed.

Williams & Dice, for appellants. John W. Arbuckle, Henry Gilmer, W. G. Mathews, and Watts, Gaines, Davis & Mathews, for appellees.

SANDERS, J. On December 19, 1857, John Williams, the father of A. G. Williams, the appellant, granted to the father of the appellee, A. G. Chenoweth, a tract of 400 acres of land, situated in Greenbrier county. A.

G. Chenoweth was a minister of the Methodist Episcopal Church, and for some time prior to the War between the States was stationed at Frankford, in Greenbrier county, but removed from that place, and died intestate in the year 1864, in the state of Indiana, leaving a widow and several children. The widow, Ann C. Chenoweth, died testate in the year 1881, devising all her property, both real and personal, to her daughter, the appellee here. This tract of 400 acres of land was returned delinquent for the non-payment of taxes thereon for the years 1885 and 1886, and sold on the 7th day of November, 1887, and purchased by the appellant, A. G. Williams; and the clerk of the county court of Greenbrier county, on the 17th day of May, 1889, made him a deed for it. On the 22d day of December, 1890, Williams conveyed said tract of land to H. H. Fay and others, trustee of the Gauley Coal Land Association. On the 4th day of February, 1903, the plaintiff, Alice C. Day, filed her bill in the circuit court of Greenbrier county, alleging that during the lifetime of her father, A. G. Chenoweth, the taxes on this land had been regularly paid, and that after his death her mother made arrangements with the appellant, A. G. Williams, by which he was to pay the taxes on this tract of land, and that her mother sent to him at stated times money to cover the amounts paid by him on said taxes, and that up to the death of Mrs. Chenoweth. In the year 1881, Williams faithfully and conscientiously attended to the matter for her; that after the death of her mother, she wrote to the Auditor of this state, and also to the clerk of the circuit court of Greenbrier county, for information, and through information derived from this correspondence she was placed in communication with J. H. and S. B. Williams, brothers of A. G. Williams, and wrote to them in regard to the matter; that she received a reply from S. B. Williams, telling her that A. G. Williams had been paying the taxes on the land for Mrs. Chenoweth; and that, acting upon this letter she, in 1882, wrote to A. G. Williams in regard to the land and the payment of taxes thereon; and, growing out of the correspondence thus begun, and what is shown of the previous dealings between Mrs. Chenoweth and the appellant, A. G. Williams, Mrs. Day claims that Williams became her agent to pay the taxes, and that the purchase of the land by him at the tax sale in 1887 should be held to be a purchase for her, and that the conveyance to the Gauley Coal Land Association should be set aside. Plaintiff's bill is drawn with a double aspect, and seeks: First, to have the various deeds constituting the title of the Gauley Coal Land Company, to which company this land was conveyed by the Gauley Coal Land Association, set aside, and to recover the land, for the alleged reason that the sheriff's affidavit to his return of the list of land sold in November, 1887, is fatally de-

fective. But this is not insisted upon in this court. Second, it seeks to recover the land on the alleged ground that A. G. Williams was the agent of plaintiff for the purpose of paying her tax on this land, and that he failed to pay said taxes, and suffered the land to be returned delinquent, and purchased it at the tax sale in his own name, in violation of his trust, and that the Gauley Coal Land Association purchased the land from him with knowledge of said alleged agency. And, in the event plaintiff should fail to establish the fact that said company took the land with notice of such agency, the bill prays that she may be decreed the value of said land against the plaintiff.

The state of West Virginia, at October rules, 1903, filed a bill setting up that a tract of 400 acres of land, situated in Meadow Bluff district, in Greenbrier county, was forfeited in the name of A. G. Chenoweth for failure to enter the same for taxation after the year 1900, and was liable to be sold for the benefit of the school fund. The defendant, Alice C. Day, filed her answer, denying that said land was forfeited, on the ground that Williams was her agent to pay the taxes; but, in the event that the court should hold that said title was forfeited, she asked to be allowed to redeem. The final decree shows that these two causes were heard together, and the bill filed by the state was dismissed, and a recovery taken in favor of the plaintiff, Alice C. Day, against the defendant, A. G. Williams, for \$9,000; and from such decree the state and A. G. Williams have appealed.

The claim made by the plaintiff, Alice C. Day, in her bill, that the tax deed from Buster, clerk, to Williams, is void for irregularities in the proceedings under which it was made, has been abandoned, or, at least, is not insisted upon in this court, and it will only be necessary to state that it is no longer an open question in this state that such irregularities as are complained of will not vitiate a tax deed, but are cured by the provisions of section 25, c. 31, Code 1899. *Bogges v. Scott*, 48 W. Va. 316, 37 S. E. 661; *State v. McElDowney*, 54 W. Va. 696, 47 S. E. 650; *Kendall v. Scott*, 48 W. Va. 251, 37 S. E. 531; *State v. McElDowney* (W. Va.) 47 S. E. 653; *Hornage et al. v. Imboden et al.* (decided at this term) 49 S. E. 1036.

This brings us to the consideration of the claim made by the plaintiff, Alice C. Day, that A. G. Williams was her agent to pay the taxes on the 400-acre tract, and that he failed to do so, and suffered the land to be returned delinquent, and purchased it at the tax sale in his own name, in violation of his trust with her. The burden is upon Mrs. Day to show such agency, or the existence of such relations, between herself and Williams, as rendered it improper for Williams to become the purchaser. Has she done so? This question can be very clear-

ly answered in the negative, and it is hardly necessary, when a case turns purely upon a question of fact, for this court to undertake in detail to point out the reasons for its conclusions; but a brief reference to the facts in this case will be made to show the false clamor of the plaintiff, Mrs. Day. A. G. Chenoweth died in 1804, and Mrs. Chenoweth in 1881. Mrs. Day claims that A. G. Williams was the agent of her mother, during her lifetime, to pay the taxes on this land, but the only evidence tending to show this is that A. G. Williams himself admits that at one time he received some money from his brother, S. B. Williams, which had been sent to S. B. Williams by Mrs. Chenoweth to apply on the taxes, and that he (A. G. Williams) paid it to the sheriff. This is the only money shown to have come into his hands from Mrs. Chenoweth, and it is also shown that he applied it as he was requested to do. By Mrs. Chenoweth's will Mrs. Day was made her sole devisee; yet, if such ever existed, she has utterly failed to produce any correspondence between her mother and A. H. Williams in reference to this land, or the payment of taxes thereon. At the time of the death of her mother, Mrs. Day was living in Michigan, and soon thereafter she wrote to the Auditor of this state, and to the clerk of the county court of Greenbrier county, in reference to this 400-acre tract, and as a result of this correspondence she was put in communication with J. H. and S. B. Williams, brothers of A. G. Williams, and wrote to them, and on October 12, 1881, she received a reply from S. B. Williams, telling her that A. G. Williams said he had received money from her mother, and had kept the taxes paid up until that time. This letter, of course, is not evidence against A. G. Williams. Mrs. Day paid no further attention to the matter until November 23, 1882, more than a year after she received the letter from S. B. Williams, when she wrote to A. G. Williams in regard to the land and the payment of taxes thereon. This letter is significant in view of the alleged agency of A. G. Williams, as the whole tenor of the letter is that Mrs. Day desires to know the amount of the taxes, and when they fall due, so that she can attend to it. She says: "Will you be so kind as to let me know when they fall due, and how much it is, so that I can relieve you in future?" There is no intimation that she wanted him to continue as her agent, admitting that he had been the agent of her mother. In reply to this letter, Mrs. Day received a postal card, dated December 14, 1882, and signed by A. G. Williams, but which is admittedly not in his handwriting. A great deal of evidence was taken in an endeavor to establish the fact that this postal is in the handwriting of one James A. Donnally, a stepson of Williams, and who attended to a great deal of business for him; and Williams

himself says that it looks to be in Donnally's handwriting, and that he does not believe that Donnally would have written it without being authorized so to do.

Counsel for Mrs. Day attach great importance to this postal, and interpret the words, "I will attend to the business for your mother," as meaning that Williams would attend to it for Mrs. Day on account of her mother. But Mrs. Day herself places a different interpretation upon it. In her deposition she says: "The reference in the card to his attending to the business for my mother means the method he would use in transferring the legal title of the land from my mother or otherwise to me." And, while it is now admitted that the postal was written by some one other than Williams, she says, in her deposition: "I am familiar with A. G. Williams' signature and handwriting, having frequently read letters from him to my mother, and also from having received letters from him, and I identify the writing on the postal card and the signature as his." But Williams goes further in the postal card, and says: "James Knight, a good friend, is the sheriff, and is perfectly safe. If you write him at Lewisburg, all will be right." Here he gives her the name and address of the tax collector, and suggests that she write him in regard to the matter. What more could Mrs. Day expect from Williams in the payment of taxes, or looking after this land for her, after he had given her the information for which she asked in her letter? After the receipt of the postal card, Mrs. Day says that she wrote to A. G. Williams to pay the taxes and keep an account of the amount, and send same to her, and she would reimburse him, and that she received a reply from him, in which he stated that the amount was a mere trifle, that he would pay it along with his own taxes, that the amount was so small it had not impressed itself upon him, but that at some time he would furnish her such statement. She files neither this letter nor the reply thereto. The letter written by Mrs. Day of date November 28, 1882, and the postal reply thereto, is the only correspondence that is shown to have passed between the parties prior to the time that the land was returned delinquent, purchased by Williams, and conveyed to him. Upon this correspondence, and the letter which she claims to have received from Williams saying that he would pay the taxes, Mrs. Day predicates the agency which is the foundation for her suit. She nowhere shows, or attempts to show, that Williams ever received one cent of money from her to be applied on the payment of these taxes. The burden of proof is upon her to establish agency, and she endeavors to do so mainly on the contents of a letter, which she does not file, but the loss of which she accounts for by the fact that, owing to the ill health of herself and her first husband, Smart, she was almost continually traveling, and also by the fact that she was an author-

ess and magazine editor, with a great many manuscripts to examine, and a large correspondence in many countries. Williams denies that he ever wrote the letter which she claims to have received from him saying that the taxes were a mere trifle, but, on the contrary, says that he himself was hard pressed, during the time that this transaction is alleged to have occurred, to keep the taxes paid on the land owned by him.

After the year 1882, nothing further appears to have been done by Mrs. Day until 1891, when she wrote to A. G. Williams that she was coming to Ronceverte, and for him to meet her there. She came to Ronceverte, and met Williams for the first time at a county fair held at Lewisburg, at which time she says that Williams told her that the land had been sold and purchased by him, but that it was a benefit to her that he had done so; that he would buy the land from her, and a price of \$3,000 was named, or convey her another tract in lieu thereof, or reconvey to her the tract purchased. Williams denies that he ever offered to reconvey the land to her, but says that he at that time told her that he had sold and conveyed the land to the Gauley Coal Land Association; but he admits that he offered to convey her another tract in lieu of the one purchased by him, and says that he always intended to convey the land itself, or other lands of equal value, to the proper claimant, but that Mrs. Day, when she came to see him in 1902 in regard to the matter, claimed that he was her agent to pay the taxes, and, inasmuch as he did not consider that he was under any legal obligation to her, he refused to do anything in the premises. Williams' claim that he told Mrs. Day in 1891 that he had conveyed the land to the Gauley Coal Land Association is borne out by the fact that when, in 1892, her husband, Smart, visited Williams with a view to looking at the land which Williams was to convey to her, Williams wrote her a letter, in which he stated that, "if you will make me such title as will remove all clouds from the present one, then I will make you in consideration thereof a deed to 250 acres of my land." This letter was sufficient, on its face, to notify her that either he had disposed of the land and could not convey it to her, or that, if he still had it, he would not convey it to her. In either event, it was her duty to proceed promptly to recover it; but, instead, she did nothing further until the year 1902, 10 years thereafter, when she came to Greenbrier county, and, as she claims, learned for the first time that Williams had disposed of the land.

There were no taxes paid on this land for the years 1881 to 1886, inclusive, by any one, until after it had been returned delinquent and sold. Mrs. Day alleges in her bill that the taxes for the years 1881 to 1884, inclusive, were paid by Williams, and this is true; but these taxes were not paid until 1890, after the land had been returned delinquent and

sold for the taxes of 1895 and 1896, and purchased by him. Williams says that the only reason he paid these taxes was that the sheriff still held the tickets, and would have lost the amount represented by them had he not done so. Admitting, for the sake of argument, that A. G. Williams was the agent of Mrs. Chenoweth, during her lifetime, to pay the taxes, which the plaintiff, Mrs. Day, has wholly failed to establish, yet the agency terminated upon the death of Mrs. Chenoweth; and even if it were true that Mrs. Chenoweth furnished the money with which to pay the taxes up until the year 1880, it is equally true that during the entire time of the alleged transaction between Mrs. Day and Williams, extending over a period of more than 20 years, not one cent of money was ever paid by her on these taxes, and nowhere has she shown that Williams was her agent to pay them for her. On the contrary, in the only letter which she wrote to Williams before the tax sale and the purchase by him of the land, she asks him to give her the amount of the taxes and when they became due, so that she could take the matter in her own hands and relieve him in future.

Mrs. Day, in her deposition, says: "I have read letters written by my mother to the Williamses, and especially A. G. Williams, and also letters from the latter to my mother with reference to the payment of taxes on this land, and know from my own knowledge that mother sent Albert G. Williams money from time to time before her death in 1881 to pay taxes on this land." Where are these letters? Being the sole devisee of her mother, it is only reasonable to suppose that, after her death, Mrs. Day came into possession of all her papers. Yet she does not produce the letters to which she refers in her testimony, and gives no excuse for not doing so. And again, this testimony is not consistent, when viewed in the light of her actions after the death of her mother. If A. G. Williams had been attending to the matter of paying her taxes for her mother, as she says, and she was aware of the fact, it would hardly have been necessary for her to have written to the Secretary of State and to the clerk of the county court of Greenbrier county to ascertain whether or not the taxes had been paid, and, if so, by whom. Then it is shown by her own testimony that she wrote first to S. B. Williams, and not until 1882 did she communicate with A. G. Williams, the man who, according to her contention, had been paying the taxes all those years. Viewed in the light of all the circumstances, and given the greatest weight possible for Mrs. Day, the evidence wholly fails to show that A. G. Williams was the agent for either Mrs. Chenoweth or Mrs. Day in the matter of paying taxes on this land.

We recognize the rule laid down by this court that, if the evidence is conflicting and contradictory to such an extent that reasonable men may differ as to the true pre-

ponderance thereof, this court will not reverse the finding of the circuit court; but to secure such reversal the evidence, when shifted, must plainly preponderate against the decree. *Naughton v. Taylor*, 50 W. Va. 233, 40 S. E. 352; *Kennewig Co. v. Moore*, 49 W. Va. 323, 38 S. E. 558; *Bailey v. Calfee*, 49 W. Va. 630, 39 S. E. 642; *Weaver v. Akin*, 48 W. Va. 456, 37 S. E. 600; *Camden v. Dewing*, 47 W. Va. 310, 34 S. E. 911, 81 Am. St. Rep. 797; *Whipkey v. Nicholas*, 47 W. Va. 35, 34 S. E. 751; *McIntosh v. Oil Co.*, 47 W. Va. 382, 35 S. E. 860; *Spurgin v. Spurgin*, 47 W. Va. 38, 34 S. E. 750; and many other cases laying down the same rule. But this rule does not apply to the case we have here, and should only apply where the evidence is conflicting, and when, upon the whole evidence, it is doubtful as to what decree should be entered; and then, again, it certainly does not apply where the decree has been rendered in favor of one who has not made out a prima facie case. A prima facie case must always be made out, and in the establishment thereof, and in the proof rebutting such prima facie case, if there is such a conflict in the evidence as to render it doubtful what conclusion should be reached, then this court should accept the conclusions of the trial judge. But the plaintiff, Mrs. Day, has wholly failed, in our opinion, to establish even a prima facie case; and, this being so, the question of conflict of testimony does not arise. As before noted, the very basic principle relied on for recovery is that Williams was her agent, and in her endeavor to show this we can but conclude that she has entirely failed. Counsel for Mrs. Day cite the case of *Ruffner, Donally & Co. v. Hewitt*, 7 W. Va. 604, to show that an agent may be ordinarily appointed by parol, in the broad sense of that term, at the common law—that is, by verbal declaration, in writing not under seal, or by acts and implications—and also cite *Story on Agency*, §§ 15, 54, to sustain the view that an agency may be created by express words or acts of the principal, or may be implied from his conduct or acquiescence, and that the nature and extent of the authority of an agent may be implied or inferred from the circumstances, and that the usual mode of the appointment of an agent is by an unwritten request, or by implication from the recognition of the principal, or from his acquiescence in the acts of his agent. The correctness of these authorities is not and cannot be disputed, because they enunciate plain legal principles; but the facts of this case are not such as to make Williams the agent of Mrs. Day, under the application of this doctrine.

Then, again, a great deal of authority is cited to support the view that, when an agency has been once established to act with reference to the case of and payment of taxes on real estate, such an agency cannot be terminated without proper and legal notice

to the principal of such termination, and the burden is upon the agent to show the termination; and particularly is it necessary when the agent obtains property with which he is intrusted without the knowledge and consent of the principal. *Murdoch v. Miller*, 84 Mo. 96. "Nor will an agent be allowed to make use of his position and information thereby obtained to acquire an interest adverse to his principal, and any interest so obtained will be decreed to be held in trust for the principal. And an agent employed to manage property cannot acquire title thereto by purchase at a sale for taxes or sheriff's sale," etc. 1 Am. & Eng. Encyc. Law (2d Ed.) 1085, and citing many cases. These authorities are not questioned, and it is not necessary for us to discuss them, inasmuch as we hold that no agency has been established.

This brings us to the question as to whether or not the court decreed properly in dismissing the bill of the state in the second above-mentioned cause. The decree in this respect is so plainly right that it is hardly necessary to make any comment upon it. The land was returned delinquent for the non-payment of taxes in the name of A. G. Chenoweth, sold by the state, purchased by Williams in 1887, and conveyed to him by the clerk of the county court. This conveyed to him all the right, title, and interest of A. G. Chenoweth, thereby leaving no title in him to be forfeited, and since the purchase by Williams the taxes have been paid by him and those claiming under him.

The decree of the circuit court, dismissing the bill of the state, is affirmed; but it was error to refuse to dismiss the bill of the plaintiff, Alice C. Day, and in taking a recovery in her favor. Therefore in this respect the decree is reversed, and her bill is dismissed.

McWHORTER, J. dissenting.

(59 W. Va. 75)

LEWIS, HUBBARD & CO. v. MONTGOMERY SUPPLY CO.

(Supreme Court of Appeals of West Virginia. Feb. 20, 1906.)

1. BILLS AND NOTES — PRESENTATION OF CHECKS—DILIGENCE.

A person receiving a check, on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency of the drawee.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1067, 1091.]

2. SAME—TIME FOR PRESENTING.

If the payee of the check and the drawee reside, or have their places of business, in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1095–1099.]

3. SAME—FORWARDING BY MAIL.

If the person receiving a check and the bank on which it is drawn are in different places, it must be forwarded, for presentment, by mail or other usual mode of transmission, on the next day after the receipt thereof at

the place in which the payee resides or does business, if reasonably and conveniently practicable; and, if it is not so practicable, then by the next mail, or other similar means of conveyance, leaving after said date.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1095–1099.]

4. SAME.

Neither payee nor his agent is required to transmit such check by the only, or last, mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1095–1099.]

5. SAME.

What is an unreasonably early hour in such case depends upon all the circumstances of the transaction and situation of the parties, and, the facts being free from controversy and doubt, is a question of law for the court.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1095–1099, 1882, 1883.]

6. SAME—COLLECTION THROUGH BANK.

In the absence of any agreement to the contrary, and of any circumstance, known to the payee, making imprudent to do so, he may indorse and deliver the check to a bank for collection; but this does not extend the time within which it must be forwarded for presentment. The bank, however, in such case, is not required to forward it on the next day after its receipt by the payee, if there be no reasonably convenient means of doing so, within the banking hours of that day.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1091–1099.]

7. EVIDENCE—JUDICIAL NOTICE.

Though the courts of this state cannot have judicial knowledge of the existence of any particular bank, or of any mode of business peculiar to a given bank, they will take judicial notice that, in all cities and towns of large population and extensive business, within their jurisdiction, banks exist, and of the facts that their operations are governed by reasonable rules and regulations, to which parties dealing with them, or in commercial paper, are deemed to have subjected themselves.

8. SAME.

Courts cannot take judicial notice of the business hours of any particular bank, but the courts of this state judicially know that ordinarily banks in the cities and larger towns of the state do not open their doors for business at an hour earlier than 9 o'clock a. m.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 4, 24, 25.]

9. BILLS AND NOTES — PRESENTATION OF CHECK.

The parties to a check drawn on a bank and sent to a distant place to be forwarded for presentation are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1095–1103.]

10. SAME—LIABILITIES OF DRAWER.

In such case, the drawer, by allowing his funds to remain in the drawee bank, and the payee, by accepting the check, evince belief in the solvency of the bank, and the former voluntarily takes the risk of its solvency during the reasonable period necessary for presentment of the check in the usual manner.

11. SAME.

The drawer, in delivering a check to an agent of the payee, having no authority to in-

dorse it, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for the transmission of the check to the principal of the agent.

12. SAME.

Failure to present a check does not bar recovery from the drawer, if the time intervening between delivery thereof and the failure of the bank is not sufficient for presentment by the exercise of such diligence as the law requires.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1029, 1067, 1095-1099, 1104.]

13. APPEAL — REVERSIBLE ERROR — INSTRUCTIONS—EVIDENCE TO SUPPORT.

It is reversible error to give an instruction presenting an hypothesis which has no foundation in the evidence adduced, unless the court can clearly see that it did not prejudice the acceptor.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4220.]

14. TRIAL—OFFER OF EVIDENCE—REJECTION.

An offer of evidence, not appearing in any way to be relevant and material, is properly rejected.

(Syllabus by the Court.)

Error from Circuit Court, Fayette County.

Action by Lewis, Hubbard & Co. against the Montgomery Supply Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Berkeley Minor, Jr., and Payne & Hamilton, for plaintiffs in error. Dillon & Nuckolls, for defendant in error.

POFFENBARGER, J. A question of commercial law arises on this record. Lewis, Hubbard & Co., of the city of Charleston, doing a wholesale business in groceries, had, prior to the 24th day of September, 1900, sold goods to the Montgomery Supply Company, doing a retail grocery business in the town of Montgomery, and on that day there was due from said last-mentioned concern the sum of \$183.69. On that day W. G. Hubbard, a traveling salesman for Lewis, Hubbard & Co., was at Montgomery, called upon the Montgomery Supply Company, received from it, not earlier than 4 o'clock p. m. of that day, a check for the amount of the bill, payable to Lewis, Hubbard & Co., drawn on the Montgomery Banking & Trust Company, a bank in Montgomery, neglected or failed to forward the same to his principal, and went on from Montgomery to call upon other customers of his house, taking the check with him. He received the check on Monday, the 24th day of September, and on Friday, September 28th, the Montgomery Banking & Trust Company failed to open its doors for business, went into the hands of a receiver, and finally paid a small percentage to its depositors. The drawer of the check had ample funds in the bank to pay it, and it presumably would have been paid, had it been presented for payment at any time during banking hours on Thursday the 27th. It was afterwards sent to the bank through proper channels and protested.

This action was brought by Lewis, Hubbard & Co. against the drawer of the check, in a justice's court, and went from that court to the circuit court of Fayette county, where judgment was rendered in favor of the plaintiff for the sum of \$23.60, the amount received by the defendant as a dividend on its deposits from the assets of the defunct bank. This judgment being substantially one for the defendant, the plaintiff has brought the case to this court on a writ of error.

From the testimony in the case, it appears that Hubbard had authority to collect and to give receipts for his collections, but did not have authority to indorse checks in the name of his principal and receive money thereon. It further appears that, had he promptly mailed the check to his principal, it would have been received by it the following day, and, if discounted at Charleston on the same day and promptly forwarded back to Montgomery within business hours of that day, it would have reached the latter place not earlier than Wednesday morning. The mails left Montgomery for Charleston three times a day, namely, about noon, between 3 o'clock and 5 o'clock p. m., and between 7 o'clock and 8 o'clock p. m. The first two reached Charleston in about one hour's time. By the last one delivery was made in Charleston the next day. The east-bound train took western mail at Montgomery, carried it east, and delivered it to a west-bound train which passed Charleston at about 3 a. m. the next morning. The mails from Charleston reached Montgomery twice a day, one at about 6 a. m. and the other between 10 and 11 a. m. It was by the latter one that mail could be posted at Charleston and be received at Montgomery on the same day. If, therefore, the plaintiff was bound by law to exercise the utmost diligence possible under the circumstances to obtain the money on the check, and is precluded from recovery by its failure to exercise such diligence, its case would clearly fail; for it could have had the check presented for payment at Montgomery on Thursday. But, if the law does not demand of the holder of a check the utmost diligence and haste in procuring payment of a check by the drawee, the question depends upon the degree of diligence that is required. If such diligence did not require the discounting or depositing of the check at Charleston on the day of its reception at that place by the plaintiff, and it was allowable to deposit at a Charleston bank on the next day, namely, Wednesday, it could not have reached Montgomery until Thursday, unless deposited and forwarded early in the morning, for the last mail from Charleston to Montgomery on that day left not later than 10 o'clock a. m., for it arrived at Montgomery between 10 and 11 o'clock a. m. The mail for that train would probably close by 9:30 o'clock a. m. If the plaintiff was bound to put the check

in the hands of the bank in time for that mail on Wednesday, it was necessary, therefore, to do so on Tuesday or at an early hour on Wednesday. If the plaintiff was bound to deposit it on the same day of its reception, and the Charleston bank was not required to forward it until the next day, it would not have reached Montgomery until Thursday, unless mailed at an early hour on Wednesday. If so, and the Charleston bank had the whole of the business day in which to mail it, it would not have reached Montgomery until Thursday. If it had been received at Montgomery by the agent or correspondent of the Charleston bank on Thursday, then the question arises whether the agent or correspondent was bound to present it on the day of its reception, or was entitled to hold it until the next day, Friday. Upon the answers to these questions, to be found in the principles declared by the courts, the correctness of some of the positions taken by the attorneys in the case depends.

In some respects, the rights of the parties to a check, drawn by an individual on a bank, are governed by the principles applicable to the parties to an inland bill of exchange, but not in all respects. Notice of dishonor and nonpayment of a check, and diligence in the presentation thereof, are required only when it is necessary to protect the drawer from loss by reason of the failure of the drawee, holding funds of the drawer sufficient to pay the check. Presumably the check is drawn upon funds in the hands of the drawee belonging to the drawer, and amounts to an appropriation thereof in favor of the payee of the check, and he owes to the drawer the duty of exercising a certain amount of diligence to obtain payment in order to prevent a loss to the drawer by reason of failure of the bank. In other words, if he fails to perform such duty, the loss falls upon himself, and he is barred by law of any right to recover against the maker of the check. If, by delay in presentation, a loss occurs, the payee or holder is deemed to have extended credit to the bank, and must suffer the consequences. *Cox v. Boone*, 8 W. Va. 500, 23 Am. Rep. 627; *Compton v. Gilman*, 19 W. Va. 312, 42 Am. Rep. 776; *Purcell v. Allemon & Son*, 22 Grat. 739; 5 Am. & Eng. Ency. Law 1030; *Parsons on Notes and Bills*, vol. 2 pp. 58, 59; *Bank v. Bank*, 10 Wall. 647, 19 L. Ed. 1008.

For the reasons above stated, presentation of the check for payment, at the bank on which it is drawn, must be made within a reasonable time, and what is a reasonable time depends upon the situation of the parties with reference to one another and with reference to the bank and all other material facts and circumstances entering into the transaction. When the drawee and payee are in the same town or city, presentation must be made not later than the next day after the reception of the check, unless there

is some understanding or agreement to the contrary, or some circumstance intervenes or is connected with the transaction sufficient to vary the rule; but it is sufficient to present it at any time on the next day within business hours. *Alexander v. Birchfield*, 1 Car. & Marsh. 75, 41 E. C. L. 47. In that case *Tindal, C. J.*, said: "The only way in which I can state the rule to you is this, that, if a party receive a check on a particular day, he may present it at any time during banking hours on the following day to that on which he received it." See, also, to the same effect, *Moule v. Brown*, 4 Bing. N. C. 266, 33 E. C. L. 347; *Cox v. Boone*, 8 W. Va. 500, 23 Am. Rep. 627; *Simpson v. Insurance Co.*, 44 Cal. 139; *Cawein v. Browninski*, 6 Bush: (Ky.) 457, 99 Am. Dec. 684; *Schoonfield v. Moon*, 9 Helsk. (Tenn.) 171; *Boddington v. Schlenker*, 4 Barn. & A. 752; *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844; *Lloyd v. Osborne*, 92 Wis. 93, 65 N. W. 859; 5 Am. & Eng. Ency. Law 1042. But when the person receiving the check is at a place different from that of the place of business of the drawee, additional time is allowed. The person receiving it need not forward it for presentation on the day of its reception, but may do so on the next day thereafter, and the person to whom it is forwarded for presentation need not present it on the day of its reception, but may do so on the next day after he receives it. In this case two extra days are allowed, while in the other but one is allowed. 5 Am. & Eng. Ency. Law 1042; *Moule v. Brown*, 4 Bing. N. C. 266; *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844; *Erideaux v. Criddle*, L. R. 4 Q. B. 455; *Griffin v. Kemp*, 48 Ind. 172, 176; *Burkhalter v. Bank*, 42 N. Y. 538; *Parsons on Notes and Bills*, 72. The reason for this indulgence is well stated by *Story on Bills* (section 290), in discussing the law of notice of dishonor and protest, in which the principle is generally held to be the same. He says: "In the first place, then, it is not by our law necessary in any case to give notice, either by post or otherwise, on the very day on which the dishonor and protest took place, although the holder is at liberty to do so at his option. He is always allowed by law a whole day for this purpose, and is not compellable to lay aside all other business to devote himself to that particular purpose. For it would be most inconvenient and unreasonable to require such strictness, as it might interfere with other business and duties quite as pressing and important; and therefore it is sufficient if he sends notice by the post or otherwise by the next day." The same reason which suffices to give two days, one for reception and the other for presentation, when the payee and drawee are at the same place, justifies the general rule allowing four days when they are at different places.

In view of these principles, the way to a

conclusion would seem to be perfectly clear, but for the circumstance of there being no mail from Charleston to Montgomery on the afternoon of Wednesday, the last day allowed by the rule for forwarding the check to Montgomery. Did this circumstance make it necessary to forward the check in the mail leaving Charleston at about 9 or 10 o'clock a. m.? If not, and it was allowable to deposit it in the post office within business hours on Wednesday, it could not have reached Montgomery until Thursday. Enough has been stated to clearly demonstrate that the utmost diligence possible is not required. The payee is bound to exercise only reasonable diligence, and need not do that which is contrary to, or variant from, the ordinary and prudent mode of transacting business. But the law does seem to require such action, within reasonable limitations, determined by considerations of convenience, but not of leisure, as is calculated, in view of the possibility of loss by delay, to prevent it. Hence, the two-day rule, allowed for forwarding notices or paper for presentment, is subject to this qualification, namely, that it must be sent by the mail of the second day. If there be more than one mail on that day, it need not go by the first; but, if there be but one, it must go by it, unless it leaves or closes at an unreasonably early hour. The whole of the second day is not allowed, unless the last mail of that day goes at the close of business.

To this point the American authorities seem to be unanimous. They are ably reviewed, and the result clearly stated, by Chief Justice Green, in *Burgess v. Vreeland*, 24 N. J. Law, 71, 59 Am. Dec. 408. In that case the controversy related to presentment, nonpayment, and protest of a note and notice thereof, but the principles governing that subject are applicable to checks, when loss occurs by failure to promptly present them. "In the more recent edition of Kent's Commentaries, the rule is stated thus: 'According to the modern doctrine, the notice must be given by the first direct and regular conveyance. * * * This means the first mail that goes after the next to the third day of grace; so that, if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may, indeed, be sent on Thursday, but must be put into the post office or mailed on Friday, so as to be forwarded as soon as possible thereafter.' 3 Kent's Com. (6th Ed.) 105, 106. And in note "a" to page 106 the author further states that the rule was laid down too strictly in *Lenox v. Roberts*, 2 Wheat. 373, 4 L. Ed. 264, viz., that notice of dishonor must be put into the post office early enough to be sent by the mail of the day succeeding the last day of grace; and that the rule, as it is now generally and best understood in England and in the commercial part of the United States, is that notice put into the post office on the next day after the third day of grace, at any time of the day

so as to be ready for the first mail that goes thereafter, is due notice, though it may not be mailed in season to go by the mail of the day after the default. This is certainly very high authority on a question of commercial law, and the change in the statement of the principle shows that it was made deliberately and upon examination and reflection. Yet it is worthy of notice that this authority was before this court at the time of the decision in *Sussex Bank v. Baldwin*, 17 N. J. Law, 487. It has since undergone the examination of other American courts without securing their concurrence of approbation. *Downs v. Planters' Bank*, 1 Smedes & M. (Miss.) 261, 40 Am. Dec. 92; *Wemple v. Dangerfield*, 2 Smedes & M. (Miss.) 445. In both these cases the rule was held to be that the notice must be in the post office in time to go by the mail of the day next after the day of protest, if a mail goes on that day, unless it leaves at an unreasonably early hour. In *Beckwith v. Smith*, 22 Me. 125, 38 Am. Dec. 290, it was held that the notice must be in the post office in season to be carried by the mail of the next day after the note is dishonored. In *Chick v. Pillsbury*, 24 Me. 458, 41 Am. Dec. 394, it was held by a majority of the court that it is sufficient if notice of the dishonor of a promissory note be put into the mail within a convenient time after the commencement of business on the day succeeding that of the dishonor. In that case the note was protested in the city of New York on the 29th of November, and on the same day notice was given to the agent of the plaintiff. On the next day notice of dishonor, directed to the defendant at his residence in Bangor, Me., was put into the post office in the city of New York, between 12 o'clock at noon and 8 o'clock at night. So far the facts correspond precisely with the facts of the present case. But it was further proved in the case that there was but one daily mail from the city of New York by which letters would go to Bangor; that this mail closed at 6, and left the city at 7 in the morning, which in the month of November would be soon after daylight. The counsel of the defendant insisted that the notice was not mailed in season; that it must be put into the post office in season to go by the mail of the next day after dishonor, however early it might depart. And of this opinion was Shepley, J., who, in an elaborate opinion after an able review of the cases, held that the strictest rule, requiring in all cases that the notice should be mailed in season for the mail of the day next after the dishonor of the note, was sustained by the weight of the authority. And it is remarkable that Justice Kent, notwithstanding the opinion previously expressed that the party had the whole of the day following the third day of grace in which to mail notice of protest, concludes the note to which allusion has been made by saying that he ap-

prehends that the weight of authority is in favor of the view of the rule as taken by Mr. Justice Shepley. But the majority of the court in *Chick v. Pillsbury* held that the rule does not require that the notice should be mailed in season to go by the mail of the next day, however early it might close, but that it extends to the allowance of a convenient time after the commencement of business hours on the next day to prepare and despatch the notice; and, inasmuch as the notice was mailed in season to go by the next mail, which left on the day succeeding that of the dishonor after business hours had commenced, the notice in that case was adjudged sufficient. This principle is precisely in accordance with the ruling of this court in the case of *Sussex Bank v. Baldwin*, 17 N. J. Law, 487. There is, it is believed, no well considered adjudication that carries the doctrine further." *Burgess v. Vreeland*, 24 N. J. Law, 71, 77-80, 59 Am. Dec. 408.

Morse on Banking, in treating of the law of diligence in respect to the presentment of checks, says, in substance, at section 421, the same rules and principles are alike applicable to them and the giving of notice of protest. In the absence of agreement or special circumstances, the time allowed is as it has been hereinbefore stated. In subsection (c) 2, of said section 421, he says: "The drawer cannot (except by agreement or under special circumstances as above) be held absolutely beyond the business hours of the day following his delivery of the check, if the bank is in the same place, or, if the bank is in another place, the period of his liability will be until the close of business hours on the first secular day following the receipt of the check by some one in the bank's locus; the check having been mailed upon the day following its delivery by the drawer." At section 423 he states the qualification of the rule, under the special circumstances of the departure of the mail at an unreasonably early hour, citing *Cox v. Boone*, 8 W. Va. 500, 23 Am. Rep. 627, in which the failure of the holder to send the check by the only mail of the day on which ordinarily it should have been sent was excused because it departed at 7:30 o'clock a. m. in the month of February. Had it departed at a reasonable hour, the decision would have been different. It would have been his duty to forward it on the next day after its reception.

The reason for requiring the check or notice to be forwarded on the second day, if it be practicable to do so, is apparent; for otherwise the effect would be to give the party three days instead of two and without any substantial reason therefor. The holder of a check cannot extend the time allowed him by depositing it in a bank for collection. *Alexander v. Birchfield*, 1 Cat. & Marsh. 75. It must be forwarded or presented on the next day after receipt, if reasonably practicable, whether it be done in person or by agent.

What is an unreasonable hour depends up-

on circumstances. If the court could say, as matter of law, that 9 o'clock or half past 9 o'clock a. m. is an unreasonable hour, within the meaning of this law, then we could say it would have been sufficient to have forwarded it in the mail of Thursday by depositing it in the post office at some time on Wednesday. No evidence was introduced showing the business hours of the banks in Charleston, nor the situation, with reference to the post office, of the bank with which the plaintiff transacted its business. Therefore the question submitted to the jury was whether the time of departure of the mail, shown by the evidence, was, under ordinary circumstances unaffected by any local custom or mode of business, an unreasonable hour. It did not involve any inquiry as to whether, under a given state of facts, a thing could reasonably be done or accomplished. It seems therefore to have presented very little matter of fact, if any at all, for the consideration of the jury, and to have been substantially a question of law. It has been frequently held that when the only question is the reasonableness of the time, the facts being undisputed, it is one of law for the court. It is rather a question of commercial law than one of mere fact; the exigencies of commercial transactions, and the peculiarities of that kind of business, having established certain rules and regulations by which both court and jury are bound. *Taylor v. Sip*, 30 N. J. Law, 284. *Rosenthal v. Ehrlicher*, 154 Pa. 399, 26 Atl. 435, holds that: "When the only question is that of diligence, and the facts are uncontroverted, it is one of law for the court." See, also, *Cawein v. Browinski*, 6 Bush (Ky.) 457, 99 Am. Dec. 684; *Walker v. Stetson*, 14 Ohio St. 89, 84 Am. Dec. 362; *Linville v. Welch*, 29 Mo. 203. In *Downs v. Bank*, 1 Smedes & M. (Miss.) 261, 277, 40 Am. Dec. 92, it is said the question is not what inference the jury might draw, but what testimony does the law require in the case? In *Prescott Bank v. Caverly*, 7 Gray (Mass.) 217, 66 Am. Dec. 473, Bigelow, J., said: "Ordinarily, the question whether a presentment was within a reasonable time is a mixed question of law and fact, to be decided by the jury, under proper instructions from the court. And it may vary very much, according to the particular circumstances of each case. If the facts are doubtful or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the time required by law for the presentment has been exceeded or not." *Parsons on Notes and Bills*, p. 340, says: "Where the facts are few and simple, and the acts or admissions of parties clear and unequivocal, the question is one of law for the court. But where the rights and liabilities of parties depend on contracts, and a variety of transactions and dealings arising therefrom, or where the facts are contradictory and com-

plicated, it is a question for the jury to determine."

In the exercise of the power to determine what is a reasonable time, or whether an act is done within a reasonable time, according to the law merchant, the courts have always taken judicial notice of some of those customs, habits, and practices which may be deemed to be a part of the knowledge and information of the people generally, and also of customs and practices peculiar to banks and other financial and commercial institutions. They have determined repeatedly what is a reasonable hour for presentation of a bill for acceptance at the place of business of a trader, as well as for the presentation of a note or other negotiable instrument at a bank, marking a distinction between the two classes of institutions due to the known difference in their hours of business. What is a sufficient presentation in point of time at the place of business of a merchant might not be sufficient in the case of a bank. Numerous illustrations of this will be found in the reported cases. In making such distinctions the courts necessarily take judicial notice of the difference in methods of transacting business. In some instances they have expressly declared their power to take judicial notice of such matters. Thus, in *Davis & Co. v. Hanly*, 12 Ark. 645, it is said: "This court will take judicial notice of 'the general customs and usages of merchants' as well as of the 'general customs of our own country,' as matters that are generally known." *Wigmore on Ev.*, at section 2580, says: "Courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history, and natural science. It is unprofitable, as well as impracticable, to seek to connect them by generalities and distinctions; for the notoriety of a truth varies much with differences of period and of place." In the note to this section the author cites a vast number of instances illustrating the proposition. As indicated by his language, the basis of judicial notice is the common notoriety of the thing which the courts judicially observe. While a court cannot take judicial notice of the existence of a bank in any particular place, nor of the peculiar methods of business adopted by any bank, they must presume that every bank operates under some reasonable rules and regulations in the transaction of their business; and that parties, in dealing with them or making themselves parties to commercial paper, contemplated the delay incident to, as well as the promptness designed to be effectuated by, such rules and regulations. They do not expect a bank, handling a large number of important securities or commercial instruments each business day, to give to one any particular or special attention not ordinarily given to others of the same class. It is notorious that, for business purposes, banks open their doors

later, and close them earlier, than other institutions, and that, as a rule, in cities and towns of considerable size, they are never open earlier than 9 o'clock a. m. Charleston is a city of considerable proportions, in which there must necessarily be a number of banks, doing business after the manner and customs adopted by banks generally throughout the country. Hence, it requires no strain of judicial cognizance to say that they are not open for business before 9 o'clock a. m. As the evidence discloses that the last mail leaving Charleston for Montgomery must have gone very soon after the banks opened in September, 1900, the forwarding of the check by that mail would have required more than ordinary diligence. A bank is entitled to a reasonable time after the commencement of business in which to perform any given duty. It cannot be expected to lay aside all other matters and give its attention to that one. "Banks would be kept in continual fever if they were obliged to send out a check the moment it was paid in." Lord Ellenborough, in *Rickford v. Ridge*, 2 Campb. 537. It is not a question of what it is possible for banks to do, but one of what they do, and of what the parties to the paper know to be the custom and practice of banks. Since the mail must have left Charleston between 9 and 10 o'clock a. m., it must have been closed at the post office very soon after the banks opened; for some time is required for the preparation of it and for carrying it from the post office to the railway station. It is highly probable that this mail closed just about the time the banks opened, and it is reasonably certain that it was closed within a few minutes after the opening of the banks. All this the drawer of the check must be deemed to have contemplated. He was bound to know that the usual method of collecting checks is to indorse them to the banks to be forwarded by mail for presentment. Both parties, in view of their knowledge of this method of transacting such business, are deemed to have agreed to be bound by the delays incident to this mode of demanding payment. It may be said that both contemplated the possible insolvency of the bank on which the check was drawn, or were bound to know that such a thing might happen; but the drawer, by allowing his money to remain in that bank, and the payee, by accepting the check upon it, each evinced belief in its solvency, and the former a willingness to take the risk thereof, during the reasonable period of time necessary for the presentation of the check in due course of business, by the means which both parties knew the banks generally employ for that purpose.

As long ago as 1853, the Supreme Court of New Jersey, in *Burgess v. Vreeland*, 24 N. J. Law, 71, 59 Am. Dec. 408, expressed the opinion that a mail closing at half past 9 in the morning would be before usual business hours. If since that time there has

been any change in this respect, it cannot be deemed to have been to the contrary of, or in conflict with, this proposition. The tendency is to limit, rather than extend, the business day in all branches of industry and commerce. A bank is not required to take advantage of a mail which closes before, or at the time of, the opening of business. In *Chick v. Pillsbury*, 24 Me. 458, 41 Am. Dec. 394, it was expressly decided that a convenient time after the commencement of business hours of the day is allowed for the mailing of a notice of dishonor. In *Haskell v. Boardman*, 8 Allen (Mass.) 38, it was held that the mailing of a notice of protest at 10 o'clock a. m. was not due diligence; it appearing that the only mail for that day departed at 10 o'clock. It was sent by an individual to a prior indorser for the purpose of binding him. The rule in such case would be different, for the reason that there is no presumption that an individual engaged in business other than banking does not commence business at an early hour. On the contrary, it is a matter of common knowledge that merchants and traders open their places of business at an earlier hour than banks. Moreover, in this instance, the evidence shows the mail must have closed long before 10 o'clock. "What is a reasonable time must depend upon circumstances, and in many cases upon the time, the mode, and the place of receiving the bills, and upon the relations of the parties between whom the question arises." Dan. Neg. Instr. § 605. That the check in this case was not actually put in course of presentment can make no difference. It is enough to make the drawer liable, that, if it had been, the time allowed by the rule of diligence was not sufficient. *Cox v. Boone*, 8 W. Va. 500, 23 Am. Rep. 627.

In view of these principles the court clearly erred in giving the following instruction: "The court instructs the jury that, if they believe the plaintiff could by due diligence have presented the check in question to the bank upon which it was drawn before it failed, it was the duty of plaintiff to do so; and, if the jury further believe the plaintiff failed to use due diligence in such respect, and its lack of diligence caused the loss of the amount of the check to the defendant, the defendant is not liable to the plaintiff for the amount of the check, but may find for the plaintiff for the sum of \$22.60, interest from November 15, 1901." There was no evidence of lack of diligence. On the contrary, the evidence showed that, by the exercise of due diligence, the loss would not have been averted.

An assignment of error is predicated on the action of the court in giving the following instruction: "The court instructs the jury that, if they believe from the evidence that W. G. Hubbard was the collector of the plaintiff and had authority to collect as agent, and as such agent and collector ac-

cepted the check of the defendant, his act in so accepting the said check was the act of the plaintiffs." This, however, is a proper instruction. It was the duty of the agent to forward the check to his principal, and delivery to him was delivery to the principal; but it must have been contemplated that he would promptly forward it, and that the time allowed for presentment would be correspondingly extended. *Rosenthal v. Ehrlicher*, 154 Pa. 396, 26 Atl. 435; *Bank of Grafton v. Buckannon Bank*, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332; *Balkwill v. Bridgeport, etc., Co.*, 62 Ill. App. 603; *Gifford v. Hardell*, 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925.

The rejection of the following offer of evidence is also complained of: "Here plaintiff offered to prove by witness (W. G. Hubbard) that he stated to S. B. Morgan (manager of defendant), and that Morgan knew, his regular course to be leaving Montgomery on Monday and go up on the C. & O. railroad and back on Friday evening on the same week to Charleston." In this no error was committed, for the materiality of the proposed evidence was not shown. If Morgan knew of this practice, it does not follow that he knew the agent habitually carried checks with him over this route, delivering them to his principal on Friday. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

It is hardly necessary to say that, if a different state of evidence should appear on the new trial to be allowed, the rulings of the court will have to be varied so as to conform thereto. The law here declared is applicable only to the evidence in the trial which resulted in the judgment now under review.

For the reasons stated, the judgment will be reversed, the verdict set aside, a new trial allowed, and the case remanded.

(59 W. Va. 106)

REEL v. REEL et al.

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1906.)

1. TRUST—RESULTING TRUST.

One taking a deed for land knowing that another has a valid equitable title to the same land from the same vendor is held in equity as holding the legal title in trust for the benefit of the first purchaser, and equity will compel him to pass the legal title to such first purchaser.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 145.]

2. SPECIFIC PERFORMANCE—ORAL CONTRACT AS TO LAND.

An oral contract by a father to convey land to his son in consideration that he shall support the father is not enforceable in equity, unless the possession has been transferred to the son under the contract.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 115-118.]

3. DEED—DELIVERY.

Though the grantor tender to the grantee a deed with intent to deliver it, yet, if the

grantee refuse to accept it, it is not a perfect deed, and passes no title.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 142.]

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by James Reel against William C. Reel and others. Decree for plaintiff, and defendants appeal. Reversed.

Bent & Spears, for appellants. Talbott & Hoover, for appellee.

BRANNON, J. James Reel filed a bill in equity in the circuit court of Randolph county against William C. Reel and Andrew Fansler, setting up that he was over 51 years of age, and until the winter of 1903 had lived with his father and mother on the farm; that his mother was dead, and one of two sisters was dead, and the other was the wife of Andrew Fansler; that the daughters, upon marriage, had left home, but he remained; that, when 21, he told his father that he was going away from home to earn money for himself; that his father told him that he was his only son, and, if he would remain at home with his father and mother and aid in supporting and caring for them, he would give all the lands he might own at his death to him, James Reel; that he and his father made a definite agreement to that effect, the father agreeing to convey the lands to him at his death; that in execution of the agreement he remained at home with his father and mother, and worked on the farm with his father, clearing land, cropping the land, building a house on it for the family, paying the taxes, and sometimes working elsewhere for wages, and devoting his earnings to the support of the family; that his father, in execution of said agreement, went to Amos Canfield, and had him to draw a deed conveying two tracts of land, one of 31½ acres, the other 56 acres, to said James Reel, and signed and acknowledged it; that his father brought the deed home, and informed the plaintiff that he had placed said deed in a chest or drawer, and told plaintiff to take it and have it recorded, but, as plaintiff seldom went to the county seat, he left the deed where his father had placed it; that afterwards, September 1, 1902, his father had conveyed to Andrew Fansler the same tracts in consideration of support and maintenance during life; that the deed was made and put on record, without the knowledge of the plaintiff; that Fansler was fully informed through years of the said agreement between William C. Reel and the plaintiff, and when he took the deed Fansler knew that William C. Reel had made the deed to the plaintiff, and had delivered it to him, though it had never been in the hands of the plaintiff or put on record; that Fansler had moved on the farm, driven plaintiff away, and was living on the farm with William C. Reel; that Fansler had

fraudulently and corruptly induced William C. Reel to make the deed to him. The bill claims that the placing of the deed in the drawer was in law a delivery of it, and it sought to compel the defendants to surrender it to him, if in their possession, and, if not, to compel them to convey the land to the plaintiff, reserving a lien for the father's support; and, if that could not be done, that the lands be charged with \$1,000 compensation for work and labor done and money spent by James Reel for his father, as a judgment for it would be unavailing against his father, as he was insolvent. William C. Reel and Fansler demurred to the bill for want of equity jurisdiction, and answered, denying that James Reel had supported him. William C. Reel admitted that for a short time prior to the year 1900 he did propose to make his son a deed for the land in consideration of support of himself and his wife, and that for a time James Reel agreed to the proposition, and it was a mutual understanding that such deed would be made; but the answer averred that finally the plaintiff refused to accept any such deed for the support and maintenance of his father and mother. The answer stated that James Reel simply lived at home, sharing in the product of the little farm along with other members of the family, until about the year 1900, when he (the father) did agree to convey to the son the land in consideration of such maintenance, but the son refused to consummate the agreement. The answer admits that on the 19th of January, 1900, William C. Reel did sign and acknowledge a deed whereby he intended to convey to his son the land, and that he informed his son that he had made the deed and offered it to him, and his son declined to accept it, and never did accept it, and authorized his father to convey the land to Fansler, and authorized him to make the deed to Fansler which he did make. Fansler admits that, when he took the deed for the land, he was aware of the existence of the said deed to James Reel; but that before the deed was made to him (Fansler) James Reel had declined to accept said deed, had declined to assume the obligation of supporting his father and mother, and that James Reel got possession of the said deed from his father to him, and delivered it to Fansler, and urged him to undertake the support of his father and mother, and after hesitation he (Fansler) agreed to do so, and accepted a deed for the land, which was executed with the full knowledge and consent of James Reel, and that he took possession under this deed, paid back taxes on the land, and ever since had been complying with his obligation to support William C. Reel. Fansler filed the said deed to James Reel from his father; it being in his possession. A decree in the case declared that the deed from William C. Reel to James Reel had been delivered to James Reel, and, the deed being filed in the papers,

it was decreed that the legal title to the land was in James Reel, and gave him leave to withdraw said deed and place it on record. The deed to Fansler was canceled as in fraud of the right of James Reel. William C. Reel and Fansler appeal.

Equity jurisdiction is denied because, on the theory of the bill that the deed to James Reel was perfected by delivery, he could sue in ejectment, and, being out of possession, must sue at law, and not in equity, to remove a cloud; citing *Smith v. O'Keefe*, 43 W. Va. 172, 27 S. E. 353. If we held that the deed to James Reel was consummated by delivery, we must needs decide the question whether one holding legal title out of possession can sue in equity to remove a cloud arising from a second deed by the same grantor, taken with knowledge of the first; but we are of the opinion said deed was not perfected by delivery, which is an indispensable element in the elementary definition of a deed. Therefore we have a suit in equity by one claiming to have first an oral contract for the conveyance of land by a father to a son on consideration of work and labor at home for the support of the father and his family, and then the contract evidenced by a deed executed in all respects, except by delivery, and the bill seeking enforcement of such contract as against the father, or the right to enforce involved in the suit as a necessary element and seeking to annul a deed accepted by another person from the same vendor for the same land, with notice of the right of him claiming under such contract, and seeking its cancellation, or to compel him to pass the legal title by deed. I suppose it would be immaterial whether a decree of relief be to enforce the contract by compelling a deed from the father and canceling the deed to Fansler, or compelling Fansler to pass the legal title to James Reel, the latter being the more usual mode of decree, simply treating him as holding title as a quasi trustee for James Reel. Surely this state of facts presents a case of equity jurisdiction of frequent occurrence. Equity follows the legal title into the hands of its fraudulent holder, and makes him hold that title as held in trust, and compels him to execute the trust by conveyance. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557. He takes the shoes of the vendor, and equity will make him do what it would have made the vendor do. 1 *Beach*, Mod. Eq. § 346; 2 *Pomeroy*, Eq. (3d Ed.) § 591. It is a clear case of jurisdiction in equity. Though I think it contrary to the weight of authority, yet under *Bowles v. Woodson*, 6 Grat. (Va.) 78, and *Parrill v. McKinley*, 9 Grat. (Va.) 1, 58 Am. Dec. 212, the undelivered deed would be good as a memorandum to answer the demand of the statute of frauds that a contract for sale of land be in writing, and we would have to say whether the mere oral contract would be enough. For myself, I do not see why it is not just as requisite that

the memorandum of the sale contract be delivered as that a deed be; and so, I think, say the authorities. But I concede that these cases eliminate the question of a writing. As we find that James Reel refused to accept the deed—repudiated it—it might be said that he would fall back on his oral contract. No; because refusing to support his father, renouncing the contract, authorizing Fansler to assume the burden of his father's support, and take a conveyance, would operate to repudiate also the oral contract, and estop James Reel from claiming against Fansler. I am, however, free to say that the oral agreement is not enforceable by specific performance, as it was not executed by a transfer of possession. There was no change as to possession. The contract was not to take effect by possession until the father's death. The father remained in possession. *Harrison v. Harrison*, 36 W. Va. 556, 15 S. E. 87; *Ratliff v. Sommers*, 55 W. Va. 30, 46 S. E. 712. As the oral contract is not good, James Reel can have no right as against his father. Nor can he against Fansler, so far as that oral contract goes; for there was nothing in it, no vested right under it, with which to affect Fansler with notice. *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 3 L. R. A. 826, 25 Am. St. Rep. 797.

A deciding question in the case is, was that deed delivered to James Reel? If so, it passed title, though not recorded, and Fansler having notice of it would take no title by his deed. On the other hand, if that deed was not delivered, James Reel got no title, and Fansler took good title. This turns on evidence, and we cannot—ought not—enter into details. The father seems to be an intelligent, plain country man, of 78 years. He swears that he talked several years of deeding the land to his son, and had a deed drawn and acknowledged, brought it home, and said: "Says I to Jim, 'Here is the deed,' and patted my hand on the deed, and says I, 'It is no account to you till you take it and get it recorded.' Says he, 'I don't want the deed'—swore he would'n't have it." He repeats several times that his son declined to accept the deed, and cursed and abused him for making it. He swears that his son told him to convey the land to Fansler. He adds: "Says I to Jim, 'If I make a deed to Fansler,' says I, 'If I do this now, the very first time you get out of humor you will swear that I have no right to make it to him, and it was against his orders, and you get the least bit mad you will be for killing me, and may be will do it.'" This is the old man's statement, reiterated in several forms during his examination. Fansler, Sallie Courtney, and Sarah Wood were present and heard the conversation, and pointedly confirm him. All four say he repeated at different times this refusal to accept the deed. All say that, when the father and Fansler were about to start to Elkins to have the deed to Fansler

written, James delivered his deed to Fansler, and consented to his father conveying the land to Fansler, and that, when they returned in the evening with the deed, he was informed that the deed had been made to Fansler, and approved it. He waited 15 months before suing. It is argued that it is unreasonable to say that James Reel at the age of 51 would thus relinquish his life long home. Not so when we reflect that his father was an aged man, his power to labor gone, frail of body, somewhat fretful, and the son himself without means, coming to an age when his own power to labor was decreasing, he childless and wifeless. Who would perform the arduous housework which the assumption of this heavy burden of supporting his father, perhaps for many years in the feebleness of old age, would impose? Quite reasonable that James Reel would prefer that Fansler and his wife, the old man's daughter, should bear this heavy burden. James talked about going elsewhere. If he should do so, how could he take care of his father? As a matter of law, if the old man did deposit the deed in a chest, giving leave to James to take it, that would be clear delivery. If he retained power and dominion over it, it was not. *Ward v. Ward*, 43 W. Va. 1, 26 S. E. 542; *Gaines v. Keener*, 48 W. Va. 56, 35 S. E. 856; *Adams v. Baker*, 50 W. Va. 249, 40 S. E. 856. But in this case there was refusal to accept—a disaffirmance. It requires not only delivery by the grantor to make a deed, but acceptance by the grantee. No matter how distinct the offer or words of delivery on the grantor's part, if the deed is refused by the grantee, there is no deed. *Guggenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. 874. When a deed is for one's benefit, there is a presumption of acceptance; but why speak of that in the face of express rejection?

James Reel's version is different, but inconsistent and unreasonable. He says that, when his father brought his deed home, he did not tell him it was a deed, but said: "It was a little script of paper, and put it in the chest. I never seen it. He said to take it and put in the clerk's office. I can neither read nor write." How unreasonable! Is it probable his father would call it a "script" of paper? And is it reasonable that James Reel could believe it to be a script of paper, when his father told him to take it to the clerk's office? But his bill does not hint that his father called it a "script," as it pointedly says that his father got Canfield to write "a deed conveying to plaintiff the 31½ acres and 56 acres of land, and after the deed was written it was signed by William O. Reel, acknowledged, and said Reel brought the deed from the residence of said Canfield to the residence of said Reel, and when he came home he informed plaintiff that he had placed said deed in a chest and told plaintiff to take it and have it placed on record." Utterly inconsistent with his statement that

he did not know it was a deed. He admits that Canfield told him that it was a deed for the land. He told Everett that his father had made him a deed. Also, he told Canfield that his father had so informed him. All this shows that he knew it was a deed. And he pointedly swears as to that paper that he did not accept it. The defense in volume and force of testimony has the better of the case greatly. Therefore the deed in question never took effect.

As to the claim for a lien on the land for work and labor, I know of no law to create it, and none is shown.

Decree reversed, and bill dismissed.

(59 W. Va. 113)

WADE v. McDOUGLE.

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1906.)

1. EJECTMENT—RIGHT OF RECOVERY.

A plaintiff in ejectment must locate his own land and recover upon his own title, and the fact that the defendant's land does not cover the land in dispute or lie where the defendant claims it to lie, or that his title is not good, is immaterial and irrelevant.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 16-20.]

2. ADVERSE POSSESSION—COLOR OF TITLE—EVIDENCE—COMMISSIONER'S DEED.

A deed from a special commissioner purporting to be made under authority of a decree is admissible in evidence to give color of title for adverse possession, though such decree is not shown.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 445, 446.]

3. EVIDENCE—STATEMENTS OF THIRD PERSONS.

Statements by a person cutting timber on land or cultivating it, that he is so doing under authority of a certain person as owner, made while so doing, are admissible, when the question of possession by such owner is involved.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1111.]

4. EJECTMENT—JUDGMENT—EFFECT.

A verdict and judgment in ejectment, by which the plaintiff recovers land in fee, of their own force vest title in him, and take title from the defendant, if he had any.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 379.]

5. SAME—ADJUDICATION AS TO BOUNDARY.

A verdict and judgment in ejectment fixing a line are final and conclusive between the parties and their privies in estate as to the location of such line.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 379.]

6. SAME—EFFECT OF JUDGMENT—ADVERSE POSSESSION.

A verdict and judgment in ejectment by which the plaintiff recovers the contested land destroy all title in the defendant at the date of the judgment. The defendant, by adverse possession beginning after judgment, may acquire title; but possession prior to the judgment cannot be considered.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 379.]

7. BOUNDARIES—AGREED LINE—VALIDITY OF AGREEMENT.

To make valid an oral agreement to fix a line between two contiguous tracts of land

there must be doubt and uncertainty as to the true place of the line, else the agreement is void. Where there is, in fact, such doubt and uncertainty, such oral agreement, if at once carried into execution by actual possession, is valid without other consideration than the settlement of disputed boundary.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 215-218.]

8. SAME—REQUISITES—TAKING POSSESSION.

A mutual express agreement between adjoining owners fixing their dividing line is of no force, unless actually executed immediately by taking possession actual up to it.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 217-226.]

9. COMPROMISE AND SETTLEMENT — OFFER — EFFECT.

A person is not bound by an admission in an offer to compromise not accepted by the other party.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 745-753.]

10. EVIDENCE—ADMISSIONS AS TO TITLE—EFFECT.

Where legal title to land is vested in one, his mere oral disclaimer or admission of no title cannot divest his title. It binds him not.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 173, 174.]

11. BOUNDARIES — ESTABLISHMENT BY ACQUIESCENCE.

To establish a line between adjoining owners, in absence of express agreement fixing it, by acquiescence and recognition, there must be possession actual up to it by the party claiming the benefit of the line, at least for a time prescribed by the statute of limitations, with acquiescence and recognition of such line by the other party, he knowing of such claim by his adversary.

12. ADVERSE POSSESSION — WHAT CONSTITUTES.

Mere occasional grazing cattle or cutting timber or sod on land does not constitute adverse possession under the statute of limitations.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 111-115.]

13. SAME—NECESSITY OF INCLOSURE.

Actual inclosure by fence is not indispensable for adverse possession under the statute of limitations. It is sufficient if the possession be marked or held by inclosure by fence, by cultivation, residence, clearing, or any plainly visible and notorious manifestation of sole, exclusive possession, according to the nature of the case.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 99-104.]

14. SAME—ABSENCE OF COLOR OF TITLE.

Where there is no color of title, possession, for the purpose of adverse possession, is confined to the land in actual, open, notorious, exclusive occupation by inclosure by fence, residence, clearing, cultivation, or such other act, notorious and open, according to the nature of the case, telling the world of adverse possession under his own claim.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 77-81, 123-125.]

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by C. A. Wade, as sheriff, against A. H. McDougale. There was judgment for plaintiff, and defendant brings error. Reversed.

H. P. Camden, for plaintiff in error. Merri-
rick & Smith, for defendant in error.

BRANNON, P. Daniel R. Neal brought an action in ejectment in the circuit court of Wood county against A. H. McDougale counting in his declaration for a tract of 60 acres. A disclaimer was made by the defendant for all of the tract except a parcel of specified boundary containing about 15 acres. A trial resulted in a verdict and judgment for the plaintiff.

Defendant's first assignment of error is that the plaintiff was allowed to prove a survey, made under an order of survey in the case, of the land covered by defendant's deed. The plaintiff claimed that the deed under which the defendant claimed does not include the land in contest. The plaintiff introduced a deed for the 60 acres dated 1st February, 1867, from William Logan to Daniel R. Neal, under which the plaintiff claimed, but traced no title back to the state. On the strength of paper title, the plaintiff showed no title; for to recover on paper as per se giving superior title, it must trace back to the state, unless the title of the contestants comes from a common grantor. *Ronk v. Higginbotham*, 54 W. Va. 137, 46 S. E. 123. No show to recovery by the plaintiff on paper title was made in this case. The plaintiff did not even give evidence of the boundaries of the Logan deed to show that it covers the land in controversy. If the plaintiff showed no title in himself, what matters it where the land embraced within the defendant's deed lies? In ejectment, the plaintiff must, if he claims under paper title, locate his exterior boundary so as to show that his title takes in the disputed land. *Miller v. Holt*, 47 W. Va. 12, 34 S. E. 956. What matters it whether the defendant has title or not, if the plaintiff himself has no title? He must gain on the strength of his own title, not on the weakness of the defendant's title. *Low v. Settle*, 32 W. Va. 600, 9 S. E. 922. Thus, it would seem that this evidence of the defendant's location would be immaterial, and introduce a matter, and call on the defendant to meet it, not pertinent to the case, and calculated to hurt his defense before the jury. It could not locate the plaintiff's land, as he had no title to locate. If it is said that to locate the defendant's deed would locate the Logan deed, as the Logan deed calls for the "Neal and Stokely line," the reply is, the Logan deed is not surveyed, and the deed to Beckwith does not call for the line.

A second assignment of error is the admission of evidence of surveying a line between a tract owned by the city, known as the "city hospital ground," and a tract of Sarah Neal. I do not see what light this could throw on the case. It could add to the intricacy and difficulty of the case and confuse the jury. It was not relevant. Neither claimed under or derived title from the owners of those tracts. Their location would not settle the location of the claims of the plaintiff or defendant. The call in a deed to which the Lauch deed referred for the Neal line was

not binding on the defendant; it was *res alios acta*.

A third assignment of error is that plaintiff gave evidence to prove that defendant's deed would not reach the disputed land is well taken under principles stated above, that the plaintiff must show that his own right covered the land. And mere call for distance is not material when a fixed line is called for.

A fourth assignment of error is the admission of a deed from Taylor, commissioner, to Sanders; no authority to make it being shown, and no connection being shown between the title of one Davis, whose title the deed purports to convey, and the plaintiff. As passing title, it was not admissible; but the plaintiff, after giving that deed in evidence, gave in evidence a deed from said Sanders to William Logan, and a deed from Logan to the plaintiff. As color of title for adverse possession, I see no objection to the deed. *Mullan's Adm'r v. Carper*, 37 W. Va. 215, 16 S. E. 527.

A fifth assignment of error is the admission in evidence of a deed from Sanders to Logan. It is admissible for color of title in connection with the deed from Logan to plaintiff. It is said the descriptions in the two deeds vary. If it were plain that they relate to different land, this would be a good objection; but that seems to me to be a question of identity as a fact for the jury, that is whether it could give any color as to the land in contest. The fact that no surveying was done to show the location of the land described in the deed only went to make it weak as affording color of title for the land.

The sixth assignment of error is the admission in evidence of a deed from Lauck and Logan to Logan and Leach. It is not claimed that the plaintiff claimed the land in this deed, or had any privity with it, or that it bounded on the land conveyed to him by Logan. It was in no sense in controversy. It was irrelevant, producing confusion before the jury. The argument for it is that Logan's deed to the plaintiff refers to this deed, and this deed calls for the Neal and Stokely line. What if it does? Is it used to locate that line? It cannot do so. It is a declaration by its parties that that line was there; but does their declaration or assertion bind the defendant? No surveying of its bounds proves that declaration true.

The seventh assignment of error is in the admission in evidence of a deed from Logan and Leach to Parkersburg. What has been said under the sixth assignment here applies.

The eighth assignment of error is the admission in evidence of a decree of partition and plat of lands of Bradford's estate. They were transactions between strangers to this suit, not involving the land in dispute. It is claimed that these papers are admissible, as Beckwith's deed, under which defendant claims, calls for this Bradford land. That would tend to locate the land of defendant; but the plaintiff is suing, and must show

where his land is, no matter where may be the defendant's. Possibly, if the plaintiff had had his tract under the deed from Logan to him surveyed and proven, his right to go to a line the same as the line of Bradford, the call in Beckwith's deed might be an admission of the location of Beckwith's line; this is doubtful, because the defendant was not a party to the partition so as to give it force to establish the true place of the Bradford line. Surely, the action of parties to the partition of the Bradford land could not fix its bounds so as to bind Beckwith to a particular line as being the true place of that line called for in his deed. It is *res inter alios acta*. Action of one party does not bind strangers. But this Bradford land was not surveyed, but laid down by protraction.

Where are its lines on the ground? I do not see that the Bradford land can locate the defendant's land. Would that show that the defendant's land is in a particular place? It is an effort, by the partition of other people's land, not in controversy here, to show that the defendant does not own the land in controversy without showing that the plaintiff owns it. This partition has no connection with this suit.

The ninth assignment of error is the admission in evidence of a deed from Phelps to Bradford. What does it show shedding light on this case? It is between strangers to it. Can their acts locate the land involved? No survey of the land mentioned in that deed gave it local habitation, as may be also said of other papers admitted, even of the deed of Logan to the plaintiff. It does not purport to and could not locate the plaintiff's boundary. Not every paper can be introduced in ejectment. Irrelevant ones cannot be.

The tenth assignment of error is that witness McConnell was allowed for the plaintiff to prove that Crummitt and Leary, whom he saw cutting timber and sod and cultivating, told him they were doing so under Neal. They were on the ground when so stating. Declarations of one in possession explanatory of the character of his possession—that is, how he claimed, under whom—are admissible. They are part of the act of possession, part of *res gestæ*. Cannot a tenant admit that he holds under a certain person? *High's Heirs v. Pancake*, 42 W. Va. 602, 26 S. E. 536; 24 Am. & Eng. Ency. L. (2d Ed.) 688-690; note to *Marcy v. Stone* (Mass.) 54 Am. Dec. 741; *Leger v. Doyle* (S. C.) 70 Am. Dec. 240.

The eleventh assignment of error involves principles important in the case. It is the giving of an instruction to the effect that, if Logan, at the date of his deed to the plaintiff Neal, February 1, 1867, had been prior to that date, and claiming under the deed from Sanders to Logan, in actual possession for 10 years of any part of the land in controversy in this suit, and the deed to Neal included the land in controversy, and

the defendant during said period did not have actual possession of any portion of the land in controversy, then Logan acquired a good title to the land in controversy and by his deed conveyed the same to Neal. Conceding, as the plaintiff must, and practically does, that he showed no title by documents, his claim is that his title became perfect under the statute of limitations. Let us suppose that Logan had, and by his deed conveyed to Neal, good title so acquired. As will appear from the report of the case of *Beckwith v. Thompson*, 18 W. Va. 103, in 1871, Beckwith brought an ejectment against Thompson and others to recover a tract of land of 225 acres, which resulted in a verdict and judgment for Beckwith, affirmed by this court 14th May, 1881. It was claimed in that suit by its defendants that the two surveys, below mentioned, did not adjoin on their first two lines; but that there was vacant land between them, which was patented and claimed by defendants. Thus the case involved that question, and if adjoining, the question, where is the Neal-Stokely line? Beckwith, the plaintiff in that suit, is the same person whose title vested in McDougle, as executor with his will annexed, defendant in the present suit; and Neal, a defendant in that former suit, is the same person, who was plaintiff in this suit, and whose title vested in Wade, as executor with his will annexed, the plaintiff by revival in the present suit. Neal claimed derivatively under a grant from Virginia to James Neal, dating 14th September, 1785, for 400 acres, beginning at a sugar tree standing on the bank of the Ohio, and running S. 24° E. 117 perches and S. 39° W. 243 perches. Beckwith claimed derivatively under a grant from Virginia for 1,200 acres, dating 9th May, 1804, to John Stokely, "beginning at a sugar tree, corner to James Neal's survey, a small distance from the mouth of the Little Kanawha river, and on the bank of the Ohio river, running thence with two of his lines, South 24° E. 117 poles to a white oak; S. 39° W. 243 poles to a black oak," etc. The controversy in the present case is as to land on the second line dividing these adjoining old surveys. The jury in the former case fixed both lines. It ran them from C to D and from D to E on the plat of surveyor, Farrow, made under an order or survey in that case, and used on its trial. Where is that line D, E? Wherever it is, it is a finality to fix that line between Neal and Beckwith, and those claiming under them, binding on the parties to this case. Neal claims that it was fixed wrong in that case. Whether it was fixed wrong or right by that jury, and the circuit court and Supreme Court, is now no difference, as it has passed into final judgment and must give peace. No matter whether Beckwith's deed really covered the land or not. The judgment is his deed. That verdict and judgment operated to vest title in Beckwith as against

Neal up to that line just as effectually as if Neal had conveyed or released the land to Beckwith to that line. If Logan had in anywise, by deed or by limitation, acquired title, at the date of his deed to Neal, beyond that line, and passed it to Neal by that deed, that title was lost to Neal by force of that verdict and judgment. It needs no authority for this old proposition of the law of finality of verdicts carried into judgment. Code 1899, c. 90, § 35, gives a judgment in ejectment such effect. Otherwise, what is the use of a suit, verdict, and judgment? But the instruction in hand says that possession would give title to Logan, and he passed it to Neal, leaving the inference that Neal thus got legal title, and still held it, regardless of the effect of the subsequent verdict and judgment. The instruction forgets that element of the case. Any title existing before in Logan or Neal was gone, and immaterial in the present case. It is useless to discuss whether there was such possession anterior to Logan's deed as to give him title. After that judgment, Neal must get a new title by possession, or otherwise, for land on the Beckwith side of the line fixed by the jury. He has no title by conveyance, as none appears. He must, then, get it by new possession; a new title by possession after judgment in the former suit. The finality of said trial is another reason why it was error to allow evidence of a survey of the land in the deed from Stokely to Beckwith. The verdict located that deed; the verdict is the deed; its boundaries are the only test without the deed. Where are they? What land does the verdict give Beckwith? These are the questions. The plaintiff's declaration calls for bounding his claim on the Stokely-Neal line. That line is where the verdict laid it down on the ground. I would say not where the deed placed it, if I could say that the verdict differed as to its place from the deed, as I do not say. Such is the force of the verdict and judgment in the old suit.

I do not think this oblivion in this instruction of the judgment is cured by the instruction spoken of under the next assignment of error, which puts recovery by Beckwith from Neal in as an element of its hypothesis. This instruction is so strong in stating that Logan acquired title by possession before he conveyed to Neal, that it was calculated to confuse the jury, and inspire belief that such title was still in Neal, and it would not be going very far to say that they conveyed inconsistent impressions. How any jury could avoid confusion amid so many instructions as were involved in the case, we cannot realize. Hence the need of clearness. This instruction, I repeat, is faulty in not incorporating the former judgment in its hypothesis. If that judgment covered the land in contest, Logan's or Neal's title before its date was utterly immaterial, and foreign to the case. If that verdict fixed the

line as the Beckwith side claims, it is immaterial whether he had possession before it or not of his tract. Defendant's counsel says that the uncontradicted testimony shows that the old verdict found for Beckwith the land in controversy, and for this reason the instruction was improper. Just where the line fixed by the verdict is is a question of fact, on which we cannot properly express an opinion, in view of a new trial. We say, however, that if the verdict in the former case gave the land to Beckwith, that is an end to Neal's claim to its date.

The twelfth assignment of error is an instruction that if good title was conveyed to the land in controversy by Logan's deed to Neal, the jury should find for the plaintiff, unless Beckwith thereafter, in a court of proper jurisdiction, recovered the land from Neal, and if such recovery was shown, the plaintiff could prove title to himself acquired after such recovery by adverse possession "under color or claim of title other than that adjudicated in such suit, or otherwise." It is not easy to say what the instruction means. The deed from Logan to Neal was in evidence in this case. It was not in the Beckwith-Thompson action. This instruction would say that that suit did not affect Neal's title under the Logan deed, because not adjudicated. This would leave that deed to have force notwithstanding the former suit. So the jury might say. But that is not correct. That judgment wiped away all title of Neal acquired under his deed from Logan. The instruction says that Neal could acquire title by possession "or otherwise." How otherwise? Under the evidence there is no appearance of claim except under the Logan deed or possession. It seems indefinite and misleading. And plaintiff could not go beyond the Neal-Stokely line, as his declaration only claims to it.

The thirteenth assignment of error is that the court instructed that if Beckwith by said former suit recovered of Neal land adjoining the land described in the deed from Logan to Neal, 1st February, 1867, and after such recovery Beckwith had the lines between his lands so recovered and the land of Neal "run and established as now claimed by the plaintiff, and recognized and treated such line as the line between the said line of Beckwith and Neal, acquiesced therein thereafter, and for 10 years prior to the institution of this suit, said Neal had actual adverse possession of the land in controversy, claiming to the line so run, and established by said Beckwith, then the jury should find for the plaintiff." This instruction, after conceding recovery by Beckwith in the former suit, whereby clear title would vest in him, and which would give certainty and remove all doubt as to the line, says that mere agreement, acquiescence by Beckwith and possession by Neal would pass and transfer Beckwith's title fresh from victory.

The law says that it takes a deed to pass land. If it is to be done by agreement on a line, there must be doubt and uncertainty as to the true line. Here, there was no doubt, no uncertainty. The old suit removed uncertainty and doubt. Doubt and uncertainty constitute the consideration for the agreement to stand on. *Le Comte v. Freshwater*, 56 W. Va. 336, 49 S. E. 238; 5 Cyc. 932; *Turner v. Baker* (Mo.) 27 Am. Rep. 226. Therefore, such agreement, if proven, would be void. And there must be controversy; and the agreement made as a compromise. These elements are omitted in the instruction. This instruction confuses right by mutual agreement upon a line, and right by adverse possession, two different things; as the one is friendly, growing out of agreement, and the other a hostile relation, unconnected with agreement. Whilst such agreement must be executed at once by actual possession to the line, 10 years' occupancy is not required—only time enough to show intent. *Turner v. Baker* (Mo.) 27 Am. Rep. 235. Without such agreement, Neal could get title by adverse possession, if proven, and of a character to be adverse possession, and of sufficient continuous duration. Perhaps the defendant could not complain of this confusion. This instruction is, however, intended to say that such an agreement would do away with the effect of said verdict and judgment. It would not, if fully proven, for want of doubt and uncertainty as to the line. The decisions say that the only reason why such agreement can hold as not violating the statute of frauds is, that it does not originate or create a line, but simply ascertains its place amid doubt and uncertainty. But it was fixed free from doubt and uncertainty, in the eye of the law, by that verdict and judgment. And to make such agreement binding, it must be definitely agreed, and very clearly proven.

The evidence of Stout, the surveyor on whose survey the alleged agreed boundary line rests chiefly, says, without any evidence to contradict his statement, that he did run a line at Beckwith's request, and that Beckwith indicated to Paul Neal, son of Daniel R. Neal, the latter not there, his willingness to agree to the line, and they went to Parkersburg to execute an agreement, but Neal declined to execute the agreement; Paul saying they had changed their minds since they were on the ground the day before, and Beckwith declared that "they will never get me to agree to that again." Here is no consummated agreement—a mere disposition to compromise. This was not 10 years before suit. And Beckwith's executor went on the land in 1904, claiming it, recognizing no such agreement. "A party is not bound by any admission in an offer tending to a compromise, which was not accepted." *Williams v. Price*, 5 Munf. (Va.) 507. On this unconsummated agreement, an instruction giving it full force was based.

It is said that Beckwith in surveying stopped short of the line claimed by his administrator in this suit. This was because distance gave out; but perhaps he did not know that calls for an ascertainable line or marked corner take precedence over mere distance. Beckwith never admitted that this line was the true Neal-Stokely line. Suppose he had; suppose he had even admitted that he did not own the disputed land. It would not take away his title or estop him from afterwards claiming it. When the statute of frauds requires a deed to pass title, it would be absurd to say that an unaccepted proposal for compromise, or mere knowledge that one is cutting timber or sod on one's land, or claiming it, and he remains silent, or does not sue, or even concedes by words the right of his adversary, his title is gone. The law denies this. He may have done so for mere peace, and freedom from annoyance. 2 Wigmore, Ev. § 1061. It is well settled that the true owner may change his mind, and assert his right. It is no estoppel. What pay does the party get for his land? It is not proven that Beckwith ever induced Neal to act on his conduct, or change his condition, or spend money in faith of it. If Neal chose to act on it—and what loss did he incur by it or outlay did he make?—it was his own risk. And had he not the same means of knowing where the jury had fixed the line as Beckwith. By no such oral admissions or conduct, as shown in this case, can a man lose his title on ground of estoppel, or otherwise. *Suttle v. Railroad*, 76 Va. 284. In *High's Heirs v. Pancake*, 42 W. Va. 607, 26 S. E. 537, we said: "Mere oral declarations to destroy title are inadmissible, because parol disclaimers cannot affect a vested title in the face of the statute of frauds." The authorities there cited, and 3 Cyc. 725, 784, show this. And to make an agreed boundary, if not written, there must not only be a finished agreement, but it must be carried into execution by the parties by full actual possession to the line. *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880. And as the declaration in this case only claims to the Neal-Stokely line, the plaintiff can go no farther, even if there had been a valid agreement to fix a line.

The fourteenth assignment of error is that the court instructed that if, after judgment in said action of Beckwith v. Thompson, Neal was in actual possession by residence, inclosure, clearing, pasturing, sodding, or cultivation of the land in controversy up to a line marked on the new plat, in this action under claim of title other than that adjudicated in said suit, the jury must find for the defendant. We do not say whether the evidence proves possession under Neal. There is great question whether any foot of the land in controversy was in such occupation by residence, inclosure, cultivation, or clearing, as to give title by limitation. We do

not decide in view of a new trial.* I make such remark for this reason: The plaintiff gave evidence of occasional acts of cutting sod and timber and pasturing cows. Now, as cutting sod, and pasturing cows which wandered from the Beckwith tract across the line for want of a fence were in evidence, the jury might have concluded that such pasturing, cutting sod and timber, in and of themselves, were adverse possession; whereas they are not. *Turpin v. Saunders*, 32 Grat. (Va.) 27. When there is otherwise actual occupation, they may go along helping to show actual possession. The defendant claimed that there was no residence on this land, no clearing, no continuous inclosure, and that such inclosure as there was went down, the rails carried away and burnt, and the inclosure lost. In view of this the instruction should have mentioned the occasional pasturage of cows, cutting sod and timber only in connection with other acts, residence, and inclosure, not as of themselves constituting adverse possession. They are mentioned in the disjunctive; the instruction is that each of those occasional acts makes such possession. This is not the case. They do not shut out the owner. Mere claim of title and occasional act of trespass will not make adverse possession. They want continuity. *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409; *Oney v. Clendenin*, 28 W. Va. 34. Instructions should be clear as applied to the evidence and claims in the case, not such as may mislead. *Parkersburg Indus. Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255.

The sixteenth assignment of error is that the court refused to give defendant an instruction that if the verdict and judgment in the former action gave Beckwith the land in controversy, they were conclusive against the plaintiff. The court gave it, but with a modification, "unless the jury believe that the plaintiff is entitled to recovery under other and different title, and right under color or claim of title, as hereinbefore set forth in instructions for plaintiff." I think the instruction, as offered, was objectionable, in not saying, unless Neal had, by possession since the judgment, got title; but how as to the modification? What are "the other and different title or rights under color or claim of title" on which plaintiff could recover? They are those specified in other instructions. Could a jury grope amid a maze of complicated instructions to get specification of such title or right? Is the Logan deed relied on for color? Where does it go? Surveying did not define it, and therefore possession of part under it would not be possession of the whole. As color is stopped at the old line, as settled by the verdict, the declaration stops there also. Does it refer to right acquired by limitation? It imports possession giving right to the whole; whereas the evidence of adverse possession, if any,

presents the question of possession of part or all. I think the modification was vague and obscure.

The seventeenth assignment of error is the refusal of an instruction that, if the verdict in the former action fixed the line D, E, as the Neal-Stokely line, then that line defined the extent of the boundary specified in the plaintiff's deed, and it did not constitute afterwards color of title to any land, beyond said line, and that possession, thereafter, by plaintiff beyond said line, would be adverse only to the extent of an actual and exclusive inclosure, and would not give plaintiff adverse possession to any land beyond that line "outside of his actual inclosure." The court changed the word, "Inclosure," to "possession," and, as thus modified, gave the instruction. Here it is proper to repeat that plaintiff showed no paper title; and, further, that his deed from Logan, as mere color of title for adverse possession, could not go over the line fixed by the verdict, because it fixed the Neal and Stokely line, and the deed is limited to it, does not pretend to go over it, and the declaration does not. No color of title, therefore, appears beyond that line, and hence any possession by Neal over it must be confined to actual occupation. Now, what could the substitution of the word "possession" for "Inclosure" mean? There was evidence of occasional cutting sod and timber and pasturing cows wandering across the line for want of a fence, and of a poor fence standing a short time on a line, then destroyed by persons carrying off and burning the rails, leaving only a line of posts, as proven by plaintiff's witnesses. Perhaps it would mislead under the circumstances developed by the evidence, would be the argument against the modification. As stated above, those things do not, in law, constitute "actual possession" under the statute. There was evidence claimed by the plaintiff to show cultivation of a field of three acres. It was a question whether it was on the land in dispute. That was not defined in bounds by plat or definite evidence, yet the recovery was of all the land. Even if it had been defined, and possession of it had been sufficient to hold it, this would give no right under the statute beyond its limit. But that evidence, on the theory that if there be any evidence tending to show the facts of an instruction justifies it, probably makes the instruction too narrow. It is true that many cases do say that where there is no color of title, but only claim, possession does not go beyond inclosure. *Core v. Faupel*, 24 W. Va. 238; *Parkersburg Indus. Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *Va. Midland R. Co. v. Barbour*, 97 Va. 118, 33 S. E. 554. But others use broader language. *Core v. Faupel*, 24 W. Va. 238, Syl., point 239. *Oney v. Clendenin*, 28 W. Va. 34, uses the words actual possession "by enclosing it under fence, or by clearing it, or in some other visible or notorious manner." *Ewing v. Burnet*, 11

Pet. 41, 9 L. Ed. 624; *Ellicott v. Pearl*, 10 Pet. 412, 9 L. Ed. 475; *Tyler on Eject* 892. See *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426, and 1 Am. & Eng. Ency. L. (2d Ed.) 847. Fencing is not necessary if there is cultivation or other sufficient act. 1 Am. & Eng. Ency. L. (2d Ed.) 827, 828. I think that if one cultivate a field for the period, with claim, it is enough. The word substituted is "possession," making the instruction read "actual possession." Various things make actual possession, and it may be said this change does not clarify, but is bad, because it does not define what makes it. It has a meaning, however. If the instruction had gone on to define it, and defined it wrong, it would be error; but I cannot say that the change merely is error. A party has right to an instruction, if good, in his own words; but I think the word "Inclosure" made the instruction too narrow, under the theories presented by the case, and I do not see that the change is bad. But it is proper to say that this instruction cannot be applied to make occasional cutting of sod or timber, pasturing cows, or a fence once built, but suffered to go to decay, or destroyed by persons stealing and burning its rails, leaving nothing but a line of posts, thus breaking the continuity of possession, sufficient to show adverse possession. *Oney v. Clendenin*, 28 W. Va. 34, 1 Am. & Eng. Ency. L. (2d Ed.) 827, 828; 1 Cyc. 990. I remark that where the word "Inclosure" was used in the *Parkersburg Industrial Case*, we were discussing the efficiency of the fence as an inclosure. And it is prudent to say, lest this instruction mislead on another trial, that the plaintiff shows no paper title; and further that his deed from Logan, as mere color of title for adverse possession, could not go over the line fixed by the verdict, because that fixed the Neal-Stokely line, and Logan's deed is limited to that line, and also the declaration in the present case claims to go no farther. No color of title appearing beyond that line, Neal could go no further than actual occupation by inclosure, cultivation, residence, clearing, or other open, notorious manifestation of hostile possession, according to the nature of the case. It could not go to the extent of the controverted land, though Neal claimed it all. *Heavner v. Morgan*, 41 W. Va. 428, 23 S. E. 874. The rule that possession of part is possession of the whole does not apply where there is no color, but only claim of title. There is no whole in such case, as there is no writing to call for or bound such whole.

The eighteenth assignment of error is refusal of an instruction of defendant that Beckwith's possession of any part of the land within the boundary defined in the verdict map would, after the affirmance of the judgment in the former action, give Beckwith possession of the whole up to the limits of said boundary, "except such parts thereof as may have been in the actual adverse

possession of the plaintiff by inclosure sufficient to exclude Beckwith therefrom." The court struck out the words "by an inclosure," and inserted before the word "possession" the words "right of." Here the old rule of possession of part is possession of the whole applies. If Beckwith had possession of any part of the land he recovered, he had possession of all; not mere dry right of possession, because that judgment gave him title to what he recovered. Indeed, if he had possession anywhere in his tract, his recovery would give him possession of all the land recovered as part of his tract. Where is the use of inserting the words, so as to say he had no possession, but only right of possession?

The nineteenth assignment of error is the refusal of an instruction. The court struck out "inclosure," substituted "possession," so it read "actual possession." As stated above, we see no error in this. It is above discussed.

The twentieth assignment of error is the refusal of an instruction asked by defendant, that to justify the jury in inferring an oral agreement establishing an agreed line, in absence of evidence of an actual oral agreement, there must be clear evidence of acquiescence by the parties against whom it is claimed in the actual possession for 10 years up to the well-defined line, and in the continuous cultivation by the adjoining landowner for 10 years up to the line, if the land is capable of cultivation, or, if in woods, by the adjoining owner, who established such line, with knowledge of the owner against whom it is claimed, always clearing up to the line, and with his knowledge, cutting timber, and permitting other acts of visible ownership for 10 years up to such line, and that the period of 10 years must have a definite beginning, and such acts must be continuous and uninterrupted for 10 years. This instruction does not refer to a line made by express agreement, but to a line claimed to be established by acquiescence. A man's land is to be lost to him by mere silence, indisposition to sue, neglect! The statute of limitations demands 10 years of hostile, open, notorious, continuous, exclusive possession, with claim of title. Why should the rule be otherwise, where silence is to take away title? Should mere acquiescence convey title in less time or with less essentials than the statute? It is said that by this instruction the party is put to the burden of proving beginning of possession. Why not? He has to do so under the statute of limitations. The authorities show that this instruction ought to have been given. It was peculiarly proper to present the defendant's theory under evidence relied on by the plaintiff for acquiescence. To make a binding line by ac-

quiescence, it must be for the statutory period. 4 Am. & Eng. Ency. L. (2d Ed.) 863, *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880, and 5 Cyc. 942, will sustain this view. See *Adams v. Rockwell*, 16 Wend. (N. Y.) 285. I fail to discern any line of difference between acquisition by one man of another's land by what is called "practical location"; that is, by acquiescence, and acquisition by adverse possession by the statute of limitations. The line of difference is shadowy. There must be in both possession for the statutory period with certain beginning. That must be actual. Can it be by signs less signal than the statute requires? Must not this claim of line by acquiescence come up to the measure demanded by the statute of limitations?

The twenty-first assignment of error is the rejection of evidence of Bailey, tending to prove possession of Beckwith of his tract. It is stated that he was "understood" to be a grandson of Beckwith. It was not shown that his mother was dead. He might never be interested in his grandfather's estate. He was only heir apparent. *Nemo est hæres viventis*. And his evidence did not prove a personal transaction between him and his grandfather, even if that would exclude. But he was not giving evidence against Neal's administrator of a personal transaction with Neal. Why not competent?

Judgment reversed.

Ex parte PERSON.

(Supreme Court of North Carolina. Feb. 27, 1906.)

HABEAS CORPUS — APPEAL — DISMISSAL — REVIEW UNNECESSARY.

Appeal from refusal in habeas corpus proceedings to discharge from imprisonment will be dismissed as involving only an abstract question; the term of imprisonment having expired, and petitioner being at liberty.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 112.]

Appeal from Superior Court, Wake County; Hoke, Judge.

Habeas corpus proceedings by John Person. From an adverse order, petitioner appeals. Dismissed.

J. C. L. Harris, for appellant. The Attorney General and W. B. Snow, for the State.

PER CURIAM. This appeal is from a refusal to discharge from imprisonment upon a petition for habeas corpus. The term of imprisonment has since expired, and it appears that the prisoner is now at liberty. The court will not consider an abstract question.

Appeal dismissed.

(140 N. C. 258)

McADEN v. PALMER et al.

(Supreme Court of North Carolina. Dec. 12, 1905.)

LIMITATIONS—EQUITABLE ACTIONS.

Where plaintiff claims land under a grant registered in 1894, and defendant under an earlier entry and grant registered in 1896, and shows no possession and no disability, his claim of equity to have plaintiff declared trustee of the legal title for him is barred by Code, § 158, providing that an action for relief, not otherwise provided for, must be commenced within 10 years after the cause of action accrues.

Appeal from Superior Court, Cherokee County; Ferguson, Judge.

Action by J. H. McAden, trustee, against John Palmer and others for damages for cutting timber on certain land claimed by the plaintiff. The jury found that defendants Barnes, Williams, and Van Roden had wrongfully trespassed, and assessed the damages at \$261.72, and from the judgment rendered defendants appeal. Affirmed.

E. B. Norvell, for appellants. Dillard & Bell, for appellee.

BROWN, J. 1. The principal question appearing upon the record, which it is necessary for us to consider, is that presented by the eighth issue: "Is the defendant's claim of equity to have the plaintiff declared trustee of the legal title for them barred by the statute of limitations?" The defendants claim the locus in quo under an entry laid by one John P. Puett November 3, 1854. The survey was made on February 22, 1855, and the entry price paid on or before September 9, 1858. John Puett transferred his entry to D. S. Puett, who, on December 21, 1896, obtained a grant and registered it. The plaintiff claims under entries by J. R. Dyck, laid in April and May, 1859, surveyed May 27, 1859, grant issued November, 1867, and registered June 6, 1884.

This action was commenced December 6, 1902. We think the defendants barred, under section 158 of the Code, which provides that an action for relief, not otherwise provided for, must be commenced within 10 years after the cause of action accrues. The learned counsel for the defendants, Mr. Norvell, admitted in his able argument that *Ritchie v. Fowler*, 132 N. C. 790, 44 S. E. 616, is a direct authority against him, and we are unable ourselves to distinguish between the cases. Under that authority these defendants' cause of action accrued June 6, 1884, when the grant issued upon the Dyck entries was registered. In that case the present Chief Justice, speaking for the court, says: "The registration of the Herrin grants in 1872 was constructive notice to the plaintiff and those under whom he claims, and, in the absence of evidence showing that the statute did not run by reason of coverture, infancy, etc., the plaintiff is barred by failure to take this action within 10 years

from October, 1872. Code § 158." Puett perfected his equity and right to call for the grant by paying to the state the purchase money in 1858, but he and his assignee, D. S. Puett, waited until 1896 before calling for the grant. During these 38 years there is no evidence of any possession upon the part of the defendants or of those under whom they claim. In fact there is no evidence of possession until about 1902, when the defendants Barnes, Williams, and Van Roden entered and cut timber upon the land.

Section 158 of the Code is so broad and comprehensive in its terms that it covers all causes of action, equitable or legal, not otherwise provided for. It bars the assertion of an equity, as well as any other cause of action, unless there are circumstances which take the case out of the statute. The grant, registered in 1884, vested the legal title in the grantee. Registration has been held heretofore by this court to be constructive notice to all the world that the grantee claimed the land as his own. *Ritchie v. Fowler*, supra. "The legal title vesting in the first grantee drew the constructive possession which continued until there was an ouster." *Janney v. Blackwell*, 138 N. C. 442, 50 S. E. 857. The attempted ouster did not take place until 1902 (as we gather from the meagerly reported evidence), 18 years from the registration of the plaintiff's grant. During this period the plaintiff was exposed to an action by Puett and his assignees, and could have been converted into a trustee for their benefit, had they not slept on their rights. The kind of trust which the defendants seek to impress upon the legal title to the land in the plaintiff is not an express trust created by the language of the parties, the terms of which were agreed to and assumed voluntarily. It is in the nature of an implied trust, and requires the affirmative action of a court of equity to give it vitality. *Bispham*, Eq. pp. 99, 125. Independently of statutes of limitation, courts of equity uniformly decline to assist a person who has slept on his rights and shows no excuse for his delay in asserting them. "Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court." *Smith v. Clay*, 3 Bro. Ch. 640; *Spedel v. Henric*, 120 U. S. 387, 7 Sup. Ct. 610, 30 L. Ed. 718. We note this to show that the time within which an equity will be enforced has always been subject to a limitation, independent of acts of legislation. "That one may preclude himself by his laches from asserting a right which otherwise a court would help him enforce, there are abundant authorities to show; but to do so in any case there must be something on his part which looks like an abandonment of the right, or an acquiescence in its enjoyment by another. Inconsistent with his own claim. We have searched in vain for a single instance in

which the court has withheld its aid in the enforcement of an equity on the ground of the lapse of time, when the party seeking it has himself been in the continued possession of the estate to which that equity was incident."

If the defendants had shown possession of this land, or such acts of ownership as indicates and establishes possession, their delay in suing would not have precluded them, even now, from seeking the aid of the court in converting the plaintiff into a trustee for their benefit; but, as they show no such possession, they have slept on their rights too long. There being no suggestion of coverture or infancy or other disability, and no possession, we can discover no reason why section 158 should not apply to the defendants' cause of action, although equitable in its nature, as well as any other. As between the state and himself, having paid the purchase price, Puett could call for a grant at any time. The lapse of time would not hurt him. *Gilchrist v. Middleton*, 107 N. C. 678, 12 S. E. 85. But as between himself and the state's grantee for value he must assert his equity within the time fixed by the statute, or lose it. It is suggested in the defendants' brief that the decision in *Ritchie v. Fowler*, supra, will unsettle "fully one-third to one-half the land title in western North Carolina." While we regret this, we are not responsible for the acts of the lawmaking power. Statutes of limitation are statutes of repose, and intended for the prevention of litigation and the security of titles. They are subject to the authority and wisdom of the General Assembly.

2. It is stated in the defendant's brief that "the court erred in admitting the evidence of Hays and Keener, relative to locating any of these lands." The brief does not point out the particulars in which his honor is alleged to have erred, nevertheless we have examined the evidence and fail to discover any error upon the question of location of the plaintiff's grants. In the language of their counsel's brief, "upon the question of location, the judge followed the law as laid down by a long line of time-honored precedents."

Affirmed.

WALKER, J., did not sit.

(140 N. C. 272)

FRAZIER v. GIBSON et al.

(Supreme Court of North Carolina. Dec. 12, 1905.)

1. PUBLIC LANDS — ENTRY ON CHEROKEE LANDS—FORFEITURE.

Under Code, c. 11, §§ 2466, 2356, providing that persons entering the Cherokee lands shall file their bonds with the entry taker, payable to the state in four equal annual installments, which, when paid, shall be in full of the purchase money, and the Secretary of the State shall issue a grant, and declaring that, on fail-

ure to pay the whole when due, if the money cannot be collected by judgment on the bond, the land shall revert to the state, where bonds were filed by an enterer on Cherokee lands in February, 1880, and payment made in December, 1884, the failure to make full payment in four years did not work a forfeiture of the entry, so as to impress the legal title, which rested with the grant, with a trust for the benefit of a junior enterer, who paid the purchase money in 1883 and took grants for the land.

2. SAME—JUNIOR ENTERER—TRUSTS—BURDEN OF PROOF.

In an action by a junior enterer to have defendants declared to hold the legal title to land in trust for him, the burden is on plaintiff to show that the senior entry was invalid for indefiniteness.

3. LIMITATION OF ACTIONS.

Where the grant under which defendant claimed land was issued and recorded in 1883, plaintiff's action in 1903 to have the defendants declared to hold the legal title impressed with a trust was barred.

Appeal from Superior Court, Swain County; Ferguson, Judge.

Action by W. W. Frazier against Franklin Gibson and others to have defendants declared to hold the legal title to certain land in trust. From a judgment for defendants, plaintiff appeals. Affirmed.

Fry & Rowe, for appellant. Bryson & Black, for appellees.

CONNOR, J. This action was disposed of by his honor below upon a demurrer ore tenus to the complaint, which disclosed the following facts: On December 11, 1879, defendant J. D. S. McMahan entered in the office of the entry taker of Swain county 640 acres of land on the waters of Ocona Luffy river in said county; said entry being No. 826. He filed his bonds for the purchase money on the 20th day of February, 1880, and paid same on the 1st day of December, 1884, obtaining grant numbered 7,294 on August 17, 1885. On March 15, 1880, one S. Everett, without notice of the McMahan entry, entered in the entry taker's office of said county eight tracts of 640 acres each, and filed his bonds for same, as required by law. A portion of such entries cover the entry made by McMahan as aforesaid. Said Everett assigned said entries to one D. Lester, who paid the purchase money on June 27, 1883, and took grants for said lands on November 4, 1891; a portion of said grants covering the aforesaid McMahan entry and grant. The defendants, Gibson and others, claim the land entered by McMahan by virtue of conveyances therefor. The plaintiff is the owner of such right and title as Lester obtained under the grant issued to him, No. 7,294. Defendant Frank Gibson is in the possession of said land. That said land is located in that portion of the state to which the statute in regard to the Cherokee lands applies. Plaintiff demanded judgment that the defendants be declared to hold the legal title to said land in trust, and that they be decreed to convey the same

to him. Defendants, among other defenses, pleaded the statute of limitations. When the cause came on for trial, defendants relied upon the statute of limitations as a bar to the plaintiff's action and further demurred ore tenus to the complaint for that it failed to state facts sufficient to constitute a cause of action, and that he was not entitled to the relief prayed for. The court sustained the demurrer, and dismissed the action, from which plaintiff appealed.

The defendants claim title under a senior grant, issued upon a senior entry, by which they have a perfect title from the state, unless, for the reason assigned by plaintiff, the entry made by McMahan had lapsed at the date of the grant issued thereon. He contends that by McMahan's failure to file the bonds at the time of making the entry, and paying them within four years thereafter, the entry, with such rights as accrued therefrom, was forfeited. It will be noted that the entry was made on December 11, 1879, the bonds filed February 20, 1880, and paid December 1, 1884. If, as contended by the plaintiff, the bonds should have been filed within four years from that date, then more than that period elapsed before their payment. If, as contended by defendants, the enterer had three months within which to file them, the same result in respect to time follows, it is therefore immaterial which view we take of that question. The question is therefore fairly presented whether the failure to make full payment within four years from either date works a forfeiture of the entry, so that the legal title which vested by the grant is impressed with a trust for the benefit of the Everett entry. This contention is the basis of the plaintiff's action. When we refer to chapter 17 of the Code, relating to "Entries and Grants" it is clear that by the express terms of section 2766, which was in force at the date of both entries (Rev. Code, c. 42), the failure to pay the purchase money within the time prescribed, after entry, works an absolute forfeiture of the entry or, in the language of the statute, "all entries of land not thus paid for shall become null and void, and may be entered by any other person." The lands in controversy are a portion of the "Cherokee Lands" and in respect to the manner of entry, terms of payment, etc., are governed by the provisions of chapter 11 of the Code. The plaintiff contends that the same rule prevails in regard to the failure to pay the purchase money when due, as in case of other public lands. If he is correct in this, and the McMahan entry of December 11, 1879, lapsed by reason of the failure to pay the bonds when due, then upon the authority of the uniform decisions of this court the entry of Everett of March 15, 1880, followed by the payment of the bonds on June 27, 1883, entitles the plaintiff, succeeding to his rights, to have the defendants claiming thereunder declared trustees for his benefit,

and decreed to convey to him the legal title. *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. 85, in which the authorities are cited.

The defendants, however, contend that no language can be found in chapter 11 of the Code, declaring a forfeiture of an entry by reason of the failure of the enterer to pay the purchase money within the prescribed period. This contention invites us to an examination of the statutes compiled in and constituting chapter 11 of the Code, entitled "Cherokee Lands." Without entering into a discussion of this interesting subject by referring in detail to the several statutes enacted by our General Assembly beginning with the act of 1783, it is sufficient with some slight exceptions, to the decision of this appeal to note that at the session of 1852 an act was passed, being chapter 119 (Code, § 2464 et seq.), providing for the entry and purchase of such portions of the Cherokee lands as had not been sold pursuant to preceding statutes. After providing for the appointment of an entry taker and a scale of prices regulated by the date of the entry, it was provided: "It shall be lawful for all persons entering lands in said county of Cherokee to file their bonds, with approved security, with the entry taker, payable to the state in four equal annual installments which shall, when paid, be in full of the purchase money of the tract or tracts so entered, and, upon proof of such payment as herein provided, the Secretary of State shall issue a grant or grants according to the entry and survey thereon, etc." Section 2466. By the same statute (Code, § 2468) it is provided that all money received from the sale of vacant lands in the counties of Cherokee, Macon, and Haywood shall be paid to contractors for making the Western Turnpike Road, etc. The remaining sections of this act provide for the construction, etc., of this turnpike. At the same session, by chapter 120, § 2 (Code, § 2476), it is made the duty of the agent appointed for the collection of the bonds to proceed to collect by suit or otherwise, and pay the proceeds over as directed. It will be observed that nothing is to be found in the act of 1852 (chapters 119 and 120), as incorporated in the Code, declaring the effect, upon the rights of the enterer, of a failure to pay the bonds at maturity. We find, however, that in other acts relating to the sale of these lands it is expressly provided that no grant shall issue until the entire amount of the purchase money is paid. A careful examination of the legislation upon the subject of the Cherokee lands discovers on the part of the state a policy in respect to them different from that adopted in regard to other vacant and unappropriated lands. Prior to 1819 no part of the lands described in section 2346 of the Code (Act 1783) was subject to entry. By Act 1819 provision was made for surveying such portion of said land as was acquired by treaty with the Cherokees, and selling

parts of it at public auction, etc. Entries were forbidden and declared void. Purchasers were required to pay one-eighth part of the purchase money in cash, and to execute bonds with security for the remainder, payable in installments. No grant was to issue until the amount was paid in full "and in case of failure to pay the whole when due and the money cannot be collected by a judgment on the bond, then the land shall revert to the state and be liable again to be sold for the benefit of the state." Section 2356. In 1836 legislation looking to further sales of the Cherokee lands by commissioners, etc., was enacted. Section 2402 (Act 1836) makes the same provision for collecting the bonds as section 2356. Provision is made in several other acts for bringing suit on the bonds, etc. It was not until 1852 that any portion of these lands were open to entry, and then, as we have seen, the enterer was required to give bond with security, etc.

Reverting to the legislation regarding other public lands, we find an entirely different plan and policy outlined. Subject to certain exceptions, any citizen of the state may enter the public lands as provided by statutes enacted at different dates, and incorporated in chapter 17 of the Code. By the provisions of these statutes no contract is entered into with the state to buy the land entered, nor does the state assume any other obligation than to secure to the enterer a right or option to pay the amount and call for a grant within the period fixed. In *Hall v. Hollifield*, 76 N. C. 476, it is said: "The public lands of the state are open to entry by any of its citizens, and the first declaration of intention is made on the books of the entry taker in the county where the land lies, and this gives priority, called a 'pre-emption right.' No estate or interest in the land is thereby acquired. No consideration is paid, and none of the requisites for that purpose are performed, but simply the right to be preferred when the money is paid and the other formalities required by the statute complied with." A mere enterer is not entitled to an injunction to restrain another claimant from cutting timber. *Newton v. Brown*, 134 N. C. 439, 46 S. E. 994. A status is established between the state and an enterer of the Cherokee lands by which he becomes a purchaser. The enterer of other lands acquires a mere option to buy. In the first instance, he enters into a contract with the state, obligating himself, with approved security, to pay for the land, in four equal annual installments, giving his bond therefor. In the other he is a mere proposer assuming no obligation, and acquiring no other right than a preferred bidder—an option to take the land or not, as he sees fit, or as it may be to his interest. This difference shows clearly why the language of section 2768 is not found in any of the statutes relating to the sale of the Cherokee lands. The relation

in respect to the purchase of these lands between the state and the enterer or purchaser is that of vendor and vendee, with all of the rights and equities incident thereto. The distinction between the several statutes is recognized by this court in *Kimsey v. Munday*, 112 N. C. 816, 17 S. E. 583. In that case it is said by MacRae, J., that the enterer should, within a reasonable time, pay the bonds and call for his grant, or he would be presumed to have abandoned his claim. No time was fixed by the court. It was held that 30 years was unreasonable. It is not necessary for us to say what would be a reasonable time within which he should pay his bonds and assert his right. Certainly he would be entitled to as much as 3 years, which had not elapsed in this case. It would seem that by analogy to contracts between individuals the period fixed by the Code, 10 years, would be reasonable. We are therefore of the opinion that by a correct construction of chapter 11 of the Code, considering it as an act, the entry made by McMahan, under which defendants claim, had not elapsed at the date of the grant.

The terms upon which the land would revert to the state are stated in the statute to be "in case of failure to pay the whole when due and the money cannot be obtained by judgment on their bonds." This condition could not have existed, because within a short time after maturity the bonds were paid. Forfeitures are not favored by the law, and, when incurred, can only be enforced in the manner pointed out in the contract to enforce them. The plaintiff insists that, notwithstanding this view, he is entitled to relief, because the demurrer admits that Everett had no notice of the McMahan entry when he made his entry. We understand the allegation to be that he had no actual or express notice, because upon the facts alleged the entry, followed by the survey, was constructive notice. Neither the entry nor grant are in evidence. The plaintiff's counsel, in his well-considered brief, says that the entry is too indefinite to constitute notice. We are not able to say how this is, but, in the absence of any proof to the contrary, we must assume that the entry and survey conformed to the statute in this respect. The burden was upon the plaintiff to show that the entry was invalid for indefiniteness. The defendants pleaded the statute of limitations, which we held in *Ritchie v. Fowler*, 132 N. C. 788, 44 S. E. 616, barred an action of this kind in 10 years from the registration of the grant. The question has been again discussed before us at this term, and that case, after full consideration, approved. *McAden v. Palmer* (at this term) 52 S. E. 1034.

The grant under which defendants claim was issued and recorded in 1883. This action was instituted January, 1903. This is a striking illustration of the wisdom of the statute. The welfare of the state demands

that within a reasonable time titles to land shall be protected from litigation. For some reason the plaintiff waits nearly 18 years after the public records give him notice that the defendants' grantor has a grant from the state for this land. Viewed from either aspect, we concur with his honor that the plaintiff cannot recover.

The judgment must be affirmed.

(124 Ga. 329)

SOUTHERN RY. CO. v. HOWARD.

(Supreme Court of Georgia. Feb. 15, 1906.)

APPEAL—REVIEW.

The evidence in this case being sufficient to support the verdict, which was approved by the presiding judge, and there being no error of law complained of, this court will not interfere.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3928-3934, 3948-3950.]

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by J. A. Howard against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shumate & Maddox, for plaintiff in error. W. E. Mann, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(124 Ga. 957)

STEELE v. GEORGIA IRON & COAL CO.

(Supreme Court of Georgia. Feb. 19, 1906.)

TRIAL—NONSUIT—GROUNDS.

When this case came before this court the first time (49 S. E. 291, 121 Ga. 459), it was held that the original petition was "subject to demurrer," but that the defect was cured by the amendments which had been tendered and allowed. Upon the trial of the cause, however, as the record discloses there was no evidence to support the material and essential allegations in the amendments, it was, therefore, not error for the court to sustain a motion to nonsuit the case.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 360.]

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by Wyatt Steele against the Georgia Iron & Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

B. T. Brock and R. J. & J. M. McCamy, for plaintiff in error. Watkins & Thompson and Du Bignon & Alston, for defendant in error.

BECK, J. This case was before the Supreme Court at the October term, 1904, and it was then held that "the original petition was no doubt subject to demurrer. As drawn, it referred to defects which were apparently of a kind open to the sight of the employé. Construing the petition against the pleader, it also indicated that the periodical dimness of the light was that usual in

arc lights, occasioned by the imperfect connection, but naturally caused by the gradual consumption of the carbon. But these matters were cured by the positive allegations of the amendment that the deceased did not know thereof, could not learn thereof, and that they were known to the company." 121 Ga. 459, 49 S. E. 291. When the case came on for trial in the court below, there was an entire lack of evidence to support the essential averments which had been added to the petition by the amendments referred to, and which were necessary to make the petition good as against a general demurrer; and, of course, in the absence of that evidence, the court did not err in sustaining the motion to nonsuit the plaintiff's case.

Judgment affirmed. All the Justices concurring.

MEMORANDUM DECISIONS.

BOURNE v. ATLANTIC COAST LINE R. CO. (Supreme Court of North Carolina. August Term, 1905.) Mr. Bridgers, for petitioner. Mr. Gilliam, for respondent. No opinion. The court being evenly divided (CONNOR, J., not sitting), petition to rehear dismissed.

BROCK v. GOLDSBORO LUMBER CO. (Supreme Court of North Carolina. August Term, 1905.) Moore & Guion, for plaintiff. A. D. Ward, for defendant. No opinion. Affirmed.

CABLE CO. v. SMITH. (Supreme Court of North Carolina. August Term 1905.) Stewart & Godwin, for plaintiff. Mr. Clifford, for defendant. No opinion. Dismissed for failure to print record.

COBB v. RHEA. (Supreme Court of North Carolina. August Term, 1905.) Mr. Barnard, for plaintiff. Mr. Shuford, for defendant. No opinion. Petition to rehear dismissed.

COTTEN v. BRADLEY. (Supreme Court of North Carolina. August Term, 1905.) Mr. Fountain, for appellant. Mr. Gilliam, for appellee. No opinion. Affirmed.

CUTRELL v. CUTRELL. (Supreme Court of North Carolina. August Term, 1905.) H. S. Ward, for appellee. No opinion. Dismissed under rule 17 (39 S. E. vi).

DEW v. PIKE. (Supreme Court of North Carolina. August Term, 1905.) Mr. Taylor, for plaintiff. Mr. Bryan, for defendant. No opinion. Affirmed.

FARLEY v. FARLEY. (Supreme Court of North Carolina. August Term, 1905.) Mr. Butler, for appellant. Grady & Graham, for appellee. No opinion. Affirmed.

FRAZIER v. QUEEN. (Supreme Court of North Carolina. August Term, 1905.) Mr.

Fry, for appellant. **Bryson & Black**, for appellee. No opinion. Affirmed.

GILES v. WESTERN UNION TELEGRAPH CO. (Supreme Court of North Carolina. August Term, 1905.) **F. H. Busbee**, for appellant. **Mr. Murphy**, for appellee. No opinion. Affirmed.

GRAVES v. CAMERON. (Supreme Court of North Carolina. August Term, 1905.) **Mr. Adams**, for appellee. No opinion. Dismissed under rule 17 (39 S. E. vi).

GREEN v. GREEN. (Supreme Court of North Carolina. August Term, 1905.) **Horn & Mann**, for appellant. **Moore & Shepherd**, for appellee. No opinion. Affirmed.

GRIFFIN v. ATLANTIC COAST LINE R. Co. (Supreme Court of North Carolina. Feb. 27, 1906.) Appeal from Superior Court, Halifax County; **E. B. Jones**, Judge. Action by **Hiram Griffith** against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed. **Day & Bell** and **Murray Allen**, for appellant. **Claude Kitchin**, **W. E. Daniel**, and **E. L. Travis**, for appellee.

PER CURIAM. The court has carefully examined the record in this case and the exceptions noted thereon, and is of opinion that no reversible error is presented. Judgment affirmed.

KINSEY v. NOTLA MARBLE CO. (Supreme Court of North Carolina. August Term, 1905.) No opinion. Dismissed under rule 17 (39 S. E. vi).

LASSITER v. SUGG. (Supreme Court of North Carolina. August Term, 1905.) **Mr. Lindsay**, for appellant. **Mr. Galloway**, for appellee. No opinion. Affirmed.

McKINNEY v. EDWARDS. (Supreme Court of North Carolina. August Term, 1905.) **Mr. Lindsay**, for appellee. No opinion. Dismissed under rule 17 (39 S. E. vi).

MISENHEIMER v. RITCHIE. (Supreme Court of North Carolina. August Term, 1905.) **Mr. Jerome**, for plaintiff. **Mr. Price**, for defendant. No opinion. Affirmed.

NATIONAL BANK OF GOLDSBORO v. DUNN. (Supreme Court of North Carolina. August Term, 1905.) **Mr. Isler**, for appellee. No opinion. Dismissed for want of proper certificate to appeal in forma pauperis.

PERRY v. GREENWICH INS. CO. (Supreme Court of North Carolina. August Term,

1905.) **Busbee & Busbee**, for petitioner. **Travis, Kitchin & Daniel**, for respondent. No opinion. Petition to rehear by plaintiff dismissed.

POLLOCK v. DUNN. (Supreme Court of North Carolina. August Term, 1905.) **Mr. Ormond**, for plaintiff. No opinion. Dismissed for want of proper certificate to appeal in forma pauperis.

ROPER v. NORTH CAROLINA MINING CO. (Supreme Court of North Carolina. August Term, 1905.) No opinion. Dismissed under rule 17 (39 S. E. vi).

SHANNON v. SEABOARD AIR LINE RY. CO. (Supreme Court of North Carolina. August Term, 1905.) **Shaw & Jerome**, for appellant. **Redwine & Stack**, for appellee. No opinion. Affirmed.

SIKES v. CONSOLIDATED LIGHT & POWER CO. (Supreme Court of North Carolina. August Term, 1905.) **Mr. Bryan**, for plaintiff. **Mr. Meares**, for defendant. No opinion. Affirmed.

SNIPES v. BELVIN. (Supreme Court of North Carolina. August Term, 1905.) **Argo & Shaffer**, for appellant. **Douglass & Simms**, for appellee. No opinion. Affirmed.

SNOW v. TRANSYLVANIA R. CO. (Supreme Court of North Carolina. August Term, 1905.) **Mr. Craig**, for appellant. **Shuford & Shepherd**, for appellee. No opinion. Affirmed.

STATE v. BLACKLEY. (Supreme Court of North Carolina. August Term, 1905.) **Argo & Shaffer**, for appellant. The Attorney General, for the State. No opinion. Affirmed.

STATE v. HAGINS. (Supreme Court of North Carolina. August Term, 1905.) **Mr. Jerome**, for appellant. The Attorney General, for the State. No opinion. Affirmed.

STATE v. MORTON. (Supreme Court of North Carolina. August Term, 1905.) **R. L. Smith**, for appellant. The Attorney General, for the State. No opinion. Affirmed, under authority of *In re Gorham*, 129 N. C. 481, 40 S. E. 311, and *In re Young*, 137 N. C. 552, 50 S. E. 220.

STATE v. THOMPSON. (Supreme Court of North Carolina. August Term, 1905.) **R. L. Smith**, for appellant. The Attorney General, for the State. No opinion. Affirmed, under authority of *In re Gorham*, 129 N. C. 481, 40 S. E. 311, and *In re Young*, 137 N. C. 552, 50 S. E. 220.

